

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 3 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	
	:	<u>Docket Nos.</u> <u>Assessment Control Nos.</u>
	:	
	:	PIKE 79-19-P 15-09727-03002
v.	:	PIKE 79-111-P 15-09727-03005
	:	PIKE 79-112-P 15-09727-03006 v
C.C.C.-POMPEY COAL COMPANY, INC., Respondent	:	PIKE 79-117-P 15-09727-03003 v
	:	PIKE 79-125-P 15-09727-03004 v <u>1/</u>
	:	KENT 79-116 15-09727-03007 v
	:	
	:	No. 3 Mine

DECISION ON REMAND IN DOCKET NO. PIKE 79-125-P
AND AMENDMENTS OF FINDINGS AND ORDER ACCOMPANYING
ORIGINAL DECISION ISSUED IN DOCKET NOS. PIKE 79-19-P, ET AL.

The **Commission** on June 12, 1980, issued its decision in Secretary of Labor v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125-P, 2 FMSHRC 1195 (1980), remanding my decision in the above-entitled proceeding with instruction that I rewrite the portion of my decision disposing of an alleged violation of 30 C.F.R. § 75.400 cited in Order No. 66869 dated May 12, 1978, so as to apply the holding of the Commission in Secretary of Labor v. Old Ben Coal Co., 1 FMSHRC 1954 (1979), instead of the holding of the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), which had, in effect, been reversed by the Commission's Old Ben decision, supra.

In footnote 6 on page 1197 of its decision on remand, the Commission indicated that I might wish to give the parties an opportunity to comment upon the effect of applying **the** principles set forth in the Commission's Old Ben decision to the facts surrounding the issuance of Order No. 66869 before complying with the Commission's instructions on remand. In response to the **Commission's** suggestion in footnote 6, I issued an order on July 7, 1980, providing that counsel for the parties could file appropriate comments by August 11, 1980. Counsel for the Secretary of Labor filed a three-page memorandum on August 7, 1980, in response to my order of July 7, 1980, but no comments have been received from counsel for respondent.

1/ The Commission's remand pertained only to one alleged violation out of the 11 violations alleged by the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-125-P. This decision on remand, however, can appropriately be issued only in the consolidated proceeding because the evidence concerning all alleged violations was introduced in the consolidated proceeding **and the** result of the remand requires changes in the findings and order which accompanied the decision originally issued **in** Docket Nos. PIKE 79-19-P, et al. Also, **I** have had to deal with **respon-**dent's untimely request to reopen the entire consolidated proceeding.

Inasmuch as the Commission's remand applies only to a single violation alleged by the Petition for Assessment of **Civil** Penalty filed in Docket No. **PIKE** 79-125-P, my decision on remand will be written under that docket number.

Docket No. PIKE 79-125-P

Order No. 66869 dated 5/12/78 § 75.400

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. Respondent violated section 75.400 because oil and float coal dust had been allowed to accumulate to a depth of from **1/8** inch to **1 inch on** and around the electrical components of the S and S Scoop having Serial No. 168 (**Tr.** 398). The scoop was being used to load coal and contained permissibility violations consisting of eight missing bolts around the control panel and missing conduits around power wires (**Tr.** 410; 416). The lack of permissibility increased the gravity of the violation because it would have been possible for a spark from an electrical component to produce a fire inasmuch as oil and float coal dust had accumulated around the electrical components (**Tr.** **416-417**). A high degree of negligence was associated with the violation because the last electrical inspection had been made only 2 days before the order was written and an electrical inspector (who had checked the scoop for permissibility, but who did not write Order No. 66869) testified that the amount of combustible materials he had observed on the scoop could not have accumulated within a period of 2 days (**Tr.** 421). Respondent demonstrated a good faith effort to achieve compliance.

Conclusions. In its decision In the Old Ben case, supra, the Commission stated that one of the primary purposes of the Act is to prevent death and injury by fire and explosions. In the Commission's opinion, section 75.400 was designed to prevent accumulations rather than to require ~~that accumu-~~lations be cleaned up within a reasonable period of time as the Board had held. Under the Commission's view of section 75.400, there is no doubt but that a violation of section 75.400 occurred.

Both of respondent's witnesses agreed that there were accumulations of coal, mud, and oil on the scoop (**Tr.** 423; **430**). The primary point made by respondent's witnesses was that the inspector who cited respondent for the violation of section 75.400 with respect to the scoop should have written a routine citation under section **104(a)** of the Act instead of an unwarrantable failure order under section 104(d) of the Act. While the validity of the order itself was not under review **in** this civil penalty proceeding, the **evi-**
dence did show that the violation was serious and that a high degree of **neg-**
ligence was associated with it because the accumulations were caked in a form which showed that they had existed longer than the 2 days which had elapsed since the scoop had been given an electrical inspection on May 10, 1978, or 2 days prior to the writing of the order on May **12, 1978**. Thus,

there is evidence to show that the violation was a definite hazard to the miners and that respondent knew or should have known about the violation, but had done nothing to clean up the accumulations.

The findings I have made above are consistent with the recommendations as to the criteria of gravity, negligence, and good faith effort to achieve compliance which are contained in the memorandum filed by the Secretary's attorney. While the inspector who **wrote** the order said that he felt the operator had not **shown** good faith in achieving compliance, he based that conclusion on the fact that he wrote the order on May 12, 1978, and it was not terminated until May 25, 1978 (Tr. 406; 413). **An** inspector other than the one who wrote Order **No.** 66869 **wrote** the subsequent action sheet which terminated the order. Also other evidence in the record shows that respondent had received a large number of orders and citations on May 12, 1978, so that a considerable amount of time was required to correct them. Consequently, **it would** be improper to find that respondent failed to demonstrate a good faith effort **to** achieve compliance solely because several days elapsed between the time the order was written and the time it was terminated. Additionally, inspectors do not fix an abatement period in orders because no production can be performed in any event until the hazardous conditions cited in the order have been corrected.

The stipulations of the parties in this proceeding show that respondent produced about **60,000** tons of coal annually and employed between 20 and **40** miners (Tr. 5). On the basis of the stipulation, I find that respondent operates a relatively small coal business.

In my original decision I stated that payment of penalties would not have an adverse effect **on** respondent's ability to continue in business because respondent had not introduced any evidence with respect to its financial condition (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 LBMA 164 (1974)). Although counsel for respondent filed a letter with me on **March 5**, 1980, asking that I reopen the record to permit him **to** introduce facts about respondent's present financial condition, **I** denied the request because **I** had lost jurisdiction over the case at the time his letter was received inasmuch as my decision had been issued on January 28, 1980.

I explained in my letter in response to the request for reopening the record that the Commission had granted the Secretary's petition for discretionary review and I suggested that he take up the matter of having the record reopened for receipt of additional evidence with the Commission when he filed his brief in **the review** proceedings. In my order issued July 7, 1980, I gave additional reasons for my belief that I am precluded from reopening the record. Respondent's counsel did not file a brief in the review proceedings before the Commission and did not file any comments in response to my order of July 7, **1980**. Therefore, I feel that I must adhere to the finding originally made in this proceeding with respect to the criterion of whether the payment of penalties would cause respondent to discontinue **in** business.

The discussion above has dealt with all of the **six** criteria except the criterion of history of previous violations. Exhibit 1 shows that respondent violated section 75.400 twice in 1976 and eight times in 1977. That **is** a very adverse trend **in** number of violations of section 75.400. Therefore, the penalty for the instant violation of section 75.400 should be \$100 under the criterion of history of previous violations.

The findings and conclusions above show that respondent **is** a relatively small operator, that the violation was serious, that there was a high degree of negligence, that respondent demonstrated a good faith effort to achieve compliance, and that payment of penalties **will not** cause respondent to discontinue in business. Based on those findings, a penalty of \$300 should be assessed and that penalty should be increased by \$100 under the criterion of history of previous violations to the total penalty of \$400 recommended **in** the Secretary's memorandum.

WHEREFORE, it **is** ordered:

(A) Paragraph (1) on page 23 of **my decision** issued in this proceeding on January 28, 1980, is amended by inserting under the heading "Docket No. PIKE 79-125-P" the following entry:

Order No. 66869 **5/12/78** 575.400 (Contested) \$ 400.00

(B) Paragraph (1) on page 23 of my decision issued **in** this proceeding on January 28, 1980, is amended by changing the total settlement and contested penalties for Docket No. PIKE 79-125-P from "**\$3,550.00**" to "**\$3,950.00.**"

(C) Paragraph (1) on page 23 of my decision issued in this proceeding on January 28, 1980, **is** amended by changing the total settlement and contested penalties to be assessed from "**\$12,965.00**" to "**\$13,365.00.**"

(D) Paragraph (B) on page 24 of my decision issued in this proceeding on January 28, 1980, is amended to require respondent to pay, **within** 30 days from the date of this decision, civil penalties totaling **\$13,365.00** Instead of total penalties of **\$12,965.00** as originally provided. If respondent has already paid the civil penalties of **\$12,965.00** required by paragraph (B) of my decision issued January 28, 1980, respondent should within 30 **days** from the **date** of this decision on remand submit an additional penalty of \$400.00 for the violation of section 75.400 cited in Order No. 66869 dated Map 12, 1978.

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

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