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

23 JUL 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding	
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA),	:	Docket Nos.	Assessment Control Nos.
Petitioner	:	VA 79-41	44-04680-03007 V
	:	VA 79-43	44-04680-03008 V
v.	:	NORT 79-58-P	44-04680-03002
	:	NORT 79-87-P	44-04680-03005 V
PEGGY-O COAL COMPANY, INC.,	:		
Respondent	:	No. 4 Mine	

DECISION

Appearances: Sidney Salkin, Esq., and Covette Rooney, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner; James Ball, Vansant, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 5, 1980, a hearing in the above-entitled proceeding was held on May 8, 1980, in Richlands, Virginia, 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. 103-118):

> This consolidated hearing involves four Petitions for Assessment of Civil Penalty filed by the Secretary of Labor seeking to have civil penalties assessed for a total of 13 alleged violations of the mandatory health and safety standards by Peggy-O Coal Company, Incorporated. The Petition in Docket No. NORT 79-58-P was filed on January 19, 1979, and alleges seven violations. The Petition in Docket No. NORT 79-87-P was filed on April 30, 1979, and alleges one violation. The Petitions in Docket Nos. VA 79-41 and VA 79-43 were both filed on July 10, 1979, and allege one and four violations, respectively. The issues in a civil penalty case are whether violations occurred and, if so, what civil penalties should be assessed based on the six criteria contained in section 110(i) of the Federal Mine Safety and Health Act of 1977. In this case two of those criteria can be considered

on an overall basis and I shall make one set of findings for those first two criteria, which are the size of the respondent's business and whether the payment of penalties would cause respondent to discontinue in business. First, as to the size of respondent's business, the record shows that at the time the citations and orders in this proceeding were written, the operator had two coal mines, the No. 4 and the No. 5. Each of the mines produced about 150 to 200 tons of coal on an average daily basis and employed between eight and nine miners. At the present time, the No. 4 Mine is no longer in operation, but respondent does have in operation the Nos. 8 and 9 Mines. The No. 8 Mine produces about 100 tons of coal per day and the No. 9 produces approximately 150 to 200 tons of coal per day. Respondent sells its coal to Commonwealth Resources under a contract which requires respondent to sell on a fixed amount per ton. Therefore, on the basis of those facts I find that respondent is a small company and that any penalties assessed in this case should be in a low range of magnitude to the extent that the penalties are determined by the criterion of the size of respondent's business.

The operator testified that he is not in as good a financial condition at this time as he'd like to be and he indicated that while he would be able to come up with money assessed in the form of penalties that it would be difficult for him to do so. On the basis of that information I conclude that the payment of penalties would not cause the respondent to discontinue in business so long as penalties are reasonably assessed under the six criteria.

The remaining four criteria, history of previous violations, gravity, negligence, and good faith effort to achieve rapid compliance will each have to be considered separately for each violation.

Contested Proceeding
Docket No. NORT 79-87-P

Only one violation is alleged in Docket No. NORT 79-87-P. That alleged violation is based on Citation No. 322486 dated October 24, 1978, alleging a violation of section 75.200. Section 75.200 requires the operator of each coal mine to file with MSHA a roof-control plan applicable to the situation in each mine. In this proceeding the roof-control plan was introduced as Exhibit 2A. A violation of section 75.200 occurred because in the operator's battery charging station, which was located in the No. 6 entry inby survey station No. 248, the inspector observed 18-inch roof bolts in an area measuring approximately 80 feet by 20 feet. The roof-control

plan requires that bolts no shorter than 30 inches shall be used in the roof-control pattern. On October 24, 1978, when the inspector wrote Citation No. 322486, he found that only 10 of the bolts in the battery charging station were 30 inches in length. The inspector did not make a detailed diagram of the way the bolting pattern appeared on October 24. When the inspector wrote Citation No. 322486, however, he provided that the operator should place 30-inch roof bolts as required by the roof-control plan in the battery charging station by October 27, 1978. When the inspector returned on October 27, 1978, he did not find that an appropriate number of 30-inch roof bolts had been installed. He believed that the operator had made little or no effort to abate the violation of section 75.200 cited in Citation No. 322486. Consequently, he wrote an order of withdrawal requiring the operator to install 30-inch roof bolts in accordance with the roof-control plan.

When the inspector returned on October 30, which was a Monday, following the writing of the order on the preceding Friday, he found that 30-inch roof bolts had been installed on 5-foot centers as required by the roof-control plan and therefore he terminated the order of withdrawal. The roof-control plan does indicate on page two of Exhibit 2A that the roof bolts must anchor in at least 12 inches of firm strata. A roof-control expert has testified in this proceeding that that provision should be interpreted to mean that a 30-inch roof bolt is always required as a minimum length and that 30-inch roof bolts must anchor into at least twelve inches of firm roof support. It was the inspector's belief and also the belief of the roof-control expert that the violation alleged in Citation No. 322486 was serious because of respondent's failure to install a proper number of 30-inch roof bolts.

The inspector stated that when he came back on October 27 to check this area, nine roof bolts had been installed of the required 30-inch length, but they had been installed where nine 18-inch roof bolts had been removed. The inspector's Exhibit 23 shows that there were 31 eighteen-inch roof bolts in existence in the battery charging station area and nine of those indications, namely Nos. 7, 12, 13, 14, 15, 16, 18, 26, and 27 did have 30-inch roof bolts installed beside the holes where the 18-inch roof bolts had been removed. So by October 27, or 3 days after the citation was written, respondent had installed nine bolts in addition to the 10 which the inspector observed on October 24. The inspector estimated that 60 roof bolts would have been required in this area and the roof control expert testified that 64 thirty-inch bolts should have been installed in this area. Consequently, on

October 27, 1978, there were still lacking in this area at least 40, thirty-inch roof bolts. Based on the facts that I have just recited I think that the record justifies a finding that this was a serious violation.

Respondent was represented by the owner in this proceeding and the owner has testified that he did not install any more bolts in the battery charging station between October 24, 1978, when the citation was written, and October 30, 1978, when the order of withdrawal was terminated. The owner states that he did install about eight or 10 roof bolts in a 10- by 15-foot area which had been cited by the inspector in his order as having been completely unsupported (Exh. 3).

I find that the inspector's testimony in this instance must be given more weight than that of the owner because the inspector had detailed notes to document his findings and I do not believe the inspector would have fabricated what he saw and would have put it in documentary form without having a visual basis for it. Moreover, the inspector's findings were supported by the testimony of Inspector Matney, who at that time was a trainee and who is now a full-fledged MSHA inspector. Consequently, I find that I must make my findings on the basis of the inspector's statements in this instance.

Coming to the criterion of negligence, the operator knew, and is required to know, the provisions of his roof control plan; consequently, he should have installed the necessary 30-inch roof bolts.

It should be noted for the record that the area where the battery-charging station was situated had been increased in height by the removal of some of the roof, so that where the ordinary mining height in this area was 44 inches, the roof of the battery-charging station had been blasted out to make an area approximately 7 feet in height. In doing the blasting work the operator had, of course, destroyed the original roof support pattern and was obligated to install 30-inch roof bolts, on 5-foot centers just as if this were a new area from which coal had been removed.

It has been the operator's defense in this case that the 18-inch roof bolts had been installed for the purpose of holding the wires which carried the electricity needed to operate the battery-charging stations, of which there were three in this area. While that may have been his purpose in putting in the 18-inch roof bolts, the fact remains and the evidence shows that the 30-inch roof bolts had not been installed as they should have been. The inspector has indicated that there would have been no objection to the operator's having installed 18-inch roof bolts to support his

wire provided he had first installed 30-inch roof bolts as required by the roof-control plan. The inspector claims that the reason the operator had not put in 30-inch roof bolts was that he felt that the sandstone in the roof of the battery-charging station was extremely hard and a lot of bits were used up in drilling these holes and that the operator used 18-inch roof bolts, instead of 30-inch roof bolts, as a matter of economics rather than for the purpose of hanging the wires on them.

There is no reason to doubt the operator's statement that he put in 18-inch roof bolts for the purpose of supporting his wire. The fact remains that he had not put in 30-inch roof bolts which were required to make this area safe. Three scoops were used in the mine to load coal and transport it from the face to the conveyor belt; consequently, at various times, three different scoop operators came to the battery-charging station to get new batteries or to obtain recharged batteries. Therefore, the operator's failure to support this area properly was the result of gross negligence.

We come now to the criterion of whether the operator showed good faith effort to achieve rapid compliance. The record shows that he did not demonstrate good faith because he not only didn't make any effort to install the proper number of 30-inch roof bolts between October 24 and October 27, but did not install them at all until his mine was closed with a withdrawal order. Consequently, it's impossible to find that he showed good faith in abating this violation of section 75.200.

Exhibit 5A shows that the No. 4 Mine had two violations of section 75.200 in 1977 and two violations in 1978. Although we have two exhibits in the proceeding which are supposed to cover different portions of the years both of the exhibits show violations for some of the same time period. So it's a little bit confusing to try to determine the number of violations for other than 1977 and 1978. I always look upon violations of section 75.200 as being the worst type of violation that a company can have on a repetitious basis. So I think that even two violations each year is an excessive number of violations of section 75.200 and therefore under the criterion of history of previous violations I shall assess a $50 penalty on that criterion alone. Respondent's failure to show a good faith effort to achieve rapid compliance should be assessed at $150. The gravity of the violation should be assessed $200, and the negligence involved should be assessed at $300, or a total penalty of $700 for this violation of section 75.200 alleged in Citation No. 322486.

After the bench decision set forth above had been rendered, the parties entered into a settlement conference which resulted in the making of motions for approval of settlements as to the alleged violations in the remaining three dockets. The bases for approval of settlements are discussed below.

Settlement Agreements

Docket No. VA 79-41

Order No. 322927 1/23/79 § 75.403

Order No. 322927 alleged a violation of section 75.403 for which the Assessment Office proposed a penalty of $700. Respondent has agreed to pay a reduced amount of $600. The circumstances believed to warrant the reduction of $100 is that, although the violation did exist, the operator had in fact made preparations to clean up and rock dust the affected areas and had assigned a man to do the work prior to the time the inspection occurred. At the time the inspector observed the violation, the work had not been started, but the preparations had been previously made. Counsel for the Secretary believed that the aforesaid circumstances reduced the degree of gravity and negligence sufficiently to justify the reduction (Tr. 112-113).

Docket No. VA 79-43

Order No. 322926 1/23/79 § 75.400

Order No. 322926 alleged a violation of section 75.400 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $250. The grounds for the reduction are based on the facts that the inspector observed no stuck rollers along the belt line where the accumulations existed and the mine floor was wet. No known ignition sources were present and there were no miners in the area. Additionally, the alleged violation was promptly abated. In such circumstances, the gravity of the violation was diminished. Therefore, a reduction in the penalty is justified (Tr. 113).

Order No. 322515 12/28/78 § 75.316

Order No. 322515 alleged a violation of section 75.316 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $400. The alleged violation did not expose any miners to respirable dust because no one was working in the area where curtains had not been installed. There was immediate compliance because curtains were installed within 45 minutes (Tr. 113-114).

Order No. 322516 12/28/78 § 75.316

Order No. 322516 alleged a violation of section 75.316 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $400. The degree of negligence was reduced by the fact

that the operator was prepared to install line brattice in each of the affected work areas at the time of the inspection. Gravity was not great because, although coal had been shot, it had not been loaded. Abatement was immediate; therefore reducing the penalty is justified.

Order No. 322517 12/26/78 § 75.319(1)

Order No. 322517 alleged a violation of section 75.319(1) for which the Assessment Office proposed a penalty of $250. Respondent has agreed to pay a reduced amount of $150. The inspector's order was based on his conclusion that the operator had been working two sections on a single split of air. The inspector, however, did not observe two loading machines and the operator denies that he intended to operate two sections on a single split of air. If a hearing had been held, a credibility issue would have been raised. Therefore, a reduction in the penalty is warranted (Tr. 114).

Docket No. NORT 79-58-P

Citation No. 323809 8/1/78 § 75.1715

Citation No. 323809 alleged a violation of section 75.1715 for which the Assessment Office proposed a penalty of $40. Respondent has agreed to pay a reduced amount of $35. A reduction of $5 is warranted because the operator explained to the Secretary that he did have a check-in and check-out system; that he had records which indicated to him the identity of each miner working underground. The only items he lacked were the tags which the regulations require miners to wear (Tr. 81).

Citation No. 323810 8/1/78 § 75.1702

Citation No. 323810 alleged a violation of section 75.1702 for which the Assessment Office proposed a penalty of $78. The respondent has agreed to pay a reduced amount of $73. As justification for the reduced penalty, the operator claims that he had just purchased a cigar prior to accompanying the inspector inside the mine. The cigar was still wrapped and the operator had no matches. The operator forgot that he was carrying the cigar until it happened to drop out of his pocket (Tr. 82).

Citation No. 323811 8/1/78 § 75.1714

Citation No. 323811 alleged a violation of section 75.1714 for which the Assessment Office proposed a penalty of $84. Respondent has agreed to pay a reduced amount of $78. As justification for the reduction, the operator indicated to the Secretary's counsel that no hazard was involved in the fact that two miners were not wearing their self-rescuers because of the fact that self-rescuers were in the area. The gravity of the violation was low inasmuch as self-rescuers were promptly obtained once their absence was pointed out (Tr. 82).

Citation No. 323812 8/1/78 § 75.400

Citation No. 323812 alleged a violation of section 75.400 for which the Assessment Office proposed a penalty of $114. Respondent has agreed to pay a reduced amount of $94. As grounds for the reduction, the operator has indicated to the Secretary's counsel that the wiring was intact in the area of the coal accumulation and no stuck rollers existed along the conveyor belt. The inspector agreed that there were no ignition sources which would have been likely to cause a fire.

Citation No. 323813 8/1/78 § 75.516-2(a)

Citation No. 323813 alleged a violation of section 75.516-2(a) for which the Assessment Office proposed a penalty of $106. Respondent has agreed to pay a reduced amount of $98. As grounds for a reduction, the operator indicated to the Secretary's counsel that there was insulation on the wires used as hangers and that the wires being suspended were in good condition. The inspector confirmed the operator's claims. Therefore, the Secretary's counsel believed that a reduction in the penalty is justified.

Citation No. 323814 8/1/78 § 75.1713-7(a)(3)

Citation No. 323814 alleged a violation of section 75.1713-7(a)(3) for which the Assessment Office proposed a penalty of $66. Respondent has agreed to pay a reduced amount of $61. A reduction is believed to be appropriate because the operator and the inspector both agree that only one person was in the area where the first-aid kit lacked a full complement of supplies and the operator immediately corrected the deficiencies.

Citation No. 323817 8/2/78 § 75.1704-2(d)

Citation No. 323817 alleged a violation of section 75.1704-2(d) for which the Assessment Office proposed a penalty of $48. Respondent has agreed to pay a reduced amount of $43. The basis for the settlement in this instance is that the operator has indicated to the Secretary's counsel, and the inspector agrees, that the operator did have a map and that he promptly posted the map after the citation was issued, thus reducing the degree of negligence and providing prompt abatement.

I find that respondent and counsel for the Secretary gave satisfactory reasons for approval of the penalties agreed upon in their settlement conference and that the settlement agreements hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreements, the following civil penalties should be assessed:

Docket No. VA 79-41

Order No. 322927 1/23/79 § 75.403 .....(Settled).....	$	600.00

Docket No. VA 79-43

Order No. 322515 12/28/78 § 75.316 .....(Settled).....		400.00
Order No. 322516 12/28/78 § 75.316 .....(Settled).....		400.00
Order No. 322517 12/28/78 § 75.319(1) ...(Settled).....		150.00
Order No. 322926 1/23/79 § 75.400 .....(Settled).....		250.00
Total Settlement Penalties in Docket No. VA 79-43.....	$1,200.00	

Docket No. NORT 79-58-P

Citation No. 323809 8/1/78 § 75.1715 .....(Settled)...	$	35.00
Citation No. 323810 8/1/78 § 75.1702 .....(Settled)...		73.00
Citation No. 323811 8/1/78 § 75.1714 .....(Settled)...		78.00
Citation No. 323812 8/1/78 § 75.400 .....(Settled)...		94.00
Citation No. 323813 8/1/78 § 75.516-2(a) ....(Settled)...		98.00
Citation No. 323814 8/1/78 § 75.1713-7(a)(3).(Settled)...		61.00
Citation No. 323817 8/2/78 § 75.1704-2(d)....(Settled)...		43.00
Total Settlement Penalties in Docket No. NORT 79-58-P..	$	482.00 1/

Docket No. NORT 79-87-P

Citation No. 322486 10/24/78 § 75.200 .....(Contested)..	$	700.00
Total Settlement and Contested Penalties in This Proceeding...	$2,982.00	

(2) Respondent, as the operator of No. 4 Mine, is subject to the Act and to the mandatory safety and health standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The parties' requests for approval of settlements are granted and the settlement agreements in Docket Nos. VA 79-41, VA 79-43 and NORT 79-58-P are approved.

1/ On page 84 of the transcript, counsel for the Secretary stated that the total proposed settlement was $470; however, a mathematical error was made at that time, and is corrected in the tabulation above.

(B) Pursuant to the parties' settlement agreements and the bench decision rendered in the proceeding in Docket No. NORT 79-87-P, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $2,982.00 as set forth in paragraph (1) above.

Richard C. Steffey

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

Distribution:

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Peggy-O Coal Company, Inc., Attention: James Ball, President, P.O. Box 235, Vansant, VA 24656 (Certified Mail)