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SOL (MSHA) V. LESLIE COAL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding	
		Docket Nos.	Assessment Control Nos.
	PETITIONER	KENT 79-51	15-07082-03007
		KENT 79-88	15-07082-03008
v.		KENT 79-148	15-07082-03009
		KENT 79-297	15-07082-03012
LESLIE COAL MINING COMPANY,	RESPONDENT	Leslie Mine	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 29, 1980, a hearing in the above-entitled proceeding was held on June 26, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence with respect to the contested issues, I rendered the bench decisions which are set forth below (Tr. 105-111):

Contested Issues

This consolidated proceeding involves four cases for assessment of civil penalty filed by the Mine Safety and Health Administration. The petitions in Docket Nos. KENT 79-51 and KENT 79-88 were both filed on June 22, 1979, and seek assessment of civil penalties for five and two alleged violations, respectively, of the mandatory health and safety standards by Leslie Coal Mining Company.

The proposals in Docket Nos. KENT 79-148 and KENT 79-297 were filed on August 21, 1979, and October 11, 1979, respectively, and seek assessment of civil penalties for two alleged violations in each separate docket.

The issues in a civil penalty proceeding are whether a violation of the mandatory safety standards occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Docket No. KENT 79-297

In this proceeding, evidence was first presented in Docket No. KENT 79-297. The first alleged violation in that docket was set forth in Citation No. 67917 dated May 5, 1978, alleging a violation of section 75.403.

The former Board of Mine Operations Appeals held in Valley Camp Coal Company, 3 IBMA 176 (1974), that before a violation of section 75.403 may be found to exist, the judge must first find that the conditions in section 75.402 do not exist. I have not asked specific questions about the conditions noted in section 75.402 in this proceeding, but we have had a diagram for reference and have had extensive discussions of the section so that I can conclude that the areas in which the inspector alleged a violation of section 75.403 were not so wet or so high in incombustible content as to be unsusceptible to an explosion. I also find that the areas are not inaccessible or unsafe to enter; and that the Secretary of Labor has not found that the Leslie Mine is a mine which requires no rock dusting.

Section 75.403 requires that rock dust be applied so as to render the areas which are in intake air to be at least 65 percent incombustible, and areas which are in return air to be at least 80 percent incombustible. The inspector, in this instance, took three rock-dust samples on the No. 4 section on May 5, 1978. According to those samples and the analyses made by the Mount Hope Laboratory, the inspector found that his sample taken in the alleged No. 3 return entry was 61.6 percent incombustible; and that the other two samples taken in the intake entries were 73 and 67 percent incombustible. Since the incombustibility was above 65 percent, according to the analyses, the inspector did not prove or claim that a violation occurred as to the two samples which he designated as intake samples, or samples taken in intake air.

The main thrust of the evidence has been a claim by respondent that the inspector's sample taken -- allegedly taken -- in return air, was not actually obtained in a return entry; and therefore, that the incombustibility did not have to be 80 percent, as required by section 75.403. The inspector was cross-examined at great length about how he knew for

certain that the No. 3 entry was a return. He primarily based his conclusion that it was, a return entry upon the fact that the company's safety inspector, who accompanied him on the inspection, had indicated to him that the No. 3 entry was the return entry. The inspector, in addition, drew, as Exhibit 2(g), a diagram of his recollection of the No. 4 section.

According to that diagram, the inspector indicated that the company had just recently begun to produce coal from the fourth entry, in the No. 4 section. The inspector showed, on Exhibit 2(g), that until the No. 4 section was developed to the extent that intake air was passing across all three entries, air would not pass down the No. 4 entry. Therefore, the No. 3 entry would at times, before the full development of the fourth entry, be a return entry. However, the inspector conceded, upon cross-examination, that he could not be sure at what point the No. 3 entry might be a return.

Consequently, I find that his lack of certainty as to whether the No. 3 entry was a return entry prevents me from finding that the sample which he allegedly took in the return entry was in fact taken in return air.

Mr. Stewart has pointed out, in both cross-examination and oral statements, that regardless of whether that third sample was taken in intake air or return air, since it showed only 61.6 percent incombustibility, the sample would still indicate that there was a violation of section 75.403 as to the third sample because rock dusting would not have rendered it at least 65 percent incombustible.

Mr. Stephens does not disagree with that argument, but he has pointed out that that is certainly not a very serious infraction of the rules, since only a difference between 61.6 percent incombustible and 65 percent incombustible is involved. Therefore, I find that there was a violation of section 75.403.

Having found that a violation of section 75.403 occurred, I am required to assess a penalty based on the six criteria. As to the size of Respondent's business, which is the first criterion, it was stipulated that Leslie Coal Mining Company is a medium-sized company, producing 177,818 tons of coal per year. It was also stipulated that the payment of penalties would not cause the operator to discontinue in business.

There was introduced as Exhibit 1 a computer printout for the purpose of showing information about respondent's history of previous violations. That exhibit shows that

respondent has violated section 75.403 only once on a prior occasion. It has been my practice to assess some portion of the penalty under the criterion of history of previous violations, when the section allegedly violated in the case before me, has been previously violated. Therefore, under the criterion of history of previous violations, a penalty of $15 will be assessed.

It was stipulated that there was a good faith effort to achieve rapid compliance. That criterion will be given full credit in the assessment of the penalty.

Inspector Smith introduced, as Exhibit 2(e), a page on which he felt, or indicated his views as to the negligence involved, and he stated that the area had been checked by a certified fire boss prior to his inspection and that the company should have known that the area had not been adequately rock dusted.

Of course, the evidence in this proceeding shows that after Mr. Smith received the analyses showing the incombustibility of his samples, two of them indicated no violation, and the other one barely showed a violation. Consequently, I find that a certified fire boss would not necessarily have been able to determine, with his visual inspection, that this area had not been adequately rock dusted. Consequently, I find that the company was not negligent.

As to the gravity of the violation, the inspector indicated on Exhibit 2(e), that he thought that an explosion was probable because the mine does emit methane, that he did detect some methane when he was in the mine on May 5, and that he thought that some work days would be lost from such an explosion if it occurred. But he also indicated that an ignition of methane would be necessary before an explosion would be likely.

The evidence, of course, shows that the area was almost completely within the requirements of rock dusting. Consequently, I think that the preponderance of the evidence shows that there was a very low degree of danger in this instance.

Considering that a bare violation of section 75.403 was shown, a penalty of $5 will be assessed for the violation; and to that will be added a sum of $15 under the criterion of history of previous violations so as to make a total penalty of $20 for the violation of section 75.403 set forth in Citation No. 67917.

Docket No. KENT 79-148 (Tr. 183-186)

The next contested alleged violation in this proceeding dealt with Docket No. KENT 79-148. The first alleged violation in that docket relates to Citation No. 67918 dated May 8, 1978, alleging a violation of section 75.507. Section 75.507 provides, "ÕeÊxcept where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air." I find that no violation of section 75.507 existed in this instance.

First of all, respondent implies that the power center here involved may be permissible, but Inspector Smith stated that it did not have a tag on it showing that it had been approved as a permissible piece of equipment. Therefore, I must find, on the basis of the evidence in this case, that it was a nonpermissible power center. However, the section required that a nonpermissible power connection, outby the last open crosscut, shall be in intake air.

In order for Inspector Smith to have shown that this particular power center is in intake air, he must use a definition of return air which is untenable in many respects. As shown in the inspector's Exhibit 3(c), the air which would pass over the power center would be air which had to pass over two entries, namely, the No. 4 and the No. 3 entries -- and thereby might pick up some methane. And if it did so, the methane could then pass over the power center. But it is also true that, after the air has traveled to the position where it might come into contact with the power center, it then has to pass across two other working faces before it would be exhausted into the No. 1 entry, which is the designated return entry.

We do not have, in this case, a definition for return air that is applicable to a situation like this, because we are still ventilating at these two working places with air which is technically intake air, until it has finally been exhausted into the No. 1 entry.

There is considerable merit to Inspector Smith's contention that it would be possible for some methane to get into the No. 2 entry, where it might pass across the power center and cause an explosion, if the methane content should become high enough to be in the explosive range of from 5 to 15 percent.

But the problem here, as I see it, is that respondent's ventilation plan has been amended, according to the company's evidence, to permit the company to put a check curtain in

front of the power center, where Mr. Smith had it moved in this instance, in order to abate the violation alleged in Citation No. 67918. But the company has also had its ventilation plan approved to permit the curtain to be outby the power center, in the same position it was situated when it was cited by Inspector Smith, on May 8, 1978, as being in violation of section 75.507.

A situation such as we have here, where the company can be cited for a violation of section 75.507, depending upon the inspector's view of what constitutes return air as opposed to what constitutes intake air, I find that it is not possible for me to find equitably that there was a violation of section 75.507. I believe that the company is entitled to rely upon its ventilation plan at any given time.

According to respondent's witness Evans, the ventilation plan on May 8, 1978, when Citation No. 67918 was written, provided that the curtain could be placed outby the power center. In such circumstances, I believe that the appropriate way for Inspector Smith to deal with this would have been to propose an amendment to the ventilation plan so as to require the curtain to be placed inby the power center. Apparently, that was done in this instance. But then, when a different inspector came by, he required that the ventilation curtain be moved back to a position outby the power center.

I do not believe that the company should be cited for a violation regardless of which of two ways it ventilates the power center. Therefore, I find that the Petition for Assessment of Civil Penalty in Docket No. KENT 79-148 should be dismissed to the extent that it alleged a violation of section 75.507 in Citation No. 67918.

Docket No. KENT 79-148 (Tr. 208-211)

The second alleged violation in Docket No. KENT 79-148 is contained in Citation No. 67886 dated May 12, 1978, which alleged a violation of section 75.326. That section provides that entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1 percent of methane, and such air shall not be used to ventilate active working places.

I find that a violation of section 75.326 occurred because the intake and return air courses were not separated adequately, that one stopping was missing

between the No. 5

entry and the No. 6 entry which would have permitted a possible amount of return air carrying methane to get upon the track or belt entry, where electrical components existed, so that an explosion might occur.

I interpret section 75.326 to require that the return and intake air courses be separated. The other provisions in that section simply provide that some oxygen be in the belt and track entries and that the air in those entries not be used to ventilate an active working place.

Having found a violation, it is necessary that I assess a penalty. I have already made findings in connection with the size of the respondent's business and with respect to the fact that the payment of penalties would not cause it to discontinue in business.

The inspector's Exhibit 4(b) indicates that respondent shut down the section and immediately corrected the problem. That action should be given considerable weight so that the penalty that I might have assessed will be less than if respondent had not made that rapid effort to achieve compliance.

Exhibit 1 shows that respondent has only one previous violation of section 75.326, so under the criterion of history of previous violations, a penalty of $15 will be assessed.

With respect to negligence, the inspector's testimony indicated that the section foreman had moved up the belt and had failed to install one curtain before they began operations. So, I find that there was a normal degree of negligence.

As to the gravity of the violation, the inspector has, on Exhibit 4(b), given a rating which I would classify as a moderately serious violation. Considering that there was an unusually rapid effort to achieve compliance, that there was only a moderate seriousness to the violation, and that there was ordinary negligence, a penalty of $30 will be assessed, to which there will be added $15 under the criterion of history of previous violations, for a total penalty of $45.

Settled Issues

Docket No. KENT 79-51

All five of the violations alleged by the Petition for Assessment of Civil Penalty in Docket No. KENT 79-51 were the subject of settlement agreements.

The first violation was alleged in Citation No. 69599 dated June 2, 1978, claiming that respondent had violated section 75.516 because insulated low-voltage control cables had been allowed to come in contact with suspended conveyor belt structures. Counsel for the Secretary stated that the Petition for Assessment of Civil Penalty should be dismissed to the extent it alleged a violation of section 75.516 because he had concluded, after discussing the alleged violation with the inspector who wrote the citation, that the Secretary's evidence would be insufficient to establish that a violation of section 75.516 had occurred (Tr. 210).

The second violation was alleged in Citation No. 68385 dated October 4, 1978, claiming that respondent had violated section 70.250 because a respirable dust sample had not been timely submitted. The Secretary's counsel asked that the Petition for Assessment of Civil Penalty be dismissed as to Citation No. 68385 because MSHA's records show that respondent had submitted a miner's status change notice showing that the miner in question had terminated his employment on July 10, 1978, and that a respirable dust sample could not have been obtained for that employee on August 9, 1978, by which time it would have had to have been taken and submitted by respondent in order for respondent to have avoided being cited for a violation of section 70.250 (Tr. 113).

The third violation was alleged in Citation No. 72655 dated October 27, 1978, claiming that respondent had violated section 75.1704 by failing to maintain one of the designated escapeways in such a manner as to facilitate the transportation of a disabled person through the escapeway. The Assessment Office had recommended a penalty of $106 for that alleged violation, but the Secretary's counsel stated that, after discussing the facts pertaining to the violation, he did not believe the evidence would show that the violation was serious enough to warrant a penalty greater than $50 (Tr. 211).

The fourth and fifth violations alleged by the Petition for Assessment of Civil Penalty were of section 70.100(b) as claimed by Citation No. 72740 dated October 27, 1978, and Citation No. 9926469 dated November 15, 1978. Both citations stated that samples taken of the high-risk occupation had shown that the amount of respirable dust was greater than the applicable limit of 2.0 milligrams per cubic meter of air. The Assessment Office had proposed a penalty of $56 for the violation alleged in Citation No. 72740 and a penalty of $44 for the violation alleged in Citation No. 9926469. The Secretary's counsel felt that the respondent's agreement to pay $75 for each alleged violation was consistent with the intended purposes of the Act (Tr. 114-115).

I find that adequate reasons were given to justify granting the motions to dismiss as to two of the alleged violations and for acceptance of the settlement penalties for the remaining three alleged violations.

The Secretary's Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-88 asks that civil penalties be assessed for two

violations of section 70.100(b) as alleged by Citation No. 71719 dated September 28, 1978, and Citation No. 9926520 dated January 15, 1979. Both violations alleged that the respirable dust concentration in the atmosphere of the high-risk occupation was greater than the amount allowed. The Assessment Office proposed a penalty of $98 for the violation alleged by Citation No. 71719 and a penalty of $66 for the violation alleged by Citation No. 9926520. The proposed penalty of $98 involves a greater concentration of respirable dust, by two-tenths of 1 milligram, than was cited in connection with the proposed penalty of $66. The Secretary's counsel stated that respondent had agreed to pay a penalty of $75 for each alleged violation and that he believed the intent and purpose of the Act would be served by accepting respondent's settlement offer (Tr. 115).

I find that respondent's offer should be accepted, especially since respondent agreed to pay greater penalties than were proposed by the Assessment Office with respect to two other alleged violations of section 70.100(b) cited by the Secretary's Petition filed in Docket No. KENT 79-51, supra.

Docket No. KENT 79-297

The Secretary's Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-297 requested that civil penalties be assessed for alleged violations of sections 75.403 and 70.250. The alleged violation of section 75.403 has been disposed of in a bench decision, supra.

The Secretary's counsel asked that the Petition be dismissed with respect to the violation of section 70.250 alleged by Citation No. 9926825 dated April 3, 1979. The violation alleged in the citation was that respondent had failed to submit a respirable dust sample with respect to one employee. The Secretary's counsel stated that the facts surrounding the alleged violation show that the required sample had actually been submitted but that respondent had made an error in listing the employee's Social Security number so that respondent was not given credit in MSHA's records for having submitted the sample. In such circumstances, the Secretary's counsel believed that the Petition should be dismissed insofar as it seeks assessment of a penalty for an alleged violation of section 70.250 (Tr. 112).

I find that sufficient reasons were given to warrant approval of the motion to dismiss with respect to the alleged violation of section 70.250.

It should be noted that Exhibit 2(h) and Exhibit B were marked for identification (Tr. 103; 170), but were not received in evidence. It was the responsibility of respondent's counsel to mail a copy of each of those exhibits to me for inclusion in the record. He has had from June to September within which to do so. He was reminded of the fact that Exhibit 2(h) had not been submitted in a letter written to him by the Regional Solicitor on July 14, 1980. Since the testimony and other exhibits are entirely adequate to support the findings and conclusions made in

my bench decisions, I find that it is unnecessary for Exhibit 2(h) or Exhibit B to be submitted to me at

this late date. This paragraph is being written solely to explain why the record does not physically contain, and does not need to contain, either Exhibit 2(h) or Exhibit B.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the foregoing findings of fact, the following penalties should be assessed pursuant to bench decisions or paid pursuant to settlement agreements.

Docket No. KENT 79-51

Citation No. 72655 10/27/78 75.1704.....(Settled)...	$ 50.00
Citation No. 72740 10/27/78 70.100(b)...(Settled)...	75.00
Citation No. 9926429 11/15/78 70.100(b)..(Settled)..	75.00
Total Settlement Penalties in Docket No. KENT 79-51.....	$ 200.00

The motions for dismissal made by the Secretary's counsel with respect to the violation of section 75.516 alleged in Citation No. 69599 dated June 2, 1978, and the violation of section 70.250 alleged in Citation No. 68385 dated October 4, 1978, should be granted and the Petition for Assessment of Civil Penalty in Docket No. KENT 79-51 should be dismissed insofar as it seeks assessment of penalties for those two alleged violations.

Docket No. KENT 79-88

Citation No. 71719 9/28/78 70.100(b)....(Settled)...	$ 75.00
Citation No. 9926520 1/15/79 70.100(b)..(Settled)...	75.00
Total Settlement Penalties in Docket No. KENT 79-88.....	$ 150.00

Docket No. KENT 79-148

Citation No. 67886 5/12/78 75.326.....(Contested).	$ 45.00
Total Penalties Assessed in Docket No. KENT 79-148....	$ 45.00

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-148 should be dismissed insofar as it seeks assessment of a civil penalty for a violation of section 75.507 alleged in Citation No. 67918 for failure of proof as found in my bench decision, supra.

Docket No. KENT 79-297

Citation No. 67917 5/5/78 75.403 (Contested).....	$ 20.00
Total Penalties Assessed in Docket No. KENT 79-297.....	$ 20.00
Total Contested and Settled Penalties in This Proceeding.....	$ 415.00

The motion for dismissal made by the Secretary's counsel with respect to the violation of section 70.250 alleged in Citation No. 9926825 dated April 3, 1979, should be granted and the Petition for Assessment of Civil Penalty in Docket No. KENT 79-297 should be dismissed insofar as it seeks assessment of a penalty for that alleged violation.

(2) Respondent, as the operator of the Leslie Mine, is subject to the Act and the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) Pursuant to the settlement agreements described above and the bench decisions hereinbefore reduced to writing, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $415.00, as summarized in paragraph (1) above.

(B) The motions for dismissal made by the Secretary's counsel are granted and the Petitions for Assessment of Civil Penalty filed in Docket Nos. KENT 79-51 and KENT 79-297 are dismissed to the extent described in paragraph (1) above.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-148 is dismissed to the extent and for the reason given in paragraph (1) above.

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