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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),  v.  G & M COAL COMPANY,	PETITIONER	Civil Penalty Proceeding  Docket No. SE 79-128 A.O. No. 40-02419-03002  No. 1 Wartburg Mine  RESPONDENT
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DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the petitioner Bill Marshall, pro se, Harriman,  
Tennessee, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 75 and Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Knoxville, Tennessee, on October 29, 1980. The parties waived the filing of posthearing proposed findings and conclusions, were afforded an opportunity to present arguments in support of their respective positions on the record, and agreed to a bench decision which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. 2700.65.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the

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criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Stipulations

The parties agreed to the following (Tr. 7-11):

1. Respondent's No. 1 Wartburg Mine is subject to the Act, and I have jurisdiction to hear and decide this case.
2. Respondent is a small operator who was operating the subject mine at the time the citations in this case were issued.
3. Respondent's history of prior violations is not excessive.
4. MSHA mine inspectors Harrison R. Boston and Arthur C. Grant are duly authorized representatives of the Secretary of Labor and issued the citations in question upon inspection of respondent's mine.

#### Findings and Conclusions

##### Fact of Violations

Citation No. 140915, May 17, 1978, 30 C.F.R. 77.1301, states as follows: "Detonators and explosives were not stored in magazines in that explosives and detonators were being stored in the temporary mine office."

Section 77.1301(a) requires that detonators and explosives be stored separately in magazines. MSHA inspector Harrison R. Boston confirmed that he issued the citation after inspecting the mine and finding detonators and explosives stored and stacked together in a small building or shed approximately 10 feet by 10 feet which also served as an office. He discussed the matter

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with mine owner Bill Marshall who advised him he would move the explosives and store them as required by the standard. Mr. Boston did not believe that the situation posed any imminent danger and he believed that the respondent should have known about the requirements of section 77.1301(a). He confirmed that the respondent is a small operator and that there was no immediate possibility of any explosion.

Mine operator Bill Marshall testified that the explosives and detonators had just been delivered to the mine and placed in the office temporarily until he could store them properly. He did not believe that the standard required a magazine since the mine had not begun any coal production and he was simply in the process of reviewing the feasibility of starting up production.

I conclude and find that the petitioner has established a violation by a preponderance of the evidence and the citation is AFFIRMED.

Citation No. 0743769, May 2, 1979, 30 C.F.R. 75.200, states that "[t]he operator's approved roof control plan was not complied with on 001 section in that an approved calibrated torque wrench was not provided for the roof bolting machine."

MSHA inspector Arthur C. Grant confirmed that he issued the citation in question after conducting an inspection of the mine and determining that a torque wrench was not available to torque the roof bolts as they were installed into the mine roof. Respondent's approved roof-control plan (Exh. P-4) at page 6, paragraph 11, provides that "[a]n approved calibrated torque wrench that will indicate the actual torque on the roof bolts by a direct reading shall be provided on each roof bolting machine."

Mr. Grant stated that he discussed the matter with Mr. Marshall and he obtained a wrench and had it available the next day. Mr. Grant also indicated that the roof was in good condition and safe and he confirmed that the mine had only been in operation for a short time and that all of the required roof bolts had been installed. He also confirmed that the roof-bolting machine was capable of making roof-bolt torque adjustments but that a wrench was necessary to insure that proper torque was in fact accomplished. If this is not done, the bolts will not hold and a roof fall could result. Mr. Marshall indicated that torque wrenches were available at the mine but that he had theft problems and people were stealing his equipment.

I conclude and find that petitioner has established a violation of section 75.200 by a preponderance of the evidence. Failure to follow the roof-control plan requirement that a torque wrench be provided constitutes a violation of the cited standard. Accordingly, the citation is AFFIRMED.

Size of Business and Effect of Assessed Penalties on  
Respondent's Ability to Continue in Business

The evidence establishes that at the time the citations were issued respondent operated a very small mining venture employing three or four people

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at most, including the mine owner, Mr. Bill Marshall. Petitioner asserted that coal production was some 6,000 tons annually, but Mr. Marshall stated that at most, production was only 4,600 tons. In addition, the record establishes that Mr. Marshall is no longer in the mining business, that the mine is not in operation, that one of the two working sections has been permanently sealed, and for the approximate period from May 22, 1978, to March 1, 1979, the mine was not in production.

The parties agreed that the respondent was a small operator and that since he no longer is in business, the question of his ability to remain in business is moot. As for respondent's ability to pay the penalties assessed by me in this case, I have considered respondent's assertion that he is in debt, but absent any documentation on his part that he is unable to pay the penalties assessed by me in this matter, I cannot conclude that the penalties are unreasonable.

#### Good Faith Compliance

The record establishes that both conditions cited by the inspectors were abated in good faith and that respondent exercised rapid compliance in obtaining the required roof-bolt torque wrench the day after the citation issued, 1 day earlier than the time fixed for abatement by the inspector. As for the storage of explosives and detonators, Inspector Grant confirmed that they were subsequently stored in an approved storage area and subsequently removed from mine property.

#### Negligence

The inspectors testified that respondent should have been aware of the fact that the explosives and detonators were not properly stored in a manner as required by the cited standard, and that respondent did not have a torque wrench at the time the inspector observed the conditions cited. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

#### Gravity

I conclude that the particular facts and circumstances which prevailed at the time the citations issued support a finding that both violations were nonserious, and that the inspector conceded that this was the case. The roof conditions were good, all required roof bolts were in place, the roof-bolting machine was engineered to pretorque the bolts as they were installed, and the inspector testified that he sounded and inspected the roof and found that it was safe.

With regard to the explosives and detonators citation, the facts establish that they were permissible explosives and were stored on the surface some 100 feet from the entrance to the underground mine, that no mining was taking place, and Inspector Boston testified that when he first observed the

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condition cited he could find no one at the mine. He conceded that in the circumstances presented, the probability of any explosion occurring was unlikely, and the evidence establishes that the explosives had been present for a short period of time and were possibly delivered to the mine the day before the citation actually issued.

#### History of Prior Violations

Respondent's history of prior violations as reflected in MSHA's computer printout (Exh. P-4) shows that respondent made payment in the amount of \$96 for four prior assessed violations, none of which are repeat violations. I cannot conclude that respondent's history of prior violations is such as to warrant any increase in the civil penalties assessed in this case. Further, I have taken into consideration the testimony by Inspector Grant that the respondent was a responsible operator who attempted in good faith to comply with the mandatory safety requirements of the Act.

#### Penalty Assessment

In response to a show-cause order issued by Chief Judge Broderick on May 15, 1980, for failure to file an answer to the petitioner's proposals for assessment of civil penalties, respondent stated that all assessed penalties for the period May 1978, through December 1979, had been paid and that the No. 1 Mine was closed in December 1979, and all mine openings were sealed. A copy of respondent's response was furnished to the petitioner as part of my order of June 6, 1980, in which I ruled that the response satisfied the show-cause order. Since no further information was forthcoming regarding respondent's claims that the assessments had been paid, the case was docketed for hearing.

Respondent could not substantiate his claims that he had paid the initial assessments made by MSHA for the two citations in question, and the computer printout reflects that they have not been paid. However, the parties were directed to further review their records in this regard and to file any evidence of payment with me. No such evidence has been forthcoming.

After careful review and consideration of the evidence adduced in this proceeding, including the six statutory criteria found in section 110(i) of the Act, and in particular respondent's prior history of violations, good faith compliance, my gravity findings and the fact that respondent is no longer in the mining business, I conclude that the following civil penalty assessments are reasonable considering the particular circumstances of this case:

Citation No.	Date	30 C.F.R. Section	Assessment
140915	05/17/78	77.1301	\$15
0743769	05/02/79	75.200	10
			\$25

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ORDER

Respondent IS ORDERED to pay civil penalties totaling \$25 within thirty (30) days of the date of this decision for the two citations in question, and upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras  
Administrative Law Judge