

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

1 4 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-348
Petitioner : Assessment Control
v. : No. 15-10919-03003
: :
DK TCOALCOMPANY, : No. 1 Mine
Respondent :

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Roy Darrell Coleman, Elkhorn City, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 22, 1980, a hearing in the above-entitled proceeding was held on June 17, 1980, in Pikeville, 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. 37-41):

This hearing involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-348, on October 15, 1979, by the Secretary of Labor, seeking to have civil penalties assessed for two alleged violations of 30 C.F.R. § 75.1710-1. The issues in a civil penalty proceeding are whether violations occurred and, if so, what civil 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.

There is no dispute in this case but that the violations alleged in the two citations here at issue occurred. The operator has testified in this proceeding and he agrees that the tractor, in one instance, and the scoop, in the other instance, did not have canopies on them, as required by section 75.1710-1. Therefore, I find that the violations occurred.

It is now necessary to consider the six criteria before assessing a penalty. First of all I should discuss the criterion as to the size of respondent's business. The testimony indicates that respondent owned one underground mine which produces approximately 200 tons of coal per day and employs about nine miners. The equipment at the mine consists of scoops which pick up the coal, after it's shot from the solid, and transport the coal outside the mine. The operator hires independent truckers to haul the coal from the mine to a tipple, which is owned by Hall & Adkins Coal Company, in which the operator in this case also owns an interest. Hall & Adkins employs four people, and the operation of that company consists of running a tipple and selling coal to various purchasers on a spot market.

On the basis of those facts, I find that respondent is a small operator and that penalties in a low range of magnitude should be assessed to the extent that they are determined under the criterion of the size of respondent's business.

The operator has testified in this case, personally, and he has stated that assessment of reasonable penalties would not cause him to discontinue in business.

The next criterion is whether respondent made a good faith effort to achieve rapid compliance after being cited for the violations. The evidence shows that respondent did not install the canopies immediately after their absence was cited by the inspector. Respondent's testimony shows, however, that the canopies had been placed on order, and that the citations were terminated because the mine was abandoned in November of 1978 and reopened in May of 1979. The interim period of closure of the mine resulted from the fact that respondent did not have a market for its coal for a period of time.

Before respondent resumed operating the mine in May of 1979, it did install canopies on the tractor and on the scoop. Respondent recalls that the canopy came for one of the pieces of equipment in December of 1978, and he doesn't recall when the other canopy was available. Since they were installed before the equipment was used again in 1979, and since they had been placed on order before the citation was written, I find that respondent did make a good faith effort to achieve compliance after the citations were issued.

As to history of previous violations, Exhibit 1 shows that respondent was cited for one previous violation of section 75.1710 in September of 1978. In that instance, respondent did have a canopy on the premises for the roof bolter cited in that instance, and that canopy was installed within a short period of time.

It has been my practice to increase a penalty otherwise assessable under the other five criteria, If I find that respondent has violated that same section on a previous occasion. In this instance, since there has only been one previous violation and a small operator is involved, a penalty of \$10 will be assessed under the criterion of history of previous violations.

As to the criterion of negligence, counsel for the Secretary has emphasized that there was a high degree of negligence in this instance because respondent had been operating in a low seam of coal and had then moved to working in a higher **seam**. While it is true that the low seam of coal ranged from 38 to 42 inches. so that canopies were not required at that location, respondent was aware of the fact that canopies were required at the new location where the citations were actually written.

Since the operator did initiate mining in a higher seam of coal, knowing that he could not get the canopies at that time, and even though he put them on order, there was still a high degree of negligence in his beginning to operate in the high seam without the installation of canopies.

The final criterion that must be discussed is the gravity of the violation. The purpose of a canopy is to protect the operator of a given piece of equipment from possible falls from the roof. The degree of gravity is dependent, of course, upon how much danger or chance there is in a roof fall where the equipment is being operated. The inspector has testified that the roof in this mine was average and that he saw no unduly serious conditions in the roof that showed any imminent likelihood that the roof would fall.

There is testimony, of course, in this proceeding, as there is in most canopy citations, that the operators of the equipment were not very pleased with having to use canopies. For that reason, I can sympathize with the operator's difficulties in achieving use of these canopies, because there is a certain amount of opposition to them on the part of some of the miners. Nevertheless, they have been known to protect people in cases of roof falls and they are considered to be a very important provision for protecting equipment operators from roof falls. Therefore, I find that the violations were serious.

Inasmuch as a small operator is involved, I find that a penalty of \$100 for each violation is appropriate, and that to each of the **100-dollar** penalties should be added a further \$10 for history of a previous violation. Therefore, a penalty of \$110 will be assessed for each violation.

WHEREFORE, **itis** ordered:

Within 30 days from the date of this decision, respondent shall pay civil penalties totaling \$220.00 which are allocated to the respective alleged violations as follows:

Citation No. 76265 10/16/78 § 75.1710-1	\$ 110.00
Citation No. 76266 10/16/78 § 75.1710-1	110.00
Total Civil Penalties in This Proceeding	<u>\$ 220.00</u>

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

Distribution:

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