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SOL (MSHA) V. PIKEVILLE COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER | Civil Penalty Proceeding<br>Docket No. KENT 79-105<br>Chisholm Mine |
| v. | |
| PIKEVILLE COAL COMPANY, RESPONDENT | |

DECISION

Appearances: Darryl A. Stewart, Office of the Solicitor, U.S. Department of Labor, for Petitioner
John M. Stevens, Esq., Stephens, Combs and Page, Pikeville, Kentucky, for Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered a detailed opinion on the record. It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar and punctuation:

> Turning to Docket No. KENT 79-105, that docket contains one charge of violation of section 30 CFR 75.400, the 75.403 violation having been dismissed for failure of evidence previously in this proceeding.
>
> The question involved is whether or not the accumulations as charged in the withdrawal order did exist, and if so, what the amount of penalty should be based upon the statutory penalty assessment criteria and any other relevant factor which might stand either in mitigation or aggravation of the amount of penalty.

As I have previously noted in my decision in the review proceeding which is related to this penalty proceeding, I find no question on the record but that the accumulations as described by inspector Vernon P. Hardin in the order of withdrawal did exist. There was no really serious challenge to the existence of such accumulations. I found specifically in the review proceeding that Inspector Hardin's testimony describing the appearance of these accumulations, the fact that the rock dusting was inadequate, and the depth and extent of the same, to be credible. And I so find here.

Having found that the accumulations existed, and that does constitute the violation itself, I conclude that a violation of 30 CFR 75.400 occurred.

I also find that this is a large company from the standpoint of a three-size spectrum--small, medium and large--since it had approximately 270 employees at the time of the violation, 285 employees at the present time, and since its coal production annually runs approximately 680,000 tons per year. To be more specific, I also find that if one were to take only the large category of coal companies, that this is not one of the giants, certainly, of the coal industry, nor would it be one of the middle range coal companies. This would be one of the smaller of the large coal companies.

I find that the history of previous violations for this company is average for a company of this size based upon the stipulation of the parties, and also based thereon, that any penalty that I assess in this case and which I am going to be assessing in this proceeding will not affect the company's ability to continue in business.

Turning now to the third statutory penalty assessment factor, whether or not the respondent company proceeded in good faith to abate the cited violation, I can only conclude that the company did proceed in ordinary good faith to abate this violation, there being no evidence to the contrary. I do note in this connection, in viewing abatement, that even though the inspector first sighted the violation at 9 o'clock, the abatement period would run from the time of the issuance of the order of withdrawal (approximately 2-1/2 hours later). It would not run from 9 o'clock to 11:30. It did appear to me that perhaps the operator here was a little slow in correcting the problem. On the other hand, it does appear that the scoop broke down with a defective hose at the wrong time, and perhaps other unanticipated misadventures occurred.

With respect to the seriousness of the violation, I find that 10 employees were exposed to a hazard which itself could

be either fire or an explosion. As I have previously noted in the related review proceeding, I do not find this hazard to be an "urgent" or an "imminent" one. I do find this to be a serious violation. Accumulations are one of the serious violations, and as the Commission has recently noted in its decision in Old Ben Coal Company, which issued within the last month, this type of violation is one of the kinds which contributed to the passage of the 1969 Federal Coal Mine Health and Safety Act since it is the cataclysmic or disaster-type of violation. This type of violation will normally be found to be serious.

In connection with negligence, I find the delay between 9 o'clock and 11:15 which the operator engaged in to be adverse to any argument that the penalty should be nominal or small. One of the things which was not shown is whether or not, when a dangerous situation occurs and a piece of machinery designed to correct that situation malfunctions, there is a backup procedure or backup equipment or the like to cure it. If a fire is in progress and you have a hose which does not work, it would seem to me that there should be a backup procedure which would take care of a such a serious condition, or else some procedure or means of diverting another piece of machinery from another operation into an area where a danger occurs. While I do not find gross negligence, and it is very close to gross negligence in my estimation, I find a high degree of negligence in this case for allowing this type of condition to exist for that period of time.

I know of no other factors to consider with respect to this violation.

In summary, I do find that that violation occurred and that the penalty factors of seriousness, negligence and size of the company mandate a substantial penalty. The MSHA proposed assessment of $1,000 is a substantial penalty. I see no reason to increase it. On the other hand, I see no reason to reduce that penalty on the basis of this record. So a penalty of $1,000 for the 75.400 violation contained in Withdrawal Order 065134, dated December 20, 1978, is assessed and the Respondent is directed to pay the same to the Secretary of Labor within 30 days from receipt of my written decision which will issue after this hearing."

## ORDER

Respondent, Pikeville Coal Company, is ORDERED to pay a penalty of $1,000 to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge