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SOL (MSHA) V. MOUNTAIN ENERGY
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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),
PETITIONER

Civil Penalty Proceeding

Docket No. SE 80-5
A.O. No. 40-02385-03004

v.

Mine No. 1

MOUNTAIN ENERGY, INC.,
RESPONDENT

Appearances: George Drumming, Jr., Attorney, Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for the
petitioner

DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal 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 three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

Respondent answered and contested the proposed penalty assessments and the case was scheduled for hearing at Knoxville, Tennessee, October 29, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties. A tentative partial bench decision was rendered and my final decision is hereby reduced to writing as required by the Commission's Rules.

Issues

The 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

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against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. One additional issue concerning respondent's failure to appear at the hearing pursuant to notice is discussed and disposed of in the course of my 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 Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Citation No. 145851, May 9, 1978, 30 C.F.R. 75.1100-2, states as follows: "A water line or a 500 gallon water car was not provided for the 001 section."

The inspector fixed June 9, 1978, as the abatement date for the citation, but subsequently extended this date to August 18, 1978, by an extension notice issued on July 27, 1978, where he noted that "the mine is closed at the present time and the operator is trying to obtain a permit to build a pond to provide the water." On September 19, 1978, he extended the abatement time to November 20, 1978, and noted that "the mine has been idle for 9 weeks," and on November 21, 1978, extended it again to December 29, 1978, noting that "the mine hasn't operated in 4 months." Another extension was issued on May 9, 1978, by another MSHA inspector extending the abatement date to April 25, 1979, with a notation by the inspector that "the mine has been idle for 8 months," and finally on May 24, 1979, a third MSHA inspector terminated the citation with a notation that "the mine has been closed down by the operator."

Citation No. 145901, July 20, 1978, 30 C.F.R. 75.902, states as follows: "A ground monitor system was not provided for the 3 phase 240 AC water pump that was located 2 crosscuts from the surface or the belt entry."

The inspector fixed August 18, 1978, as the abatement date for this citation, and on September 19, 1978, he extended the time to November 20, 1978, noting that "the mine has been idle for 9 weeks and the pump will be monitored when the mine resumes operation." The citation was terminated on March 21, 1979, and

the inspector noted that "this citation is abated monitor provided."

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Citation No. 145906, July 21, 1978, 30 C.F.R. 75.1100-2(b) states: "A water line with valves and fire hose was not provided for the #1 belt conveyer."

The initial abatement date was fixed as August 18, 1978, was subsequently extended several times by MSHA inspectors, and was finally terminated on May 4, 1979, with a notation by the inspector that the operator had closed down.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector James P. Payne, Sr., confirmed that he inspected the mine in question on May 9, 1978, and that he issued Citation No. 145851 after discovering that the respondent failed to provide a waterline capable of reaching the working face and that no water tank was provided. Due to the lack of this equipment for the purposes of fighting a mine fire, he cited a violation of section 75.1100-2. Mine foreman Clyde Richardson accompanied him during the inspection, admitted that the required equipment was not provided, but he offered no explanation as to why it was not provided. However, two fire extinguishers and three or four bags of rock dust were present underground (Tr. 10-13).

Mr. Payne stated that the mine employed eight to 12 men on one production shift, and that there was a coal machine, a roof bolter, and two scoops present, as well as a small amount of explosives, and in the event of a mine fire, the two fire extinguishers would be inadequate to extinguish any fire. While a fire was possible, it was not probable (Tr. 14). Coal was being produced a week or so prior to May 9, but he believes the mine ceased production sometime during July 20 to July 27, 1978, and he confirmed that he extended the abatement several times because the respondent was having difficulties in obtaining a permit to build a pond to provide water for the mine. Inspector Payne did not return to the mine after November 21, 1978, but confirmed the fact that his fellow inspectors Norris W. Ferguson and Billy Griffin visited the mine in March and May 1979. Mr. Ferguson extended the abatement time further because the mine was idle, and Mr. Griffin terminated the citation on May 24, 1979, because the respondent closed the mine down. The cited conditions were never actually abated because the mine has been abandoned. However, it has not been sealed, and in November 1980, respondent will be required to seal it and submit a required map to MSHA confirming this fact. Mr. Payne stated that he recently met Mr. Connor and discussed the matter with him (Tr. 14-19).

Mr. Payne testified further that subsequent to the issuance of the citation, coal was being dumped and hauled to the surface area of the mine by means of the scoops, and that when he returned and extended the citation the first time a belt conveyor had been installed and a waterline was laid next to the belt but had not been connected due to the lack of a supply of water. In fact, respondent purchased a waterline before he had any source of water, and Mr. Payne believed that respondent was making an

effort to comply. He also believed that respondent could have purchased or rented a water tank but did not do so (Tr. 20-21).

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Inspector Payne confirmed that he issued Citation No. 145901 on July 20, 1978, citing section 75.902, after finding that respondent had no ground-monitoring system for the mine. Mr. Richardson confirmed that this was the case and indicated that the required system had been ordered, but he could not recall when it was ordered, nor could he recall requesting Mr. Richardson to produce a copy of any purchase order. From past contacts with Mr. Richardson, Mr. Payne believed he was a man of his word and he simply did not question that the system was on order (Tr. 21-22).

Mr. Payne stated that the ground-monitoring system is designed to protect against shock hazards in the event of a fault in the equipment. Power from outside the mine was used to operate a 230-volt AC three-phase pump being used underground and located "a couple of crosscuts" inside the mine, and the lack of the required ground protection system could have been fatal in the event of a shock hazard (Tr. 23). At least one miner would be exposed to the hazard, and while he recalled observing the monitor during a subsequent mine visit, the mine was not in operation during the periods when the citation was extended and that is probably why it was never installed (Tr. 25). Mr. Payne could not state with any certainty whether the respondent exercised good faith, but he believed that the monitor may have been on mine property but was simply not installed and he stated that the equipment required to install the system would be available from suppliers. The pump was used to pump water out of the mine and it was kept operating while the mine was out of production to protect the equipment from the water, and his records reflect that coal was being produced on July 20 when the citation issued (Tr. 28).

Mr. Payne stated that another MSHA inspector abated the citation on March 21, 1979, after the ground-monitoring system was installed, and during that period of time, the mine was in production sporadically during the evening because the respondent was still having difficulties with the state water quality agency and was unable to obtain a permit for construction of a water pond and the mine has produced no coal for the year 1980 (Tr. 28-29).

Inspector Payne confirmed that he issued Citation No. 145906 on July 21, 1978, after finding that a conveyor belt had been installed in the mine to transport the coal from the section but no valves were installed on the waterline as required by cited section 75.1100-2(b). The conveyor belt was approximately 500 feet long, and while two fire extinguishers were on the section, the protection afforded was not as great as that provided by a waterline equipped with operational valves which would facilitate the coupling of the hose to a water supply. The waterline itself was in place along the belt, but the valves were missing. Valves could be obtained from any mine equipment supplier and it is a common item (Tr. 31-32). The mine was in operation on the day the citation issued, but the citation was extended for a period of some 60 days because the mine was subsequently out of production and he did not return after November 21. However, Inspector

Ferguson went to the mine on March 21, 1979, and extended the abatement further because the mine had been idle and out of production. Inspector Griffin went there on May 24, 1979, and extended the citation further after determining that the mine had been closed (Tr. 36).

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Inspector Payne testified that the respondent was attempting to comply with the requirements of the standards which he cited and the fact that he purchased the equipment necessary for abatement attests to this fact. He also indicated that respondent could not come into compliance with the water quality requirements imposed on him by the state and was unable to secure the required state permit to construct a pond to retain water from the mine, and all during the periods of time in question, the mine was operating on an intermittent basis and was more or less "wildcatted" (Tr. 36-40).

Findings and Conclusions

Respondent's Failure to Appear at the Hearing

On the facts and circumstances presented in this case, I consider respondent's failure to enter an appearance at the hearing in this matter to be a waiver of any further rights on his part to be heard. For the reasons which follow below, I conclude that respondent has had more than ample opportunity to be heard with respect to his claims that due to the demise of his company he is unable to pay any civil penalty assessments.

In this case, MSHA's proposal for assessment of civil penalties was filed with the Commission on April 1, 1980, and the certificate of service reflects that a copy was served on the respondent at the following address:

Tom Connor, President
Mountain Energy Incorporated
Route 2, Box 85 C
LaFollette, Tennessee 37766

Section 105(a) of the Act provides that "refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this section." Thus, it seems clear to me that Congress recognized the fact that a potential respondent could avoid process by simply ignoring or failing to pick up his mail when he recognizes and knows full well that it is from MSHA and probably contains an assessment notice. However, in this case, the respondent apparently readily accepted the proposal for an assessment of civil penalty since he filed an answer. In that answer, respondent listed his then current address as "P.O. Box 12, LaFollette, Tennessee 37766." He also listed his telephone number and he indicated that he could be contacted by phone or by mail at that address.

In its answer filed April 25, 1980, respondent asserted that the No. 1 Mine has been closed since July 18, 1978, and an attempt to reopen it was made in October 1979. However, due to lack of finances, respondent stated he has been unable to resume mining operations. Respondent requested a hearing in Jacksboro, Tennessee, "to discuss the penalties and my inability to pay my assessments at this time." The case was docketed for hearing at

Knoxville, Tennessee, along with several other cases docketed for hearing during the same time period. Since Jacksboro is approximately 30 miles from

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Knoxville, I believe that the hearing site is convenient to the parties. My initial notice of hearing was mailed by registered mail to the address of record given by the respondent but it was returned by the post office marked "unclaimed" after two attempts to serve it on the respondent. The second notice of hearing advising the parties of the specific hearing location in Knoxville was also mailed by registered mail and was again returned by the post office as "unclaimed."

Petitioner's counsel asserted that he personally contacted respondent's president, Tom Connor, by telephone on October 29, 1980, several hours in advance of the scheduled 2 p.m. start of the hearing for the purpose of discussing the case with him and Mr. Connor advised him that he had not received the notice of the hearing and did not intend to appear. Mr. Connor is employed as a member of the State of Tennessee Highway Patrol and apparently operated the mine as an outside business venture. Counsel asserted further that Mr. Connor's address of record is a valid address and that he had experienced problems in the past in effecting service of documents on Mr. Connor and that he enlisted the aid of an MSHA inspector to personally deliver documents to him because of his failure to accept registered mail addressed to his posted address of record (Tr. 5-6).

Commission Rule 7, 29 C.F.R. 2700.7(b) provides in pertinent part as follows:

[A] proposal for a penalty * * * shall be served by personal delivery or by registered or certified mail, return receipt requested. All subsequent documents may be served by personal delivery or by first class mail. Service by mail is complete upon mailing. (Emphasis added)

On the facts presented in this case, it seems clear to me that two notices of hearing were mailed to the respondent by registered mail and in both instances, he obviously ignored them. Coupled with the fact that respondent has paid no civil penalties for past violations and allowed them to go to default, the fact that MSHA followed up with additional letters in its attempts to collect those prior assessments, the fact that MSHA counsel has had to arrange for personal service of documents on the respondent because of his failure to respond to the letters, and the fact that counsel personally advised the respondent by telephone about the hearing on the morning of October 29, 1980, several hours in advance of its commencement, I can only conclude that respondent is deliberately avoiding the inevitable and that he is entitled to no further consideration. I conclude that he has been treated fairly, has had ample opportunity to be heard, and that the notices of hearing were served in accordance with the rules.

Fact of Violation

I find that the testimony of Mr. Payne concerning the conditions and practices cited by him in the three citations

issued in this proceeding establish the fact of violation as charged on the face of the citations by a preponderance of the evidence and the citations are AFFIRMED. Failure to provide

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the required water to the working section of the mine, and failure to install the required outlet valves constituted violations of the cited sections, 75.1100-2 and 75.1100-2(b). In addition, failure to provide the required ground-monitoring system as required by section 75.902, constitutes a violation of that mandatory standard.

Negligence

I conclude and find that each of the citations in this case resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited by Inspector Payne. Although there is some testimony from the inspector that some of the equipment necessary for compliance was ordered by the respondent, there is no evidence that it had been ordered in advance of the inspection, and there is an inference through the many extensions granted by the inspectors that the equipment was ordered after the citations issued. I find that all of the citations resulted from ordinary negligence.

Gravity

I find that each of the citations were serious. On each occasion, the mine was in production and men were underground. The failure to provide adequate firefighting equipment, water, and protection against possible shock and electrocution constituted serious hazards.

Good Faith Compliance

The only citation which was actually abated was the one dealing with the ground-monitoring system. The inspector recalled observing the system at the mine, but could not recall whether it was actually installed and the termination notice simply stated that it "was provided." As for the remaining two citations, although the waterline was purchased and laid next to the conveyor line, it was never operational due to the lack of a water supply. As for the valves, the record reflects that the valves were never installed and both of the citations were apparently terminated because of the fact that the mine was idle and apparently abandoned by the respondent. The record suggests that respondent was making an effort to comply and he did in fact purchase a waterline and ground-monitoring device. Accordingly, I conclude that while total abatement has never been achieved due to the fact that the mine closed down, respondent should not be penalized further for this.

History of Prior Violations

Petitioner's Exhibit P-1 is a computer printout reflecting respondent's prior history of violations. The printout reflects that for the period July 22, 1976, through July 21, 1978, respondent was issued 18 citations for which he was assessed a total of \$934 in civil penalties. Surprisingly, however, the printout reflects that respondent has paid none of the assessments, and with the exception of four citations which were

contested before a Commission judge, the respondent was defaulted on the remaining 14 listed citations.

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During the course of the hearing, petitioner's counsel was asked to explain the computer code DLT3 as shown on Exhibit P-1. Counsel was unable to explain the coding, but by letter filed with me on November 17, 1980, counsel indicated that respondent had defaulted on 14 of the citations listed on the computer printout and that MSHA had apparently sent him three letters on each violation demanding payment for the outstanding violations.

Petitioner's counsel stated at the hearing that respondent's 18 prior citations is not excessive (Tr. 7). While I am in agreement with that conclusion and find that for purposes of the instant case, respondent's prior history does not warrant any increase in the penalties assessed, the fact is that respondent has totally ignored prior assessments levied by MSHA for past violations and has paid nothing for these prior assessments. In the circumstances, I can find no mitigating circumstances which would warrant any further consideration for the respondent and I have given him none.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

Petitioner agrees that respondent is a small operator (Tr. 7) and I accept that as my finding in this matter. Further, the record adduced in this case reflects that the mine has been closed and that respondent is no longer in business. However, absent any input from the respondent as to his ability to pay, I cannot conclude that the penalties assessed will adversely affect his ability to stay in business. His answer of April 21, 1980, implies that he may still be interested in resuming mining but has been unable to raise any capital. In any event, since it appears that he is no longer in business, the question of the impact of the penalties on his ability to remain in business appears to be moot. I believe that respondent has had more than a fair opportunity to come forward and be heard, but for reasons known only to the respondent it seems obvious to me that he is avoiding any confrontation with MSHA at a hearing and I do not intend to waste any more of the Commission's valuable resources dragging the respondent into court kicking and screaming.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the initial penalty assessments made and proposed by the petitioner for the three citations in issue are reasonable and should be affirmed. Accordingly, I adopt the proposed penalties as appropriate for the citations in question and they are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
145851	5/09/78	75.1100-2	\$ 66
145901	7/20/78	75.902	56
145906	7/21/78	75.1100-2(b)	114

\$236

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ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this proceeding, as indicated above, within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge