

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

14 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket Nos. Assessment Control Nos.  
Petitioner :  
v. : KENT 79-43 15-06374-03002  
: KENT 79-67 15-06374-03003  
HALL & ADKINS COAL COMPANY, INC., :  
Respondent : No. 1 Tipple

DECISION APPROVING SETTLEMENT

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 Sfeffey

Pursuant to a notice of hearing issued April 22, 1980, a hearing in the above-entitled proceeding was convened on June 17, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977. The notice of hearing had provided for the hearing to be held on June 18, 1980, but the same person who represented respondent in this proceeding had appeared on June 17, 1980, to represent a respondent in another proceeding. Therefore, it was agreeable to all parties for the hearing in this proceeding to be advanced to June 17, 1980.

Instead of presenting evidence at the hearing with respect to the four violations alleged in the Petitions for Assessment of Civil Penalty, the parties' representatives made a motion for approval of a settlement agreement which the parties had reached in a settlement conference held just prior to the convening of the hearing. Under the parties' settlement agreement, respondent agreed to pay the full amount of the penalties 1/ proposed by the Assessment Office.

Docket No. KENT 79-43

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-43 seeks assessment of penalties for three alleged violations of the mandatory health and safety standards. The Proposed Assessment shows that

1/ At the hearing, counsel for MSHA provided me with an amended Proposed Assessment which corrected some findings as to the six criteria which had been made in the Proposed Assessment which had originally been filed in Docket No. KENT 79-43. The amended Proposed Assessment reduced the total penalties proposed by the Assessment Office from \$120 to \$100.

respondent annually processes about 148,615 tons of coal at its tipple. The Assessment Office properly considered that respondent was operating a small business on the basis of that volume of processing. Counsel for the Secretary stated that the parties had agreed that payment of penalties would not affect respondent's ability to continue in business. The Secretary's counsel also stated that respondent had shown a good faith effort to achieve compliance with respect to all alleged violations:

The first violation alleged by the Petition in Docket No. KENT 79-43 was based on Citation No. 67077 which stated that respondent had violated section 77.208(d) by failing to secure in a safe manner two gas cylinders which were in close proximity to respondent's scale house. The Assessment Office considered the violation to be relatively nonserious, to involve ordinary negligence, and to warrant a penalty of \$36 which respondent has agreed to pay in full.

Citation No. 67078 alleged a violation of section 77.1103. Counsel for the Secretary requested at the hearing that the Petition be corrected to show an alleged violation of section 77.1102 because the inspector had inadvertently made a mistake when writing the citation. Respondent did not object to the granting of the motion to amend. Therefore, the order accompanying this decision will grant the motion to amend. As amended, Citation No. 67078 alleged a violation of section 77.1102 because respondent had failed to post signs warning against smoking or open flames at a fuel storage tank located near respondent's scale house. The Assessment Office considered the violation to be nonserious, to involve ordinary negligence, and to warrant a penalty of \$30 which respondent has agreed to pay in full.

Citation No. 67079 alleged a violation of section 77.1600(b) because traffic rules, signals, and warning signs governing traffic on company property had not been standardized or posted. The Assessment Office considered the violation to be nonserious, to involve ordinary negligence, and to warrant a penalty of \$34 which respondent has agreed to pay in full.

It should be noted that the Assessment Office assigned six penalty points under the criterion of history of previous violations with respect to each of the three alleged violations discussed above. Assignment of six penalty points means that respondent was assessed a penalty of \$12 for each of the three alleged violations under the single criterion of history of previous violations. There was introduced as Exhibits 1 and 2 some computer printouts which purported to show respondent's history of previous violations. Those exhibits list the same violations which are involved in this proceeding. If those listings are ignored as being inappropriate because such violations would not have occurred prior to the instant violations and would not constitute a history of previous violations, the evidence would show that respondent has not previously violated the sections of the regulations which are involved in this proceeding. I do not consider the fact that the Assessment Office may have rated respondent's history of previous violations as being different from the way I would look at that criterion in a contested proceeding to be significant because the penalties proposed

by the Assessment Office were on the low side and therefore respondent is not paying penalties which are unreasonably high regardless of whether the Assessment Office made as precise a finding as to the criterion of history of previous violations as might have been appropriate.

Docket No. KENT 79-67

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-67 alleges a single violation of section 77.1713 based on Citation No. 79467 which states that the daily examination for the safety of the employees was not being performed by a certified person. The Assessment Office considered the violation to be nonserious, to involve ordinary negligence, to have been accompanied by a much better than normal effort to achieve rapid compliance and to warrant a penalty of \$16 which respondent has agreed to pay in full.

A certified person was obtained within an hour after the citation was written. Therefore, the Assessment Office reduced the penalty points otherwise assignable by eight points. That is the reason that a small penalty of \$16 was proposed. In this instance, the Assessment Office appropriately assessed \$12 under the criterion of history of previous violations because Exhibits 1 and 2 in this proceeding show that respondent has violated section 77.1713 on two prior occasions.

I find that the reasons given by the Secretary's counsel for approval of the parties' settlement agreement were adequate and that the motion for approval of settlement should be granted.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreements hereinbefore discussed are approved.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-43 is amended to allege a violation of section 77.1102 instead of section 77.1103 with respect to Citation No. 67078 dated September 19, 1978.

(C) Pursuant to the parties' settlement agreements, respondent, within 30 days from the date of this decision, shall pay penalties totaling \$116.00 which are allocated to the respective violations as follows:

Docket No. KENT 79-43

Citation No. 67077 9/19/78 § 77.208(d) .....	\$ 36.00
Citation No. 67078 9/19/78 § 77.1102 .....	30.00
Citation No. 67079 9/19/78 § 77.1600(b) .....	<u>34.00</u>
Total Settlement Penalties in Docket No. KENT 79-43 .....	\$ 100.00

Docket No. KENT 79-67

Citation No. 79467 **1/10/79** § 77.1713 ..... \$ 16.00

Total Settlement Penalties in This Proceeding . . . . . \$ 116.00

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

Distribution:

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