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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. KENT 79-146 A.O. No. 15-11400-03004 W
v.		Preparation Plant
FAULKNER COAL & LEASING,	RESPONDENT	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner David O. Smith, Esq., Corbin, Kentucky, for Respondent

Before: Judge Edwin S. Bernstein

On June 29, 1978, Petitioner served Respondent with Citation No. 149652, for an alleged violation of the mandatory safety standard at 30 C.F.R. 77.1713. The standard requires facilities such as Respondent's to be inspected by a "certified person" at least once during each working shift and written reports of such inspections to be entered in a book maintained at the facility. On September 26, 1978, Petitioner issued to Respondent an order of withdrawal pursuant to Section 104(b) of the Federal Mine Safety and Health Act of 1977 (the Act) for allegedly failing to abate the June 29, 1978 citation. On that day, Respondent also was served with Citation No. 149666, alleging that Respondent continued to produce coal in defiance of the withdrawal order. On June 12, 1979, a petition was filed for the assessment of a civil penalty of $3,000 for violation of the September 26, 1978 citation. Respondent filed a timely answer to the petition.

A hearing was held in Knoxville, Tennessee, on January 24, 1980. In order to dispose of all the issues in one hearing, Petitioner proposed a penalty of $75 for the alleged June 29, 1978 violation of 30 C.F.R. 77.1713, and Respondent contested that proposed assessment. Respondent also contested the September 26, 1978 withdrawal order and Petitioner waived an objection to the contest of that order. Therefore, the issues to be decided are:

1. Whether Respondent violated the mandatory safety standard at 30 C.F.R. 77.1713 on June 29, 1978;

2. If so, what penalty should be assessed, taking into consideration the six criteria set forth in Section 110(i) of the Act;

3. Whether the September 26, 1978 withdrawal order was proper;

4. Whether the issuance of Citation No. 149666 on September 26, 1978 was proper; and

5. If Citation No. 149666 was properly issued, what penalty should be assessed for this violation, again taking into consideration the criteria in Section 110(i) of the Act.

At the hearing, the parties waived submission of posthearing briefs.(FOOTNOTE 1) Based upon the evidence and my evaluation of the credibility of the witnesses and exhibits, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The parties stipulated, and I find:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. The Faulkner Coal & Leasing Preparation Plant is subject to the provisions of the Act.

3. The Faulkner Coal & Leasing Preparation Plant is a "mine" within the definition of that term contained in Section 3(h)(1) of the Act.

4. The products of the Faulkner Coal & Leasing Preparation Plant enter into and affect commerce.

5. The Faulkner Coal & Leasing Preparation Plant operates one production shift with an average of three employees.

6. Citation No. 149652 was issued on June 29, 1978.

7. The order of withdrawal was issued on September 26, 1978.

8. Respondent is a small operator which mined less than 50,000 tons of coal per year at the time of the alleged violations.

9. Respondent had 13 alleged violations for the three-year period prior to June 30, 1978. All of these violations were discovered during the inspection of Respondent's facility on June 29, 1978. There were no violations by Respondent during the three-year period prior to June 29, 1978.

10. At all times relevant to this proceeding, Marion McKee was qualified as a "certified person" within the meaning of 30 C.F.R. 77.1713

11. As of December 29, 1978, Arlis Faulkner also has been a "certified person" within the meaning of that term in 30 C.F.R. 77.1713.

At the hearing, H. M. Callihan, Jr., Ronnie Brock, and Ken Howard testified for Petitioner. Arlis Faulkner and Marion McKee testified for Respondent.

Mr. Callihan stated that on June 29, 1978, he inspected Respondent's preparation plant and found 13 violations of mandatory safety standards. He testified that on that day, he asked Mr. Faulkner if he had a certified person making and recording daily examinations. When Mr. Faulkner indicated that he had no one, Mr. Callihan issued Citation No. 149652. Mr. Callihan told Mr. Faulkner that he or one of his employees should contact the Kentucky Department of Mines and Minerals and take the test to become a "certified person."

On July 28, 1978, Mr. Callihan revisited the Faulkner facility to determine whether the 13 violations had been corrected. Mr. Faulkner indicated that he still had no one to make the inspections, but that he had made arrangements for himself or someone else to take the test. Mr. Callihan extended the time to abate the violation.

On September 26, 1978, Mr. Callihan accompanied Ken Howard, an MSHA inspection supervisor, and Ben Bunch, another inspector, on an inspection trip to check on a reported illegal mine in the area. En route, Mr. Callihan decided to visit the Faulkner facility to determine whether the violation of 30 C.F.R. 77.1713 had been abated. Mr. Faulkner again stated that he had no one to make the inspections and that he himself had not had time to take the test. Mr. Faulkner stated that he had contacted Marion McKee, who was qualified, but that he "couldn't keep up with him." Upon learning that the violation had not been abated after almost three months, Mr. Callihan issued a withdrawal order pursuant to Section 104(b) of the Act. Mr. Faulkner told Mr. Callihan that despite the order, he would be unable to stop loading coal that day and continued to load coal. As a result, Mr. Callihan issued Citation No. 149666.

Mr. Callihan further stated that during his three visits to the facility on June 29, July 28, and September 26, 1978, Mr. Faulkner never showed him nor offered to show him a record book; that the first time he saw such a record book was the night before the hearing; that during these three visits he never saw Mr. McKee at the Faulkner facility; and that if Mr. Faulkner had shown him a record book, he would not have issued the withdrawal order, but would have abated or terminated the citation. Mr. Callihan also testified that he never told Mr. Faulkner that the certified inspector must be a full-time employee; however, he did tell Mr. Faulkner that the individual must be "someone who would

be on the property," and someone who "must be there more than just in or out."

Mr. Callihan further testified that on November 17, 1978, he revisited the Faulkner facility to see if it was still processing coal. He inspected the preparation plant and talked to Mr. Faulkner. As Mr. Callihan was making his inspection, Mr. McKee drove up and there was some banter about an old shotgun which Mr. McKee jokingly waved about. Mr. Callihan did not see any written records at that time. Mr. Faulkner did not offer to show him any written records, and did not indicate that there was a record book.

Ronnie Brock, another MSHA inspector, testified that he made a follow-up inspection of the Faulkner plant on July 7, 1978 to determine whether the citations issued on June 29, 1978 had been abated. Mr. Callihan was on National Guard duty and thus unavailable to conduct the follow-up inspection. Mr. Faulkner told Mr. Brock that he needed more time to take the test. Mr. Faulkner did not indicate that Mr. McKee was making inspections and did not indicate that he had an inspection book. Mr. Brock extended the abatement time to July 14, 1978. Mr. Brock did not tell Mr. Faulkner that the inspector had to be a full-time employee. It was his understanding that no MSHA policy required this.

Ken Howard, an MSHA supervisor, testified that he visited the Faulkner facility with Mr. Callihan and Mr. Bunch on September 26, 1978. Mr. Faulkner then stated that he had not had time to arrange for the test to obtain his certification, and had no one on the site to make examinations. Mr. Faulkner did not indicate that he had any records of examinations, but said that he had attempted to hire Mr. McKee, and "couldn't keep up with him." It was Mr. Howard's understanding that nobody was making examinations.

Mr. Callihan issued the Section 104(b) order, but Mr. Faulkner said that he would not close down his facility since he could not afford to shut down. Mr. Howard did not remember any conversation regarding the necessity of having a full-time employee make the inspections. He stated that MSHA's policy is that whoever makes the examinations should be on site about 50 to 60 percent of the time. Mr. Howard did not recall any conversation regarding MSHA policy at the time, and Mr. Faulkner did not ask about policy.

Mr. Howard testified that MSHA believes that this inspection procedure is an effective tool of hazard prevention, and a very important requirement. He stated that at the September 26, 1978 meeting, when Mr. Faulkner said that he would not comply with the Section 104(b) order, Mr. Howard explained the ramifications of such conduct, specifically the possibility that Mr. Faulkner might be subject to further penalties and even criminal prosecution. Mr. Faulkner told the MSHA inspectors that he intended to comply with the requirement, but that if he did not load the Louisville and Nashville railroad cars which he had obtained, he would lose his contract for such cars and be out of business. He said he would leave the premises and did not want any trouble.

Marion McKee testified that between July 1 and July 5, 1978, he began to help Mr. Faulkner temporarily as a bulldozer operator and tipple inspector. He stated that although he made his first tipple inspection at the Faulkner plant in early July 1978, he did not record his inspections in a

book until August 22, 1978. He also testified that in July 1978, he saw Mr. Callihan at the Faulkner facility and they joked about an old shotgun. According to Mr. McKee, all of his inspections were made at 7 a.m., except for the November 17, 1978 inspection which was made at 7:30 a.m. He testified that from early July 1978 until Mr. Faulkner became qualified in December 1978, he inspected every day that coal was loaded. Mr. McKee stated that he inspected the preparation plant on September 26, 1978, but was not present when the inspectors were there.

Arlis Faulkner testified that he held a Bachelor of Science degree from the University of Kentucky, attended graduate school in pharmacy for three years, and has been the sole proprietor and owner of Faulkner Coal & Leasing since he built the coal preparation plant in 1973. He also owns three concrete plants, some bluejean stores, and some rental income property.

Mr. Faulkner testified that on June 29, 1978, Mr. Callihan told him that the inspector should be a full-time employee. Accordingly, he hired Mr. McKee in July 1978. Mr. McKee would begin work, either at Respondent's plant or elsewhere, at 7:30 a.m., and would stop by Respondent's plant before work and inspect at about 7 a.m. on days when the tipple was in operation. In July 1978, the tipple was inspected, but the inspections were not recorded in a book. Mr. Faulkner stated that on July 7, 1978, when Mr. Brock made his follow-up inspection of the plant, he did not tell Mr. Brock about Mr. McKee's employment even though Mr. McKee was inspecting for him at the time. Mr. Faulkner told Mr. Brock that he needed more time to study for the certification examination.

Mr. Faulkner testified that the shotgun incident occurred on July 28, 1978. He added that at that time, Mr. McKee told Mr. Callihan that he was making the inspections. Mr. Callihan did not then ask for the inspection records. Mr. Faulkner stated that Mr. McKee was inspecting as of July 28, 1978, but that Mr. Faulkner did not know if a part-time inspector was sufficient to comply with the standard. Mr. McKee also ran a bulldozer for Mr. Faulkner. Mr. Faulkner admitted saying that he could not "keep up with" Mr. McKee. Mr. Faulkner testified that one day Mr. McKee would come in; another day he would not. Mr. McKee was never a full-time employee. He would come by to inspect the tipple and would go to work. Mr. Faulkner stated that he did not always know where Mr. McKee could be located.

On September 26, 1978, the facility was loading coal. There had been a shortage of railway cars, and Mr. Faulkner had waited three weeks before getting the cars which he was loading that day. Unless he loaded those cars, he would lose his railroad contract and would be unable to obtain any more cars. He told the inspectors he was doing everything he could to comply with the standards, but that he had not had time to take the certification examination. He testified that the inspectors did not ask for the inspection book on September 26.

Mr. Faulkner conceded that the proposed $3,000 penalty would

not put him out of business. His 1979 production at the facility was approximately

15,000 to 20,000 tons, and his 1978 net profit from the facility was between $25,000 and $35,000.

Mr. Faulkner had stated that there was an inspection every time that coal was loaded. On cross-examination, he was asked why there was an inspection report for September 19, 1978, even though he had also testified that coal was not loaded for three weeks prior to September 26. Mr. Faulkner qualified his earlier testimony by adding that inspections were made when the tipple was used to move or stockpile crushed coal, as well as when coal was being loaded.

In response to my questions, Mr. Faulkner stated that he did not examine the provisions of 30 C.F.R. 77.1713. He also stated that Mr. McKee was an erratic worker, and that "[i]f he took a notion to go somewhere, fishing or somewhere, he went. If he took a notion to get him a bottle and go, he did it." When I asked Mr. Faulkner why he did not tell the inspectors on September 26, 1978 that he had a record book, he gave various answers which included: (1) "they didn't ask for it"; (2) "I didn't really think about it"; and (3) he thought a full-time employee was required.

The record book which was introduced into evidence was a spiral notebook. Petitioner's counsel noted that the book began with entries for the month of November 1978, and that entries for the previous August appeared on subsequent pages. He also noted that while the November entries were all in one color ink, the August entries were in another color ink, and that all of the entries indicated that Mr. McKee made his inspections at 7 a.m., with the exception of the November 17, 1978 entry, which was made at 7:30 a.m. Petitioner's counsel challenged the authenticity of the book on the grounds of the differing colors of the ink and the fact that the entries for various months were out of sequence.

CONCLUSIONS OF LAW

It is undisputed that on June 29, 1978, Respondent violated 30 C.F.R. 77.1713. Respondent's business is small in size, and had no history of prior violations. The proposed penalty would not affect the operator's ability to continue in business. The gravity of the violation was small since the probability of an accident was slight,(FOOTNOTE 2) and Respondent's negligence was

slight. There were, however, no good faith efforts to abate the violation. I assess a penalty of $75, the full amount of the Assessment Office's proposal.

The withdrawal order of September 29, 1978, was proper. The violation had not been abated when the inspectors revisited the facility, although almost three months had elapsed since the issuance of the citation. The inspectors had extended the abatement period several times. When the order was finally issued, the inspectors were presented with no evidence indicating that the regulation was being complied with. Even if, as contended by Respondent, the required inspections were being made and records being kept, Respondent's failure to communicate this to the inspectors justified the conclusion that the violation had not been abated in good faith.

The second citation was proper in that Respondent knowingly and willfully defied a properly issued withdrawal order. This constituted a violation of Section 110(a) of the Act.(FOOTNOTE 3)

In connection with the assessment of a penalty for the second citation, several of the factors previously stated apply, including the small size of Respondent's business and its insignificant history of prior violations. Mr. Faulkner stated that the proposed penalty of $3,000 would not put him out of business, but that he would have to obtain the funds from his other businesses.

In order to determine whether the operator acted in good faith in this matter, it is necessary to evaluate apparently conflicting testimony. Mr. Faulkner and Mr. McKee testified that Mr. McKee began making inspections in early July, shortly after the June 29, 1978, citation was issued, and that from August 22, 1978, onward, Mr. McKee recorded his examinations in the inspection book which was submitted into evidence. Mr. Faulkner stated that he was under the impression that a full-time employee was required to inspect. He stated that this impression was based upon his discussions with the inspectors, although he never read the regulation itself. Mr. Faulkner and Mr. McKee stated that in July 1978, they told the inspectors that Mr. McKee was making inspections, although they never told the inspectors that a record book was kept after August 22, 1978.

Petitioner disputes the contention that Mr. McKee was making inspections and maintaining an inspection book before September 26, 1978. Counsel stressed that as late as the November 1978 follow-up inspection, MSHA personnel were not informed about the book.

There is also a discrepancy between Petitioner's witnesses and Respondent's witnesses regarding when the inspectors first observed Mr. McKee on Respondent's premises. The inspectors contend that this took place on November 17, 1978, while Mr. Faulkner and Mr. McKee testified that it took place in July 1978. Mr. McKee and Mr. Faulkner also testified that in July they told the inspectors that Mr. McKee was making inspections.

I find that the inspectors' version of the facts is more believable. The three inspectors' testimony remained consistent throughout direct and cross-examination. Upon observing their demeanor, I found them to be truthful witnesses. On the other hand, Mr. McKee's and Mr. Faulkner's testimony contained a number of factual inconsistencies. The notebook and various aspects of their testimony challenge simple logic.

The alleged record book contains several discrepancies on its face which lead me to believe that it probably was prepared after the fact, rather than during the alleged inspection period. As previously noted, the book begins with dates in November. After a page or two of November entries, the August entries appear. This lends credence to the explanation that the entries were begun in November, and that the earlier dates were added as an afterthought. Additionally, there is a regularity with respect to the entries which gives the impression that they all were prepared at the same time. Initially, Mr. McKee and Mr. Faulkner testified that entries and inspections were made when coal was loaded. This also raised some questions of credibility. Although Mr. Faulkner later qualified his testimony, it calls into question entries made during the three-week period immediately prior to September 26, 1978 when, according to the testimony, no coal was loaded onto railroad cars.

Another matter which raises questions regarding the notebook's authenticity and credibility relates to Mr. Faulkner's description and my observation of Mr. McKee. Mr. McKee is very casual man who does not appear to be totally reliable. Mr. Faulkner testified that Mr. McKee would sometimes disappear, would often be difficult to locate, was very erratic in his movements, and was the type of man who would disappear anytime he "took a notion to get him a bottle and go." Despite this, every entry in the book indicated that Mr. McKee performed his inspections at precisely 7 a.m., with the lone exception of the September 26, 1978, entry, which indicated that the inspection was made at 7:30 a.m. The apparent regularity of the inspection times is inconsistent with my observation of Mr. McKee and with the picture of Mr. McKee etched by Mr. Faulkner. Mr. Faulkner's admission to the inspectors on September 26, 1978, that he "couldn't keep up with" Mr. McKee substantiates that view and is inconsistent with the notebook which indicated that Mr. McKee was a diligent man who made regular inspections at exactly the same time each day.

Finally, and most persuasively, when Mr. Faulkner was faced with a total shutdown of his facility on September 26, 1978, a shutdown which was so economically threatening to him that he

defied the withdrawal order and subjected himself to possible criminal penalties, he still did not inform

the inspectors that Mr. McKee had been making and recording regular inspections and produce the record book. Mr. Faulkner impressed me as being an extremely bright, well-educated, and resourceful individual who apparently has done well in a number of business ventures. It is completely inconsistent with this characterization for him not to have produced or revealed the existence of the notebook at that time.

The inspectors' testimony is far more credible. I believe the inspectors when they indicated that on two visits in July 1978, and one on September 26, 1978, they were not told that Mr. McKee was performing the inspections. I do not believe that the inspectors misled Mr. Faulkner into thinking that the certified person referred to in the regulation had to be a full-time employee. According to Mr. Faulkner's own testimony, the inspectors encouraged him to take the examination knowing that he only spent part of his time at this facility. I also do not believe that the alleged shotgun incident took place in July as Mr. Faulkner and Mr. McKee alleged. I credit the inspectors' testimony that this meeting took place in November. I further accept the inspectors' testimony that the conditions were not abated until sometime after November 17, 1978, probably in December 1978.

I also do not find Mr. Faulkner's testimony that he did not know that the inspections were required to be recorded to be believable. The initial citation issued to Respondent indicated that "[n]o certified person was available to make and record inspections." [Emphasis added.]

In summary, the evidence of record convinces me that as of September 26, 1978, there were no regular inspections being performed and there was no record book of any such inspections at Respondent's facility. Further, Mr. Faulkner was extremely slow in abating both citations. It was not until November or December 1978 that he finally corrected the condition.

The violation of the withdrawal order was thus willful.(FOOTNOTE 4) The gravity was small;(FOOTNOTE 5) I do not believe that as a result of the defiance of the withdrawal order any lives were endangered. There was a complete lack of good faith in complying with the second citation.

In consideration of all of these factors, I find that a penalty of $2,000 is appropriate to achieve the purposes of the Act.

~689

ORDER

The order of withdrawal is AFFIRMED. Respondent is ORDERED to pay $2,075 in penalties within 30 days of the date of this order.

Edwin S. Bernstein
Administrative Law Judge

~FOOTNOTE 1

Counsel for both parties presented excellent closing arguments to conclude an extremely well-tried case.

~FOOTNOTE 2

In Robert G. Lawson Coal Company, 1 IBMA 115, 120 (1972), the Interior Board of Mine Operations Appeals made the following comments concerning the "gravity" criterion:

"Each violation should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring. The potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the particular mine at the time the violation is detected."

~FOOTNOTE 3

Section 110(a) reads:

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

~FOOTNOTE 4

The willfulness of the violation is somewhat ameliorated by the fact that at the time of the withdrawal order, Mr. Faulkner was faced with a desperate economic situation in that he had been waiting for several weeks to obtain railroad cars, and felt that he would suffer dire economic losses if he complied with the withdrawal order and failed to load the cars. I think this situation should be considered as a mitigating factor in assessing an appropriate penalty.

~FOOTNOTE 5

See footnote 2, supra.