FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY ANDHEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding		
	Docket Nos.	Assessment Control Nos.	
v.	KENT 80-289	15-05179-03010	
	KENT 80-290	15-05179-03012	
	KENT 30-324	15-05179-03013	
BIG THREE COAL COMPANY, Respondent	KENT 80-325	15-05179-03014	
	KENT 80-329	15-05179-03015	
	No. 1 Mine		

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Charles E. Lowe, Esq., Lowe,'Lowe & Stamper, Pikeville, Kentucky, for Respondent.

Bafore: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated November 17, 1980, as amended January 13, 1981, a hearing in the above-entitled proceeding was held in Pikeville, Kentucky, on March 5, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 315(d).

The issues in civil penalty cases are whether violations of the mandatory health and safety standards occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

After the hearing had been convened in this proceeding, an inspector testified in support of Citation No. 703127 which alleged that respondent had violated 30 C.F.R. § 75.301 because the volume of air in the last open crosscut was less than the minimum quantity of 9,000 cubic feet per minute required by section 75.301. The inspector stated that the air velocity was so low that it would not turn the blades on his anemometer (Tr. 10-12). The inspector testified that he had gone to respondent's No. 1 Mine to investigate a roof-fall accident. While the inspector was in the mine, he wrote Citation No. 703127, but the inspector stated that the low air velocity in the last open crosscut had no bearing on the cause of the accident and that the citation should be considered as a routine citation written as if the inspector had been conducting a "spot" inspection, that is, an inspection other than the four regular inspections required each year by section 103(a) of the Act.

The inspector did not consider the violation to be serious because no coal was being produced on the day the citation was written (Tr. 13-14).

The inspector stated that the anemometer would not turn if the air velocity was less than 50 feet per minute. He concluded that the air velocity was somewhere between 0 and 50 feet per minute. He stated that other persons involved in investigating the accident were in the last open crosscut and that no one had any difficulty in breathing (Tr. 22-23). The inspector said that the cause of the air deficiency was the fact that no curtain had been hung in the second open crosscut from the face and the lack of a curtain caused the air to be coursed from the second open crosscut to the return before being directed into the last open crosscut (Tr. 24).

The inspector first based his belief that the violation was associated with ordinary negligence by stating that the preshift examiner should have noticed the lack of air in the last open crosscut and should have reported it to mine management, but the inspector retracted that claim after he acknowledged that the mine had been closed by an order written under section 103(k) of the Act so that an investigation of the accident could be made. Since no one could have made a preshift examination while the mine was closed, the inspector was unable to say exactly how the operator could have known that a curtain had not been installed in the last open crosscut (Tr. 18). The inspector testified that the violation had beenicorrected in less time than he had allowed for abatement in his citation (Tr. 15).

Larry Ratliff, who is a half owner of Big Three Coal Company, claimed that the curtain in the second open crosscut could have been knocked down between the occurrence of the accident on September 18, 1979, and the time that the inspector went into the mine the next day (Tr. 32). Although the inspector testified that occurrence of the accident had no bearing on the lack of a curtain in the second open crosscut, there is no real certainty as to whether the curtain had never been erected at all, or had been installed during the previous production shift and had been torn down after the accident occurred.

The evidence supports a finding that a violation of section 75.301 occurred. As to the criteria of gravity and negligence, the evidence supports a finding that the violation was nonserious and that it was associated with a low degree of negligence in view'of the fact that neither the inspector nor the owner could say for certain that the curtain had been in place during the time that coal had last been produced in the mine.

After the parties had presented evidence with respect to the first violation alleged in this proceeding, Mr. Larry Ratliff, who is half owner of Big Three Coal Company, presented some detailed testimony bearing on the criteria of the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business. Mr. Ratliff testified that respondent had opened its mine in August 1979 and had closed the mine on June 15, 1980, after occurrence of% massive roof fall which covered up respondent's continuous-mining machine, as well as a feeder and a shuttle car which respondent had been leasing from Island Creek Coal Company (Tr. 39).

Before respondent closed its mine, it had employed approximately 22 miners and had produced about.150 tons of coal per day. Respondent was under contract to produce the coal for Island Creek Coal Company. Island Creek paid respondent $19.25 per ton, less $4.80 per ton for such services as removal of impurities from the coal, and maintenance of a reclamation fund, providing electric power, and use of bathhouse facilities. Respondent also had to pay all labor costs associated with producing coal and pay for hauling the coal to Island Creek's prepearation plant (Tr. 37-39).

Mr. Ratliff, in addition to having a-50-percent interest in Big Three Coal Company, also had a half interest in Vanhoose Coal Company. The Vanhoose Company stopped mining coal on April 4, 1980, and the 265 Lee Norse continuous-mining machine being used by the Vanhoose Company was transferred to Big Three's Mine and Big Three assumed the payments on the Lee Norse which Vanhoose Company had been making prior to its discontinuance in business (Tr. 47). It was not possible to recover the continuous-mining machine after the massive roof fall occurred in respondent's mine. Respondent was also unable to recover a feeder and a shuttle car which were being leased from Island Creek. Mr. Ratliff testified that the cost of the timbers and other equipment required for recovering the equipment was estimated to be $387,000, whereas the original cost of the Lee Norse was $278,000. Respondent's insurance on the Lee Norse was sufficient to pay the remaining amount due on it as well as $49,000 in debts which respondent owed to Ingersoll Rand (Tr. 44; 46-47; 50).

When Island Creek found that Mr. Ratliff was unable to recover its feeder and shuttle car which had been covered up by the roof fall, Island Creek cancelled its contract with Big Three Coal Company and Mr. Ratliff was unable to reopen the Big Three Mine at a different location.' Mr. Ratliff's counsel mailed to me on May 28, 1981, some financial data and a copy of the only income tax return which Big Three has filed. The return covers the entire period that Big Three was in business. According to the tax return, Big Three incurred a net loss of $96,016.79. Other data submitted by respondent show that it has no assets to pay existing obligations amounting to $109,931.79.

Respondent's counsel in this proceeding stated at the hearing that respondent planned to file a bankruptcy petition within a week or 10 days after the hearing was held on March 5, 1981 (Tr. 56). In a letter to me dated May 25, 1981, respondent's counsel stated that respondent still plans to file a bankruptcy petition in the near future.

Mr. Ratliff now has no interest in any active coal mine (Tr. 35). He is now running a hardware store (Tr. 30) and Mr. Ratliff does not plan to mine coal at any time in the future. His position as to the business of producing coal was given at the hearing (Tr. 52):

> I would like to state it for the record, my feelings right to this day, if there is never another lump of coal mined until I have got any part in it, they will never mine another lump.

When the evidence summarized above was obtained at the hearing, I asked Mr. Ratliff why he thought that any worthwhile good would be accomplished by having inspectors testify as to the remaining 25 violations involved in this consolidated proceeding in view of the fact that his only defense was inability to pay penalties. His reply to that question was (Tr. 53):

> Well my feeling is Big Three has no assets. We have got nothing that anybody can get. If Big Three had anything we would be more than happy to sell it and pay these debts. But we just don't have anything.

The evidence in this proceeding shows that respondent did not request a hearing because it wishes to contest whether the violations occurred, but simply wanted to present evidence to show that respondent would be unable to pay penalties even if it agreed to a settlement under which it would pay a portion of the amounts proposed by the Assessment Office. Although respondent has not yet filed a petition in bankruptcy, there is no reason to doubt its statement that it is planning to do so. If large penalties were to be assessed, the Department of Labor could collect them only by filing as a creditor in the bankruptcy proceeding because respondent's evidence indicates that it has no assets which could be seized and sold in order to collect the penalties. Even if some assets could be discovered in the bankruptcy proceeding, the collection of large civil penalties would reduce the amount which other creditors could obtain. Since Mr. Ratliff is out of the coal business and does not intend to resume the business of producing coal, assessment of large penalties would have no deterrent effect because he would not personally be paying the penalties from any assets which he has not already lost from his venture into the coal business.

I. stated at the hearing that I would review the citations and order which are the subject of the five Proposals for Assessment of Civil Penalty and would reduce the penalties "by a considerable amount" in light of the fact that respondent is out of business and has no assets from which penalties can be paid (Tr. 56). If inspectors had been called to testify as to each of the 25 alleged violations as to which no testimony was taken, a period of about 2 hearing days would have been required. Even if all of the violations had been shown to have been very serious and to have been accompanied with gross negligence, I would still have felt obligated to assess relatively small penalties because a small company is involved and because it is no longer in business and has no assets from which penalties can be paid. Therefore, the remaining portion of this decision will consist of a brief review of the total violations alleged in this proceeding and a tabulation listing the alleged violations and the amount of the penalty assessed for each violation, based on the six criteria.

Docket No. RENT 80-289

The first violation alleged by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-289 was the violation of section 75.301 which was the subject of considerable testimony in this proceeding, as summarized in the first part of this decision. I have already found that the violation was nonserious in the circumstances and that there was a low

degree of negligence. The violation.was abated in less time than the inspector provided, and after it was abated, respondent was supplying a volume of 34,000 cubic feet per minute to the last open crosscut. Those facts support a finding that respondent demonstrated better than a normal effort to achieve compliance and that the penalty otherwise assessable should be reduced by a small amount under the criterion of good-faith abatement. Respondent's witness stated that respondent had not previously been cited for a violation of section 75.301. The foregoing findings, plus additional considerations as to respondent's small size, and-adverse financial condition, warrant assessment of a civil penalty of $10 for the violation of section 75.301 alleged in Citation No. 708127.

No testimony was received with respect to the remaining three violations alleged in Docket No. KENT 80-289. Citation No. 708128 alleged a violation of section 75.1702 because the intake air escapeway was not properly separated from the conveyor belt entry because of respondent's failure to erect a stopping outby the belt tailpiece. The Assessment Office considered that the violation resulted from ordinary negligence, that it was very serious; and proposed a penalty of $114. The Assessment Office did not reduce the 'penalty under the criterion of good-faith abatement even though the violation was abated in less time than provided.for by the inspector. The Assessment Office shows assignment of no penalty points under the criterion of history of previous violations for any of the violations alleged in Docket No. KENT 80-289 because all of the violations were written in September 1979 shortly after respondent commenced producing coal.

Citation No. 707945 alleged a violation of section 75.200 because respondent failed to install reflectors at the last row of roof supports. The Assessment Office considered that the violation was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of $44. The Assessment Office did not reduce the penalty under the criterion of good-faith abatement although respondent abated the violation in 15 minutes which was 10 minutes less than-the time given by the inspector.

Citation No. 707946 alleged a violation of section 75.604(a) because a permanent type splice in the trailing cable to the coal drill was not mechanically strong and lacked adequate electrical conductivity and flexibility. The Assessment Office considered that the violation was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of $66. Abatement was performed within the 30 minutes provided for by the inspector.

I find that the three violations, as to which no testimony was received, occurred. The penalties proposed by the Assessment Office are a litttle on the high side for failure to give respondent due credit for rapid abatement. Of course, the Assessment Office had no evidence as to respondent's financial condition. My order will hereinafter show reductions in the total penalties of $290 proposed‘by the Assessment Office to a total of $122, or approximately 50 percent, based on the fact that respondent is'out of business and has no assets from which penalties can be collected. Of course, the penalty of $10 assessed for the violation of section 75.301 is based on evidence received at the hearing and does not have to be compared to the penalty proposed by the Assessment Office.

Docket No. KENT 80-290

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-290 alleged occurrence of five violations. Citation No. 725312 alleged a violation of section 77.701 because respondent had failed to provide a frame ground for a-starter box. Citation No. 725313 alleged a violation of section 77.506 because respondent had used a solid wire, instead of a fuse, for the wire supplying power to the office and supply trailer. Citation No. 725314 alleged a violation of section 75.902 because a fail-safe ground check monitoring circuit had not been provided for the power circuit for the feeder on the conveyor belt. Citation No. 725315 alleged a violation of section 75.1722 because respondent had failed to provide a protective guard for the conveyor drive chain on the feeder. Citation No. 725316 alleged a violation of section 75.518 because respondent had used a solid wire, in lieu of a fuse, for the wire providing power to the control transformer. The Assessment Office found that all of the violations resulted from ordinary negligence and found that the use of solid wires, instead of fuses, was the result of a very high degree of ordinary negligence. All of the violations were properly considered to be serious. The Assessment Office appropriately reduced the-penalties for the violations of sections 77.701 and 75.518 because they were abated rapidly. Finally, the Assessment Office assigned an amount of $8 to each penalty under the criterion of history of previous violations.

The Assessment Office, proposed penalties of $52, $106, $56, $90, and $98, respectively, or a total of $402, for the five violations alleged in Docket No. KENT 80-290. I find that the Assessment Office proposed penalties which are well supported by the facts alleged in the citations. I find that all five violations occurred, but my order will hereinafter provide for reductions of approximately 50 percent in each of the penalties, or a total of $201, because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-324

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-324 seeks assessment of civil penalties for eight alleged violations. citation No. 709045 alleged a violation of section 75.1725 because a shuttle car lacked operable headlights and was, therefore, not maintained in a safe operating condition, Citation No. 708057 alleged that respondent had violated section 77.1107 by failing to provide a slippage switch to stop the No. 1 belt automatically in case of excessive slippage: Citation No. 708059 alleged a violation of section 75.1102 for failure to provide a slippage switch for the No. 2 belt head. Citation No. 705980 alleged a violation of section 75.316 because respondent had not erected permanent brattices as close to the working face as is required. Citation No. 707996 alleged a violation of section 75.400 because respondent had allowed loose coal, float coal dust, oil cans, and paper boxes to accumulate for a distance of about 1200 feet in the No. 4 entry and adjoining crosscuts. Citation No. 707997 alleged a violation of section 75.200 because respondent had failed to provide additional supports in an area which was 28 feet wide. Citation No. 725317 alleged a violation of section 75.1710-l because respondent had failed to provide a

cab or canopy for a shuttle car being used in 60-inch coal. Citation No. 725318 alleged a second violation of section 75.1710-l because respondent had failed to provide a canopy for its other shuttle car being used in 60-inch coal.

The Assessment Office considered that all of the eight violations were the result of ordinary negligence. All of the violations were considered to be serious or very serious. Respondent was given no credit for rapid abatement and the Subsequent Action sheets show that no extraordinary effort was made to abate any of the violations. Finally, the Assessment Office assigned $8 to each penalty under the criterion of history of previous violations.

I find that all eight violations occurred and that the Assessment Office proposed penalties which are supported by the conditions described in each of the citations. The penalties proposed by the Assessment Office were $78, $44, $150, $114, $225, $106, $90, and $90, respectively, or a total of $897, for the eight violations discussed above. My order will hereinafter reduce the penalties by approximately 50 percent to a total of $449 because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-325

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-325 alleged occurrence of seven violations. Citation No. 708054 alleged a violation of section 75.1710-l because a canopy had not been installed on a cutting machine being used in 60-inch coal. Citation No. 708056 alleged a violation of section 75.1710-l because a canopy had not been installed on a shuttle car being used in 60-inch coal. Citation No. 709043 alleged a violation of section 75.313 because the methane monitor on the loading machine was not in operable condition. Citation No. 707989 alleged a violation of section 75.1725 because from 30 to 40 bottom rollers on the No. 2 conveyor, belt were stuck. Citation No. 707998 alleged a violation of section 75-1710-l because the canopy had been removed from the loading machine; the violation was abated by removal of the cutting machine from mine property. Citation No. 726231 alleged a violation of section 75.1100-l(b) because respondent had failed to provide a waterline for firefighting purposes along the conveyor belt for a distance of about 800 feet. Citation No. 726234 alleged a violation of section 75.326. because air being used to ventilate the Nos. 1 and 2 conveyor belts was traveling in reverse direction, the condition being the result of adverse roof conditions and water seepage.

The Assessment Office found that all of the violations were the result of ordinary negligence and that all of them were serious or moderately serious. The Assessment Office appropriately reduced no penalties because of respondent's having shown a rapid effort to achieve compliance. The Subsequent Action sheets show that no extraordinary effort was made to achieve compliance in any case. Finally, the Assessment Office assigned $8 to each penalty under the criterion of respondent's history of previous violations. The Assessment Office proposed penalties of $90, $90, $44, $52, $78, $72, and $150, respectively, or a total of $576, for the seven violations.

It should be noted that Citation No. 726231 incorrectly alleged a violation of section 75.1100-l(b). That subsection refers to portable water cars, whereas the condition described in the citation was that respondent had failed to provide a waterline along a conveyor belt. A waterline is required by section 75.1100-2(b). Inasmuch as the Subsequent Action sheet terminating the citation shows that respondent did provide a waterline, there is no doubt but that respondent was aware of the section of the regulations with which it was required to comply. The Commission held in Jim Walter Resources, Inc., 1 FMSHRC 1827 (1979), that a citation should not be vacated simply for failure to show the exact section of the regulations which has been violated, so long as the citation is sufficiently specific to explain to the operator the condition which is considered to be hazardous and which needs to be corrected. Therefore, my order in this proceeding will amend Citation No. 726231 to cite a violation of section 75.1100-2(b) instead of section 75.1100-l(b). My order will also amend the Proposal for Assessment of Civil Penalty so as to allege a violation of section 75.1100-2(b) and will assess a penalty for a violation of section 75.1100-2(b) instead of a penalty for a violation of section 75.1100-l(b).

I find, after making the correction discussed in the preceding paragraph, that all seven violations occurred and that the Assessment Office proposed appropriate penalties in each instance. My order will hereinafter assess total penalties of $238 which are 50 percent less than those proposed by the Assessment Office because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-329

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-329 seeks assessment of civil penalties for two alleged violations of section 75.200. The first violation was alleged in Citation No. 726230 which stated that respondent had failed to follow its roof-control plan by not installing straps or crossbars for a distance of about 60 feet. The second violation of section 75.200 was cited in Order of Withdrawal No. 726235 issued under the imminent-danger provisions, or section 107(a), of the Act. The violation alleged in the order was that respondent had removed seven cuts of coal from the Nos. 4 and 5 pillar blocks and had installed only four breaker posts, whereas the roof-control plan requires installation of eight breaker posts and a row of line timbers installed on 4-foot centers.

The Assessment Office found that the first violation of section 75.200 was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of $98. The Assessment Office found that the second violation of section 75.200 was the result of gross negligence, was very serious, and proposed a penalty of $445.

I find that both violations of section 75.200 occurred and that the Assessment Office appropriately evaluated the criteria in proposing the total penalties of $543 described above. My order will hereinafter reduce the proposed penalties to $272, or by about 50 perdent, because respondent is no longer in business and has no assets from which penalties can be collected.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-325 is amended to show that it seeks a penalty for a violation of 30 C.F.R. § 75.1100-2(b) instead of 30 C.F.R. § 75.1100-l(b) and Citation No; 726231 is amended to show that it alleges a violation of 30 C.F.R. § 75.1100-2(b) instead of 30' C.F.R. § 75.1100-l(b).

(B) Within 30 days from the date of this decision, respondent shall pay civil penalties totaling $1,332.00. The penalties assessed herein are allocated to the respective violations as follows:

Docket No. KENT 80-289

Citation No. 708127 9/19/79 § 75.301	$ 10.00
Citation No. 708128 9/19/79 § 75.1707	57.00
Citation No. 707945 9/24/79 § 75.200	22.00
Citation No. 707946 9/24/79 § 75.604(a)	33.00
Total Penalties Assessed in Docket No. KENT 80-289	$ 122.00

Docket No. KENT 80-290

Citation No. 725312 1/28/80 § 77.701	$ 26.00
Citation No. 725313 1/28/80 § 77.506	53.00
Citation No. 725314 1/29/80 § 75.902	28.00
Citation No. 725315 1/29/80 § 75~1722	45.00
Citation No. 725316 1/29/80 § 75.518	49.00
Total Penalties Assessed in Docket No. KENT 80-290	$ 201.00

Docket No. KENT 80-324

Citation No. 709045 10/12/79 § 75.1725	$ 39.00
Citation No. 708057 10/16/79 § 77.1107	22.00
Citation No. 708059 10/16/79 § 75.1102	75.00
Citation No. 705980 1/3/80 § 75.316	57.00
Citation No. 707996 1/29/80 § 75.400	113.00
Citation No. 707997 1/29/79 § 75.200	53.00
Citation No. 725317 1/29/80 § 75.1710-l	45.00
Citation No. 725318 1/29/80 § 75.1710-l	45.00
Total Penalties Assessed in Docket No. KENT 80-324	$ 449.00

Docket No. KENT 80-325

Citation No. 708054 10/12/79 § 75.1710-l	$ 45.00
Citation No. 708056 10/12/79 § 75.1710-l	45.00
Citation No. 709043 10/12/79 § 75.313	22.00
Citation No. 707989 10/17/79 § 7.5.1725	26.00
Citation No. 707998 1/29/80 § 75.1710-l	39.00
Citation No. 726231 5/5/80 § 75.1100-2(b)	36.00
Citation No. 726234 5/6/80 § 75.326	75.00
Total Penalties Assessed in Docket No. KENT 80-325	$ 288.00

Docket No. RENT 80-329

Citation No. 726230 5/5/80 § 75.200	$ 49.00
Order No. 726235 5/12/80 § 75.200	223.00
Total Penalties Assessed in Docket No. KENT 80-329	$ 272.00

Total Civil Penalties Assessed in This Proceeding $1,332.00

Richard C. Steffey

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

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