

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 24 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : Docket No. HOPE 78-744-P
v. : A. C. No. 46-03467-02070
SEWELL COAL COMPANY,
Respondent : Meadow River No. 1 Mine

SUPPLEMENTAL DECISION

The Petitioner seeks civil penalties under section 110(i) of the Federal Mine Safety and Health Act of 1977 for two violations alleged in notices issued on February 13 and 14, 1978, respectively, at Respondent's Meadow River No. 1 Mine. The first notice of violation alleges that Respondent violated 30 CFR § 75.1704(b), failing to maintain a designated intake escapeway to insure the passage of any person at all times. The second notice alleges that Respondent violated 30 CFR § 75.200 by permitting the occurrence of fractured and loose roof in the No. 1 section above the No. 1 entry roadway just **inby** the last open **crosscut** and extending in toward the face approximately thirty feet.

In its remand dated June 11, 1981, the Federal Mine Safety and Health Review Commission concluded that both violations occurred as charged by the Secretary and directed that penalties be assessed therefor.

The parties agreed in stipulations that the Respondent is a large operator (stipulation No. 4, Tr. 6), that it had a moderate history of previous violations (No. 12, Tr. 7), and that the Respondent demonstrated good faith in abating the notices of violations. Respondent concedes that the payment of appropriate penalties would not jeopardize its ability to continue in business (Tr. 48).

The statutory penalty assessment factors of "negligence" and "gravity" remain for discussion. These factors must be considered in light of the unique circumstances in which the notices were issued. At that time, employees at the mine had been on strike for over two months (stipulation No. 6, Tr. 6). Paul Given, Respondent's Safety Director, testified that during the strike the Respondent was unable to assign sufficient personnel for inspection and upkeep of the mine as would be necessary to prevent all violations. He stated that 50 to 60 miners would be needed during a strike to avoid violations, but that he had only 33 supervisory personnel working. Other than the inspector's unsupported opinion which I reject as not probative, there was no evidence that Respondent was negligent in committing the specific violations charged by Petitioner and found by the Commission to have occurred (Tr. 24, 39-41). There is substantial un rebutted evidence in the record that no negligence occurred (Tr. 36, 38, 113, 120, 127), and I so find.

The inspector testified that the escapeway violation was not particularly serious while the roof control violation was serious (Tr. 30, 37). Significantly, he also indicated that the gravity of the infractions was lessened by the fact that the mine was closed (Tr. 33), and that the policy behind issuing violations during "labor disputes" was to "document" hazardous conditions so that they could be corrected "when the work force returned." (Tr. 55, 57, 68, 71, 72). In this connection, he established the abatement time for the notices on a date he anticipated the strike would be over (Tr. 58, 71). In these circumstances, I find that neither violation was serious and that nominal penalties of \$1.00 for each violation are appropriate.

ORDER .

Respondent is ordered to pay \$2.00 to **the** Secretary of Labor within 30 days from the date hereof.


Michael A. Lasher, Jr., Judge

Distribution:

Michael **McCord**, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

C. Lynch Christian, Esq., Jackson, Kelly, Holt & O'Farrell, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

Gary W. Callahan, Esq., Sewell Coal Co., Lebanon, VA. 24266 (Certified Mail)