

CCASE:  
SOL (MSHA) V. N.B.C. ENERGY  
DDATE:  
19820802  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

N.B.C. ENERGY, INC.,  
RESPONDENT

Civil Penalty Proceedings

Docket No. KENT 81-133  
A. C. No. 15-08906-03039V

Docket No. KENT 81-134  
A. C. No. 15-08906-03040

Docket No. KENT 81-137  
A. C. No. 15-08906-03041

No. 1 Mine

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor,  
U. S. Department of Labor, Nashville, Tennessee, for  
Petitioner  
Wayne W. Clark, President, N.B.C. Energy, Inc.,  
Prestonsburg, Kentucky, for Respondent

Before: Judge Lasher

A hearing on the merits was held in Pikeville, Kentucky, on May 19, 1982. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

These proceedings have arisen upon the filing of proposals for assessment of civil penalty by the Secretary of Labor in July 1981. At the formal hearing held in Pikeville, Kentucky, on May 19, 1982, the Secretary was represented by counsel and the Respondent was represented by its owner and President, Mr. Wayne W. Clark.

At the outset, Respondent indicated that it did not challenge the occurrence of the violations and that the issue paramount in its defense related to the statutory penalty assessment factor relating to the adverse effect payment of penalties would have on its ability to continue in business.

The parties stipulated that the Federal Mine Safety and Health Review Commission has jurisdiction over the parties to and the subject matter of these proceedings; that the Respondent, after notification of the violations, proceeded in good faith to rapidly achieve compliance with the violated mandatory health and safety standards; that the Respondent in 1981 produced approximately 45,000 to 75,000 tons of coal; (FOOTNOTE 1) that, except for the single citation involved in Docket No. KENT 81-133, i.e., Citation No. 954184 dated January 21, 1981, the remaining twelve violations occurred as a result of ordinary negligence on the part of Respondent and its agents; and finally, except for the subject citation in Docket No. KENT 81-133, the degree of seriousness to be attributed to all violations is that demonstrated by the penalty points fixed by Petitioner during the administrative penalty assessment process for the three gravity subcriteria, i.e., (a) probability of occurrence, (b) severity of anticipated injury, and (c) number of persons exposed to risk.

In addition to the foregoing stipulations, Petitioner, MSHA, introduced as evidence on the remaining statutory penalty assessment criterion a computerized history of Respondent's previous violations for the 24-month period ending January 15, 1981, which latter date is the approximate date on which the first citation issued in these proceedings was completed by the Inspector (actually, the first violation in these proceedings was reflected in a citation issued on January 14, 1981). This history of previous violations reflected in Court Exhibit 1 indicates that seven violations were issued for which the paid penalties amounted to \$425.00. (FOOTNOTE 2)

The primary issue in these proceedings is whether payment of reasonable penalties would jeopardize the Respondent's ability to continue in business.

The Respondent, through its President, Mr. Clark, established that NBC Energy, Inc., began operating its No. 1 Mine in July 1979. According to Mr. Clark, this mine was abandoned two days prior to the hearing on May 17, 1982. Mr. Clark

~1500

testified that when the violations in question were committed, NBC Energy, Inc., had three equal owners, Jack Bush, Stanley Neese, and himself. The mine, since January or February 1982, has been operated by a new corporation wholly owned by Mr. Clark, Wayne Clark, Inc., which has the license to operate the No. 1 Mine which has not been producing coal since May 12, 1982.

Mr. Clark testified that approximately two years ago, Jack Bush and he bought out Stanley Neese, and that since that time he and Bush each had a 50% interest in the NBC Energy, Inc., establishment. At the beginning of 1982, Mr. Bush and Mr. Clark entered into an agreement wherein Mr. Clark received Mr. Bush's 50% interest in NBC Energy, Inc., and Mr. Bush received Mr. Clark's 50% interest in another corporation, C and B Coal Company, Inc. No money was exchanged in this "swap."

Mr. Clark's primary bases for urging substantial reduction of penalties are that: (1) at the present time a judgment is outstanding against NBC Energy, Inc., in the approximate sum of \$24,500.00, of which only \$5,000.00 has been satisfied; (2) a second suit has been filed against NBC by Old Republic Insurance Company, seeking approximately \$31,000.00 for non-payment of Workmen's Compensation premiums; (3) total mine safety penalty assessments (presumably MSHA's administrative assessments) totaling \$20,000.00 are presently being processed; (4) for the corporate fiscal year ending May 31, 1981, in its U. S. Corporation Income Tax Returns, NBC reflected a net operating loss, for which a deduction was taken, in the sum of \$108,860.00. Mr. Clark testified that NBC had other debts of an unspecified amount.

On the other hand, evidence indicates that the No. 1 Mine is presently producing approximately 4,000 tons of coal per month; that Mr. Clark, who is the sole owner of Wayne Clark, Inc., and, effectively, the operator of the No. 1 Mine as an individual, is taking out a salary of from \$800.00 to \$1,500.00 per month from either NBC or C and B Coal Company, Inc.

The only reliable and probative evidence of Mr. Clark's individual worth, assets, and ability to pay penalties, is reflected on Exhibits R-1, 2, and 3 (his U. S. Individual Income Tax Returns for the years 1979, 1980, and 1981, respectively), which indicate his adjusted gross income for those years was, in general terms, \$33,000.00, \$22,000.00, and \$9,700.00, respectively.

Much of Respondent's evidence was general, and which I find to be self-serving and clearly of a quality which is not sufficiently probative of the rule which this proponent seeks to have determined herein: that it is unable to pay reason

~1501

able penalties, (FOOTNOTE 3) without jeopardizing its ability to stay in operation.

A clear statement of all assets of Mr. Clark, as an individual, and of the corporations with which he is now or has been associated, is impossible to arrive at because of the approach to this proceeding taken by the Respondent. Establishing an economic defense, the burden of which rests with the operator because of his exclusive knowledge of the subject matter, is difficult. The documentary evidence which primarily consists of Court Exhibit 2 (seventeen pages of disclaimed balance sheets, and the aforesaid income tax return and its attachments) is not persuasive. Thus, the balance sheet was accompanied by a certified public accountant's cover letter which indicated that:

"A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements, and accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles, including the statement of retained earnings and the statement of changes in financial position. If the omitted disclosures were included in the financial statements, they might influence the users conclusions about the company's financial position, and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters. Likewise, without audited financial statements, verified lists of assets, one is left unconvinced by the opportunities for asset concealment and manipulation which occurs through the use of the creation of multiple corporations."

I conclude, after considering the quality of testimony and documentary evidence, that Respondent has provided no reliable basis for substantial reduction of otherwise reasonable penalties in these cases.

The only other matter litigated relates to the citation in Docket No. KENT 81-133, which involved a violation of 30 CFR 75.518, which provides:

Automatic circuit-breaking devices or refuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will deenergize all three phases in the event that any phase is overloaded.

The description of the violation contained in the citation is that:

The automatic short circuit breaker device in the switch box that supplied electrical power to the number two belt head conveyor was bridged across the fuse holders with #10 copper wire. The operator at this mine does his own electrical work."

This violation became the subject of a special assessment by MSHA for which a penalty of \$500.00 was sought. Respondent contended that the Inspector was not an electrical inspector and that he failed to recognize that between the switch box in question and the Number Two belt head conveyor there were two circuit breakers, one on a three-foot long rectifier and one on a belt motor starter, which would have been triggered and have cut off the power had there been an overload.

The Inspector testified, and I do find, that the switch box in question had one, possibly two, fuses which had either been bridged over or by-passed by a copper wire. The Inspector said he did not see, or "observe," as he put it, any other circuit breakers. A clear conflict in the testimony between the Inspector and Mr. Clark thus has occurred, the question being whether or not there were circuit breakers as alleged by Mr. Clark, or not.

The Inspector's version is accepted for the reason that his testimony was based on what he saw at the time and place in question whereas Mr. Clark couched his testimony in the vein that it was the way things ordinarily were in the mine; the way he understood it should be -- rather than what he saw. Mr. Clark was not in the area at the time the citation was issued nor was his recollection precise as to what occurred and what happened at the time.

The co-owner of the mine, Mr. Bush, was present at the time. The Inspector indicated that Mr. Bush in effect agreed that this violation occurred. So, even though at the outset of the hearing the parties did stipulate that the violations all occurred as charged, including the violation charged in this citation, I have re-evaluated whether a violation did occur and I conclude that based upon the Inspector's testimony which I believe should be accepted, a violation did occur.

~1503

With respect to the seriousness of the violation, the Inspector indicated that the danger posed was a mine fire, or shock hazard, and with respect to the possibility of a mine fire occurring, he indicated that there was coal around the belt head which could supply a fuel source for a fire. I therefore find that this was a serious violation, based on his testimony. However, I do not consider that there is any evidence of gross negligence in the occurrence of this violation based upon the Inspector's belief that the Mine Foreman at the time (Mr. Bush) was aware of the violation (Tr. 118, 119). The record indicates that any of the miners in the mine knew how to bridge over the fuses in the switch box, and there is no indication when the violation occurred, how long it might have been in existence, and whether or not the operator's management personnel were aware of it. I am unable to infer that there was willful disregard of the safety standard and intentional violation here, nor does the evidence establish gross negligence. I therefore find that this violation occurred only as a result of ordinary negligence. I conclude that it should not have been the subject of a special assessment under all the circumstances.

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a substantially adverse effect on the operator's ability to continue in business would result by assessment of penalties at some particular monetary level. Factors other than the six criteria expressly provided in the Act are not precluded from consideration, either to increase or reduce the amount of penalty otherwise warranted.

Considering all these factors in connection with Citation No. 954184, I find that the operator's size, the operator's good faith abatement of the violation, and the only ordinary degree of negligence involved, mitigate for a lessening of the penalty. I have previously rejected the operator's economic defense. Also, the penalty should not be increased on the basis of the history of previous violations which has been introduced in this proceeding. The only factor which weighs in favor of a large penalty is that of the seriousness of this violation, which had the potential for a hazard of catastrophic proportions. Weighing all factors, I conclude that a penalty of \$300.00 is reasonable and the same is assessed.

Turning now to Docket No. KENT 81-134, which contains nine violations, it is again noted that all violations have been admitted and that all statutory penalty assessment factors, other than seriousness, have been stipulated to and treated previously.

~1504

Taking each citation one at a time, and based upon evidence in the record which has previously been analyzed, I find that Citation No. 9927446 is not a serious violation; that Citation No. 953110 is a serious violation; that Citation No. 953111 is a moderately serious violation; that Citation No. 953113 is a very serious violation; that Citation No. 953114 is a very serious violation; and that Citation Nos. 953115, 954182, and 954183 are moderately serious violations. Finally, I find that Citation No. 953581 is not a serious violation.

With respect to these nine violations, the parties have stipulated that they resulted from only ordinary negligence and I conclude that the payment of reasonable penalties as to these violations will not jeopardize the Respondent's ability to continue in business based upon the rationale contained in Docket No. KENT 81-133.

Based on the factors previously noted, the following penalties are assessed:

Citation No. 9927446	-	\$ 50.00
Citation No. 953110	-	\$225.00
Citation No. 953111	-	\$125.00
Citation No. 953113	-	\$375.00
Citation No. 953114	-	\$275.00
Citation No. 953115	-	\$140.00
Citation No. 954182	-	\$125.00
Citation No. 954183	-	\$125.00
Citation No. 953581	-	\$ 75.00

Turning now to Docket No. KENT 81-137, which involves three citations, based upon my analysis in the record and the evaluation of MSHA's penalty points which was authorized by stipulation between the parties, Citation No. 993112 is found to involve a violation which was moderately serious. Likewise the same finding is made as to Citations 954181 and 927486. Based on these gravity findings and my prior evaluation of the remaining five statutory criteria, Respondent is assessed the following penalties:

Citation No. 951112	-	\$200.00
Citation No. 954181	-	\$140.00
Citation No. 927486	-	\$ 90.00

ORDER

Respondent is ordered to pay the Secretary of Labor within 30 days after receipt of this decision the penalties assessed herein-above totalling \$2,245.00.

Michael A. Lasher, Jr.  
Judge

AA

~FOOTNOTE\_ONE

1 I find therefrom, and from other evidence in the record

indicating that the Respondent had on its payroll over the last three years an employee complement ranging from 12 to 23 miners at its No. 1 Mine, that Respondent is a small coal mine operator.

~FOOTNOTE\_TWO

2 I infer therefrom that the seven violations were not particularly serious and that this is but a moderate, if not modest, history of infractions which preceded the first violation involved here. Violations which occurred after the subject violations are not properly considered as a part of the Respondent's history.

~FOOTNOTE\_THREE

3 MSHA's proposed penalty assessments for the thirteen violations involved in the three dockets amounted to approximately \$2635.00.