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 1 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket Nos. WEVA 80-59
v.	:	WEVA 80-60
	:	WEVA 80-199
	:	WEVA 80-200
MICHAEL JILES AND RICKEY C. BENNETT,	:	
Respondents	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Jiles and Rickey C. Mennett, pro se, for Respondents.

Before: Judge Lasher

This matter arises under section 110(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Sutton, West Virginia, on July 22, 1980. After considering evidence submitted by both parties, I entered an opinion on the record. 1/ My oral decision containing findings, conclusions, and rationale appears below as it appears in the record, other than for minor corrections in grammar, punctuation, and the excision of obiter dicta:

> This proceeding arises on the filing of a petition for assessment of civil penalty by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). The two Respondents, Michael Jiles and Ricky C. Bennett, are charged with and have admitted being an agent of the corporate mine operator, Kerstan Corporation, and knowingly authorizing or ordering or carrying out said operator's violations of two, mandatory health and eafetp standards, i.e., 30 C.F.R. §§ 75.200 and 75.316, which are reflected, respectively, in a section 107(a) withdrawal order dated October 13, 1978, No. 054239 and a section 104(d)(l) citation dated October 13, 1978, No. 054603 for which Petitioner seeks against each of the Respondents penalties of $300 and $200 respectively.

I_/ Tr. 80-89.

There are no constitutional issues raised in this case under the equal protection or due process clauses nor are there any issues with respect to the construction of the section of the Act involved, section 110(c).

Both Respondents have forthrightly admitted the violations charged and the only material focus of this proceeding today was to take evidence with respect to penalty assessment factors. Since these are individual Respondents and not mine operators the section 110(i) factors of size of business and effect on an operator's ability to continue in business are not directly relevant. In their place I have substituted the economic ability of the individual Respondents to pay penalties.

Turning now to the first factor, that is the history of previous violations, I find, based upon the stipulation of MSHA, that neither Respondent has a history of any previous violations. Preliminarily, it also should be noted that based upon the testimony of MSHA inspector Carlin Lucky, that both Respondents, Jiles and Bennett, exercised good faith in achieving rapid compliance with the violated standards upon being notified of the two violations involved. Thus, the remaining factors upon which evidence was taken and remain to be discussed are the gravity or seriousness of the two violations; the negligence *or* other culpability of the two Respondents in failing to correct the two violations; and the economic condition of the two Respondents.

MSHA's evidence indicates that at approximately 11:30 p.m. on October 12, 1978, and after MSHA's supervisory inspector,Clyde Perry, had received a telephone call from a complaining anonymous miner at the Kerstan No. 1 Mine, MSHA inspectors Carlin Lucky and George Moore arrived at the mine to conduct an inspection. Upon their arrival they noted that no preshift examination had been made and after Lucky spoke to Jiles with respect thereto a preshift examination was made which'was studied by Lucky and after which Lucky and Moore went underground to make their visual inspection.

It should be noted at this point that the No. 1 Mine had a daily production of approximately 100 tons; that it had approximately 19 employees, 2 surface and 17 underground; and that it operated in two shifts, a production shift from 8:00 a.m. to 4:00 p.m. and a maintenance shift from midnight to 8:00 a.m. Resondent Jiles was section foreman on the day-production shift and supervised between 10 and 13 men, and Bennett was maintenance foreman on the night shift and supervised between four and six employees. Other than the

president of the Kerstan Corporation, Mr. C. K. Scott, Jiles and Bennett were the only supervisory personnel at the mine. According to Inspector Lucky, they-ran the entire operation.

The evidence, based on Inspector Lucky's testimony, indicates that the roof control violation, 30 C.F.R. § 75.200, was extremely serious. Inspector Lucky indicated in explanation of his description of the violation contained on the withdrawal order itself, Petitioner's Exhibit 4, that six posts had been installed some 6 or 7 feet from the face whereas the roof control plan at page 17 thereof required such posts to be on 5-foot centers. He also specified on the mine map Introduced by MSHA, Exhibit P-8, that four crosscuts outby the face had been mined some 43 feet from the bolting and that this violation, i.e., mining inby permanent roof support, was likewise an infraction of the requirements of the roof control plan as is reflected in drawing No. 1 at page 17 of the plan., Inspector Lucky described five instances where there were infractions of the PO-foot width requirement contained in the plan and that in these places mining widths of 21 to 26 feet had been carried on. He also described dangerous roof conditions where roof bolts were discovered with the heads sheered. In other areas the mine roof was loose and heavy and was falling out around the roof bolts. Finally, Inspector Lucky described areas where roof falls had occurred. The sum of his testimony indicated extremely serious violations which arise out of, caused and occurred in dangerous and hazardous areas of the mine. Since roof falls are the singlemost cause of coal mine fatalities and since most of the violations which were discovered by Inspectors Lucky and Moore were in areas where miners conducted their work, the violation described in Withdrawal Order 054239, with which both Respondents are charged, is found to have a gravity which would call for a substantial penalty.

With respect to the seriousness of the ventilation violation, the infraction is described in the subject citation as follows: "The approved ventilation plan was not being complied with in that seven open crosscuts were present between the main intake and return air courses on the main sect ion." Inspector Lucky pointed out that section 6, page 2 of the ventilation plan was violated since there were not seven stoppings as required by the plan. I find this violation to be only moderately serious, since there was no urgent or proximate danger of any hazard coming to immediate fruition at the time. The hazards are distinct but not remote, there being (1) the presence of respirable dust which constitutes a health hazard in view of Its potential for the acquisition of pneumoconiosis by the miners working in the area and (2) the potential for inadequate ventilation to

sweep away any concentration of methane gas liberated by the mining process which might constitute a factor in an explosion. There was no showing that there was methane gas present at the time-or any concentration of respirable dust. Therefore, the court concludes that this violation is only moderately serious.

It appears that the roof control violation had been in existence approximately 2 weeks and the ventilation violation for more than 1 week. No real justification for permitting such violations to occur and continue was advanced by Respondents. I find on the basis of the admissions in the record, as well as the evidence in the record generally, that both Respondents were aware of the two violations with which they are charged and failed to correct them. There appears to be, therefore, the failure to discharge their responsibilities as supervisory personnel, indeed sole supervisory personnel on duty during the two shifts in which the mine was operated, to comply with the mandatory health and safety standards. Such failure is somewhat attributable to the pressure for production which came down from the president of the corporation, Mr. C. K. Scott. However, there is no indication that this pressure which is described in Mr. Jiles' letter to Judge Broderick dated February 15, 1980, was sufficiently overwhelming to excuse the failure of either Respondent from discharging his'responsibility to comply with the mandatory health and safety standards.

I therefore find that with respect to the so-called negligence factor that the degree of culpability of Mr. Jiles and Mr. Bennett exceeds ordinary negligence and as agents of the corporate Respondent they did with full knowledge of the fact proceed to allow the two violations to occur and continue.

Both Respondents were given the opportunity to present an economic defense with respect to their ability to pay penalties. Neither Respondent, in my judgment, made out a sufficient case of economic inability to pay reasonable penalties in this case. Such evidence, in the context of the situation of the two Respondents, requires a showing of heavy indebtedness, repossessions, foreclosures, out of work due to health, or the like. Both Respondents have been employed in the past. Respondent Jiles earned in excess of $23,000 in 1979; Mr. Bennett earned considerably less, for which I do plan to make an adjustment, his having earned in a 1979 only $11,000. Generally speaking, it does appear that Mr. Bennett's financial situation is a little more severe than that of Mr. Jiles and perhaps his earning capacity is less than Mr. Jiles, which militates for a different penalty between the two.

Summing up then the factors which militate for a very substantial penalty are the seriousness of the two violations and the culpability of the two Respondents, supervisory employees, in allowing a rather serious hazard to exist which jeopardized the life and health of their fellow miners. Age is sometimes a hidden criterion in evaluating the intent of one-in committing certain acts as well as the moral turpitude of those committing certain actions. I realize that when one is younger and lacks experience in life the possibility that accidents and hazards can occur is not nearly as well recognized or in the forefront of the conscious mind as it becomes as one gets older and sees more tragedies, accidents and the like. -This is why young people think they're invulnerable when they drive a car and why people, when they get older, slow down. To an extent it is an intelligence test and the understanding can only come with years. So I find (age to be) an exculpatory factor-to a limited extent-with both these Respondents. * * * Other mitigating factors are that neither Respondent has had any history of previous violations and that they exhibited good faith in attempting to achieve rapid compliance with the standards after the inspector notified them of the violations. With-respect to Mr. Bennett, I recognize that he has been totally straightforward in stating that he was wrong and; that he is in a relatively disadvantageous economic position.

Weighing all these factor8 I conclude that Respondent Michael Jiles be assessed a penalty in Docket WEVA 80-59-for the violation described in the subject withdrawal order-of $250, and for the violation described in the citation of 30 C.F.R. § 75.316 (Docket WEVA 80-60) of $175.

Respondent Rickey Bennett is assessed a penalty in Docket WEVA SO-199 for a violation of 30 C.F.R. § 75.200 described in the subject withdrawal order of $175 and a penalty for the violation of 30 C.F.R. § 75.316 described in the subject citation in Docket WEVA 80-200 of $125. 2/

ORDER

Respondent Michael Jiles is ordered to pay $425 and Respondent Rickey Bennett is ordered to pay $300, if they have not already done so, to the Secretary of Labor within 30 days of receipt of this decision.

Michael A. Lasher, Jr., Judge

2/ The thorough preparation for, and professional handling of, this matter by MSHA's counsel has been noted in the record.

Distribution:

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