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SOL (MSHA) V. BAKER COAL
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Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. The operator, Baker Coal Company, is small in size.
2. The operator's prior history of assessed violations constitutes a negligible history of prior violations and there was no prior violation of section 103(a) of the Act.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On June 7, 1979, Ronald Marrara and Carl Buckner were duly authorized representatives of the Secretary of Labor, Mine Safety and Health Administration, and were assigned to conduct a spot inspection at Baker Coal Company, Baker Strip Mine, in northern West Virginia.
2. Upon arriving at the mine site, Inspector Marrara identified himself to Wayne Baker, sole proprietor of Baker Coal Company, and informed him that the inspectors were aware that another MSHA inspector had been at the site on the prior day but that they were going to make another inspection.
3. At that point, Wayne Baker complained profanely that this was his tenth inspection in two weeks. Without provocation or warning, he struck Inspector Marrara, knocking him to the ground. Thereupon, he straddled Inspector Marrara, grabbed him by the shirt, lifted him off the ground, and slammed him back to the ground several times. During this assault on Inspector Marrara, Wayne Baker also threatened to throw the inspector in the sedimentation pond on the site.
4. After assaulting Inspector Marrara, Wayne Baker then shoved Inspector Buckner and his hard hat feel off. Baker then picked up the hard hat and threw it at

Inspector Buckner.

5. At no time did either inspector strike Wayne Baker.

6. Wayne Baker then ordered both inspectors off the mine site and instructed them not to return.

7. As a result of this attack, Inspector Marrara received treatment in the emergency room of West Virginia University Hospital, sustained a left rotator cuff tear, and was off work for six weeks.

8. Inspector Marrara pressed criminal charges against Wayne Baker and Baker entered a plea of nolo contendere and was fined \$250.

9. On March 12, 1980, Wayne Baker struck an investigator employed by the West Virginia Department of Natural Resources. He also entered a plea of nolo contendere to the criminal charge arising out of that incident and was fined \$250.

10. Baker Coal Company is a small operator but Wayne Baker has not established that any civil penalty assessed under the Act will affect his ability to continue in business because Baker Coal Company offered no documentary evidence of its financial condition and the testimony of Wayne Baker in this regard was vague and unconvincing.

11. Since this incident on June 7, 1979, Baker Coal Company has not denied entry to any inspector employed by MSHA.

12. Baker Coal Company has a negligible history of assessed violations and there was no prior violation of section 103(a) of the Act.

DISCUSSION

Wayne Baker, sole proprietor of Baker Coal Company, admitted that he refused to allow two MSHA inspectors to conduct an inspection at his mine on June 7, 1979, and that he ordered them off of his property. The above admission establishes a violation of section 103(a) of the Act which provides in pertinent part as follows: "For the purpose of making any inspection or investigation under this Act * * * any authorized representative of the Secretary * * * shall have the right of entry to, upon, or through any coal or other mine." Since a violation of the Act has been admitted by the operator, the remaining issues concern the amount of the civil penalty which should be assessed.

The two MSHA inspectors allege that without warning or provocation Wayne Baker physically assaulted them after they announced their intention to make an inspection of his mine. Baker alleges the following: (1) he had only been on this job for eight working days but had been subjected to

~2629

ten inspections by agencies of the state and federal governments consuming 35 hours of his time and that MSHA had an inspector at this mine on the preceding day; (2) Inspector Marrara approached to a distance of 12 inches from him and said to him, "We are going to straighten you out"; (3) rather than slamming Inspector Marrara to the ground as alleged, Baker was attempting to lift the inspector to get him off the property but could not do so; and (4) Baker Coal Company is unable to pay any civil penalty assessed herein.

The claim of Wayne Baker that he had been subjected to an excessive number of inspections by federal and state agencies is without merit and constitutes neither a defense to the violation nor probative evidence concerning the criteria for assessment of a civil penalty. Suffice it to say that the mining of coal is a pervasively regulated industry and any operator who objects to this fact should seek employment elsewhere in the economy.

Wayne Baker's allegations that Inspector Marrara approached to within 12 inches of him is admitted by the inspector. This fact is of no consequence and Baker admitted that he was not afraid of the inspector. Baker's claim that the inspector told him, "We are going to straighten you out," is rejected. The testimony of the two inspectors that no such statement was made was more credible than the testimony of Wayne Baker.

Baker's claim that he was merely attempting to get Inspector Marrara off his property when he lifted him off the ground is also rejected. Credible testimony of the two inspectors established that Baker slammed Inspector Marrara to the ground several times.

Finally, Baker's assertion that he would be unable to pay any civil penalty assessed here is rejected because he failed to present any documentation of his financial condition and his testimony in this regard was vague and unpersuasive. Baker presented no evidence of his net worth and he was unsure of the value of his equipment and the extent of the liens thereon.

Section 110(i) mandates the consideration of six criteria in the assessment of a civil penalty. I have considered the operator's history of previous violations, the size of the business, the ability of the operator to stay in business, and the good faith of the operator to achieve rapid compliance after notification of the violation in my Findings of Fact Nos. 10-12. The remaining issues are whether the operator was negligent and the gravity of the violation.

The evidence of record in this matter fails to establish any justification for Wayne Baker's conduct. Baker's initial assault and battery upon Inspector Marrara, which knocked him to the ground, constituted gross negligence. However, this offense was further aggravated and compounded by Baker's subsequent actions of picking the inspector up and slamming him to the ground several times and threatening to throw him in the sedimentation pond. At no time did the inspector strike Baker. It is noted

that all of

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these actions took place in the presence of Baker's employees at the mine. The willful and unlawful use of force by Wayne Baker upon Inspector Marrara constitutes gross negligence under the Act.

The evidence establishes that Baker's assault upon the inspector caused him serious physical injuries which required medical attention and resulted in him being off the job for six weeks. In addition to the physical injuries suffered by the inspector, the gravity of this offense is compounded by the fact that Baker's conduct at the time of this violation threatens to undermine the integrity of mine safety enforcement. If MSHA inspectors are intimidated by the threat of a physical assault they will not issue the citations and orders required under the Act. While a civil penalty cannot be assessed as a means of punishment, it must be sufficient to deter subsequent violations and gain the operator's compliance with the Act. The violation prevented any inspection at the time it was committed. The manner in which the violation was committed could intimidate inspectors in the future so that future inspections would be less thorough. Therefore, the violation and the manner in which it was committed could result in dangerous conditions being undetected. I find that the violation was of extremely serious gravity.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of \$8,000.00 should be imposed for the violation of section 103(a) of the Act.

CONCLUSIONS OF LAW

1. The administrative law judge has jurisdiction of this proceeding pursuant to section 110(i) of the Act.
2. Baker Coal Company and Baker Strip Mine are subject to the Act.
3. On June 7, 1979, Baker Coal Company violated section 103(a) of the Act by refusing to allow duly authorized representatives of the Secretary of Labor entry to the Baker Strip Mine.
4. The conduct of Wayne Baker, sole proprietor of Baker Coal Company, in committing an assault and battery on MSHA inspector Ronald Marrara constituted gross negligence.
5. The violation in question was of extremely serious gravity in that it resulted in physical injuries to Inspector Marrara and was intended to intimidate MSHA inspectors from performing their job.
6. Under the criteria set forth in section 110(i) of the Act, a civil penalty in the amount of \$8,000.00 shall be imposed for violation of section 103(a) of the Act.

~2631

ORDER

WHEREFORE IT IS ORDERED that Baker Coal Company pay the sum of \$8,000.00 within 30 days of the date of this decision as a civil penalty for the violation of section 103(a) of the Act.

James A. Laurensen
Judge