

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS 'NO. 2, 10TH FLOOR
520 1/2 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

7 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VINC 79-60-P
Petitioner : A.O. No. 33-01869-03001
v. :
GETZ COAL SALES INC., : **Getz** Strip
Respondent :

DECISION

Appearances: Linda **Leasure**, Attorney, U.S. Department of Labor, Cleveland, Ohio, for Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal **Mine** Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for one alleged violation of the provisions of 30 C.F.R. § 77.208(d). Respondent filed a timely answer and notice of contest and a hearing was convened in Warren, Ohio, on July 9, 1980. Petitioner appeared at the hearing, but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of its case, and a bench decision was rendered and is herein reduced to writing in compliance with Rule 65, 29 C.F.R. § 2700.65(a).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801, et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

ISSUES

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriated civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(1) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(1) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

DISCUSSION.

The section 104(a) Citation No. 273732, issued by MSHA inspector Allen E. Mann on June 22, 1978, alleges a violation of 30 C.F.R. § 77.208(d), and states as follows: "Two compressed cylinders were not secured in a safe manner, in that the compressed cylinders were laying down on the ground at the 004-O pit.!"

30 C.F.R. § 77.208(d) provides as follows: "Compressed and liquid gas cylinders shall be secured in a safe manner."

FINDINGS AND CONCLUSIONS

Fact of Violation

MSHA inspector Allen E. Mann confirmed that he issued the citation in question after observing an oxygen cylinder and an acetylene gas cylinder lying along one of the mine haulage roads. The cylinders were not secured in any manner and he determined that they were almost full by picking up one of the ends of the cylinders and he concluded that the weight of the cylinders was such as to lead him to conclude that they were almost full.

Inspector Mann testified that the cited safety standard required the cylinders to be in a standing upright position and tied securely. Since they were not, he believed that the standard was violated. He spoke with a foreman who advised him that the cylinders were probably left unsecured and lying by the haulroad by a mechanic who was using them to perform maintenance work on a piece of equipment. The cylinders were the property of the respondent and they are normally stored and secured in an area used for that purpose. The foreman could offer no other explanation as to why they were not properly secured (Tr. 8-18).

I conclude and find that petitioner has established a violation of section 77.208(d) as charged in the citation in question and **itis** AFFIRMED:

Negligence

Although the inspector's narrative statement (Exh. P-1) reflected that the condition cited could not have been known or predicted and occurred due to circumstances beyond the mine operator's control, he explained that he checked this item on the statement after being advised by foreman Roy Cusick that he was not aware of the fact the unsecured cylinders were *lying* near the haulroad.

Notwithstanding the inspector's opinion as reflected in his narrative statement at the time the citation issued, I find that the condition cited resulted from the failure by the respondent's mine management to exercise reasonable care to insure that the two cylinders in question were secured and returned to their normal storage place after being used by the mechanic. I *cannot* conclude that the normal storage area for such cylinders is out in an open field near a haulage road. Accordingly, I find that the violation resulted from ordinary negligence.

Gravity

Inspector Mann testified that the two unsecured cylinders were located some 20 feet from the **haulroad** and that trucks and bulldozers travel along the **haulroad** and that it was possible for vehicles to travel the area where the cylinders were lying. A truck or dozer could have run over them causing them to explode. In addition, gas could escape from the cylinders and a cigarette or flame could cause an ignition resulting in an explosion. However he observed no other equipment or vehicles near the cylinders and no one was present. Although he observed no trucks using the road, he did observe a truck in the pit and assumed that it had traveled over the road.

Based on the fact that no one was near the cylinders and that the maintenance work had been completed I find it unlikely that any injury could have resulted at the time the condition was observed by the inspector. I also find that absent a showing that a vehicle normally traveled the area 20 feet from and off the **haulroad** that the cylinders could have run over. Accordingly, I conclude that the violation was nonserious. However, I believe that the failure of the foreman to be aware of the fact that two gas cylinders were not where they are normally stored when not in use is a serious matter which could have been prevented by more attention to insure some accountability for the use and handling of such cylinders.

Good Faith Compliance

Abatement was achieved immediately by securing the cylinders in a safe manner (Exh. P-1). I conclude that respondent demonstrated good faith compliance after the issuance of the citation by removing the cylinders and securing them safely.

History of Prior Violations

Petitioner asserted that for the **24-month** period prior to the Issuance of the citation in question, respondent had been issued three citations. Petitioner asserted further that this indicates a good history of prior violations and I adopt this as my finding in this matter.

Size of Business and Effect of Penalty on Respondent's Ability to Remain in Business.

Petitioner asserted that respondent **is** a small mine operator and that its coal production for 1978 was 15, 385 tons and I adopt this as my finding in this matter.

Since respondent failed to appear at the hearing, there **is** no evidence or arguments advanced that the penalty assessed in this matter will adversely affect respondent's ability to remain in business. I find that it will not.

Respondent's Failure to Appear at the Hearing

The record reflects that respondent received actual notice of the hearing on April 14, 1980, and again on June 27, 1980, when the parties were advised of the specific hearing location. In both instances, the return **registered-mail** postal receipts reflect that the respondent received both notices. In addition, I personally telephoned the respondent's president Roland A. **Getz**, on July 9, 1980, when it became obvious that he would not appear at the hearing, and I did so specifically to ascertain whether he intended to enter an appearance. At that time he acknowledged that he was aware of the fact that a hearing had been scheduled, indicated that he did not intend to appear, and offered no excuse or explanation for his non-appearance. I advised him that I considered him to be in default and that the hearing would proceed without him.

I find the respondent's somewhat cavalier attitude in falling to appear at the hearing to be disturbing. The respondent specifically contested the citation and the hearing was scheduled at a time and location convenient to the parties. The scheduling of a hearing, including the expense of a hearing site, court reporter, and the appearance of government counsel and an MSHA inspector, in addition to the costs of my travel time, is a matter which should not be taken lightly. Although it may be questionable that the Commission may not assess court costs in cases where a respondent flatly fails to appear at a hearing or to offer any excuse for failing to appear, if it were within my powers I would assess court costs against the respondent in this case. One would expect any responsible mine operator who has been accommodated with an opportunity to be heard in a contested case to at least advise me or opposing counsel by letter or telephone that he does not intend to appear. The reason this was not done in this case is known only to the respondent.

The Commission's rules do not specifically address the question of the failure of a party-respondent to appear at a hearing pursuant to notice. Rule 63, 29 C.F.R. § 2700.63 provides for summary disposition of cases when a party fails to comply with an order of a judge or the Commission's rules. Subsection (a) further provides for the issuance of an order to show cause to the party (respondent) before the entry of an order of default or dismissal. Subsection (b) provides that when a respondent is found to be in default in a civil penalty case the judge shall enter summary order assessing the proposed penalties a final and directing that they be paid.

Section 105(d) of the Act provides that a mine operator be afforded an opportunity for a hearing in a contested case so that he may contest the citation and any proposed civil penalty assessment proposed by the Secretary. The record in this case clearly reflects that the respondent has been afforded such an opportunity but has failed to pursue it further by his nonappearance. I consider this to be a conscious and deliberate waiver of his right to be heard further in the matter.

On the facts presented in this case I conclude that the respondent has waived its right to be heard. While one may consider this waiver to be a technical default, I cannot conclude that it is the type of default within the meaning and intent of Rule 63. Contested cases docketed for hearings before a Commission Judge are tried and decided de novo by the judge and any civil penalties assessed by the judge for proven citations are assessed without regard to any **MSHA** proposed penalties and they are assessed by the judge on the basis of the record made at the hearing and after due consideration to the statutory criteria for assessments enumerated in section **110(1)** of the Act. If I were to consider respondent's failure to appear as a default within the meaning of Rule 63, I would be required to affirm **MSHA's** initial penalty assessments without regard to whether or not the evidence adduced through the hearing process warranted increases or decreases for the contested citations. ~~Since~~ **Since** section **110(1)** authorizes the Secretary to propose penalties on the basis of summary review of information available to him without making findings on the statutory criteria found in section **110(1)**, treating a non-appearance as a default would place the judge in the untenable position of accepting the Secretary's proposed assessments even though the judge has de novo jurisdiction of the proceeding and is required to make findings and conclusions and impose appropriate penalties on the basis of those findings and conclusions.


Since I have concluded that respondent is not in default within the intent of Rule 63, I do not believe that a show cause order is necessary. In this case, respondent offered no explanation for his failure to appear pursuant to notice and a show cause order would be an exercise in futility in my view. Had the petitioner failed to appear I would have dismissed the case for lack of prosecution and I fail to perceive of any reason why a respondent mine operator should be treated any differently.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty in the amount of \$75 is assessed by me for a violation of 30 C.F.R. § 77.208(d), as set out in Citation No. 273732, issued on June 22, 1978.

ORDER

The respondent is ORDERED to pay the civil penalty assessed by me in the amount of \$75 within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor,
881 Federal Office Bldg., 1240 E. Ninth St., Cleveland, OH 44199
(Certified Mail)

Roland A. Gets, President, Getz Coal Sales Inc., 9020 Trinity Church Rd.,
Lisbon, OH 44432 (Certified Mail)