FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2. 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. KENT 79-149 : Assessment Control No. 15-04456-03003-H
v.		
MARGIN COAL COMPANY, INC.,	Respondent	: No. 6 Strip Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Clinton Bobbins, Superintendent., East Bernstadt, Kentucky, for Respondent.

Before: Administrative Law Judge Stef fey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was held on April 23, 1980, in Barbourville, Kentucky, under' section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr.63-74):

> This hearing involve's a Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-149 on June 14, 1979, alleging five violations of the mandatory health and safety standards by Margin Coal Company.
>
> The issues raised by the Petition for Assessment of Civil Penalty are whether those five alleged violations occurred and, if so, what penalties should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> The testimony in this proceeding by both the respondent's witness and MSHA's witness shows that the violations alleged in Order No. 149242 occurred. The respondent does not contest that the violations occurred and it asked for a hearing primarily to emphasize that its financial condition is not very

good, and that it thought the assessments that should be made should take that into consideration to a greater degree than apparently vas done by the Assessment Office.

Inasmuch as the violations are conceded as having occurred, it is unnecessary for me to make any findings on whether they occurred, because we can find by stipulation that they did occur. It is, of course, necessary for me to discuss the six criteria in connection with the alleged violations.

There were some stipulations made by the parties at the outset of the hearing. One of those is that Margin Coal Company is subject to the jurisdiction of the Act and that respondent operates the No. 6 Strip Coal Mine. There was a stipulation also that respondent at the time the violations occurred would be considered a medium-sized company, but because of certain facts that I shall discuss subsequently the respondent could now be classified as a small company.

The facts concerning respondent's financial condition should be considered at the same time that we are considering the size of the company. At the time these violations occurred, respondent was selling coal under two contracts with East Kentucky Power Company and South Carolina Gas and Electric Company. Respondent was selling approximately 9,000 tons a month to both purchasers, but it lost its contract with East Kentucky in November of 1979, and its contract with South Carolina Gas and Electric in September of 1979. Since January of 1980, the company has sold only 69 cars of coal for a total of about 5,000 tons. Consequently, respondent's sales have gone down from about 9,000 tons a month to about 2,500 tons a month. Respondent estimates that it costs about $21 a ton to produce coal and yet the coal sold since January of 1980 has been sold for from $20 a ton to $22.50 a ton, with some small amount of the coal having been sold for as much as $31.50 a ton.

Those figures indicate that respondent is a marginal operation at the present time. The evidence concerning respondent's financial condition would, of course, have been enhanced considerably if respondent had introduced some documentary evidence in the form of income tax returns, or profit and loss statements, or balance sheets, or something to indicate its exact financial condition.

In addition to the facts which have just been noted, the evidence shows that respondent is a subsidiary of Glasgow, Incorporated, which is engaged in road construction. We do not have in the record anything to show how much money

Glasgow, Incorporated, makes on a yearly basis and since this is a company which is owned by another one, I think it would be improper for me to find that payment of penalties would necessarily cause this company to discontinue in business.

Nevertheless, I think I should not ignore the fact that the company is now operating one strip mine as opposed to the six which were being operated at the time the order was written or that it was employing 80 miners in May of 1978, whereas it is now employing 24 miners.

So I think the evidence will support taking into consideration the fact that respondent is certainly a marginal operation at the present time. And some consideration should be given to both its size and financial condition. But I don't think payment of even a fairly substantial penalty in this particular instance would be the factor that would cause it to discontinue in business. Nevertheless, the company's inability to sell its coal readily is an item that erodes the profitability of the company at the present time.

The next criterion that ought to be considered is respondent's history of previous violations. In connection with that, Exhibit P-4 lists some of the same violations that are alleged in this case. All of the violations alleged in this proceeding occurred on May 2, 1978. Since the violations listed in Exhibit P-4 occurred on May 2, 1978, they either are the same violations involved in this proceeding or they are not previous violations. Exhibit 4 does not show that there has been a previous violation of the sections of the regulations which are involved in this case. Additionally, there have been very few violations of any sections of the regulations by this particular company. Therefore, any penalties assessed in this case should neither be increased nor decreased under the criterion of history of previous violations.

The next criterion to be considered is negligence. According to respondent's testimony it did have a program under which it did check with its employees on a periodic basis to make sure that explosives were being handled in a proper manner. This periodic checking was done about every 10 days, and respondent's witness said it had been done about 10 days before the violations here involved occurred. It appears that the situation that occurred in this instance was an isolated matter because none of these violations had previously occurred and it doesn't appear that any of them have occurred since the order involved here was written on May 2, 1978. The testimony I have just discussed supports my finding that the violations were the result of ordinary negligence.

The major consideration in assessing penalties in this case relates to the fact that the violations were very serious. The inspector's order was issued under section 107(a) which is the portion of the Act pertaining to imminent danger. The violations are overlapping in some respects because they all deal with failures to follow certain safety procedures with respect to the handling of explosives, except for one violation involving a fire extinguisher.

In order that my decision will be clear as to the criterion of gravity, it is necessary for me to discuss briefly what the alleged violations were that are described in imminent danger Order No, 149242.

The order first alleged a violation of section 77.1302(d). That section provides that other materials or supplies shall not be placed on or in the cargo space of a conveyance containing explosives. There are additional provisions in that subsection, but that' is the primary portion of the section which was violated. The violation of section 77.1302(d) was based on the allegation that was there was an area between the cab of the truck and the first magazine situated on the truck which contained twelve boxes of electric blasting caps. The blasting caps were piled in an area where there were a metal box containing cans of oil, a metal reel, an electric blasting cable, and a blasting battery.

The same conditions described above were also alleged by the inspector to be a violation of section 77.1303(c), which provides that substantial nonconductive, closed containers shall be used to carry explosives, other than blasting agents, to the blasting site.

The two violations were serious because it would have been possible for the truck, which had to travel over rough terrain, to cause this reel to bang against the metal box and produce a spark which might have ignited the blasting caps which, in turn, could have set off a tremendous explosion of the other explosives which were being transported on the truck.

In view of the serious nature of this combination of violations, I find that a penalty of $1,000 should be assessed for each violation of sections 77.1302(d) and 77.1303(c).

The next violation alleged in the inspector's order is of section 77.1302(e). That section provides that explosives and detonators shall be transported in separate vehicles unless separated by four inches of hardwood or the equivalent.

The inspector believed that section 77.1302(e) had been violated because in the first magazine there were blasting caps. In fact, the magazine contained 18 boxes of electric blasting caps, one-half box of fuse caps, one box of primer cord, Class A, 2,000 feet, and one box of primer cord, Class C, 2,000 feet. The inspector's testimony indicates that while those caps and primer cords should have been separated or should have been in different magazines, it was not as likely that they would have produced an explosion by themselves, since they were inside the magazine, as the materials that were between the cab and the first magazine. Consequently, I find that the violation of section 77.1302(e) should be assessed at $500.

The fourth violation was another violation of section 77.1303(c), which has to do, as I've indicated, with transporting explosives in something other than a nonconductive, closed container. In this instance, the inspector cited a second magazine which was directly behind the first one. The second magazine contained three boxes of 2-1/2 by 16 dynamite and was not lined on two sides with nonconducting material. Here again, the inspector's testimony indicates that the dynamite in the nonconductive magazine was not as dangerous a source of explosion as the materials between the cab and first magazine. Therefore, I conclude that a penalty of $500 would be appropriate for that particular violation.

The final violation was of section 77.1110. That provision states that firefighting equipment shall be continuously maintained in a usable and operative condition. The section also provides that fire extinguishers are to be examined at least once every six months and the date of such examination is to be recorded on a permanent tag attached to the extinguisher .

The order states that the fire extinguisher on the explosives truck was discharged and did not have an examination date. The inspector's testimony indicates in addition to the things I have just discussed, that some oil had been spilled on the truck bed, and he considered the likelihood of a fire occurring as a potential hazard. He further believed the fire extinguisher might well be the difference between preventing a major explosion from any fire that might start, and not having a major problem. So I would consider that there might have been a larger degree of negligence in connection with the discharged fire extinguisher than there was with the way some of the explosives were hauled in the truck. I conclude that a penalty of $300 is warranted in this instance. I don't normally assess a penalty that large for

failure to have a fire extinguisher, but I think the conditions described in the inspector's testimony requires that a rather large penalty be assessed for that.

The total of all the penalties that I have assessed is $3,300. In assessing that much, I am giving considerable weight to the fact that the company's financial condition is not very good at this time; otherwise, I would have assessed a larger amount than I have.

I think I also overlooked discussing the good faith effort to achieve rapid compliance. On that, there was a very good effort made by respondent to achieve rapid compliance. The order was written at 10:30 a.m. and the inspector wrote a termination at 2 p.m. So the result was the company did immediately take care of the matter and restored its truck to a very safe conditon in a short time. I've taken that into consideration in assessing penalties. -Although I did not discuss it at the beginning of the decision, I had it in mind when I went off the record and prepared the specific assessments.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, respondent shall pay penalties totaling $3,300.00 which are allocated to the respective violations as follows:

Order No. 149242 5/2/78 § 77.1302(d)	$ 1,000.00
Order No. 149242 5/2/78 § 77.1303(c)	1,000.00
Order No. 149242 5/2/78 § 77.1302(e)	500.00
Order No. 149242 5/2/78 § 77.1303(c)	500.00
Order No. 149242 5/2/78 § 77.1110	300.00
Total Penalties in Docket No. KENT 79-149	$ 3,300.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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