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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

v.

DAVIS COAL COMPANY,  
RESPONDENT

Civil Penalty Proceedings

Docket No. WEVA 82-111  
A.O. No. 46-02208-030069V

Docket No. WEVA 82-112  
A.O. No. 46-02200-03070

Docket No. WEVA 82-206  
A.O. No. 46-02208-03072

Docket No. WEVA 82-207  
A.O. No. 46-02208-03073

Docket No. WEVA 82-231  
A.O. No. 46-03308-03074

Marie No. 1 Mine

DECISIONS

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the petitioner  
Paul E. Pinson, Esquire, Williamson, West Virginia,  
for the respondent

Before: Judge Koutras

Statement of the Proceedings

By agreement of the parties, these cases have been consolidated and submitted to me for decisions on the basis of certain stipulations and agreements concerning the fact of violations, and all of the statutory criteria found in Section 110(i) of the Federal Mine Safety and Health Act of 1977, except for the question of the effect of the proposed civil penalties on the respondent's ability to remain in business. In connection with this issue, the parties request that I incorporate by reference the testimony and evidence adduced during the hearing held in Charleston, West Virginia, May 19, 1982, in the previous civil penalty proceedings involving these parties. My decisions in the previous civil penalty proceedings was issued on June 25, 1982; see MSHA v. Davis Coal Company, Dockets WEVA 80-565, etc.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for each alleged violation based upon the criteria set forth in section 110(i) of the Act. In these proceedings, the crucial question presented is whether or not the assessment of civil penalties against the respondent for the violations in question will have an adverse impact on its ability to remain in business.

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.

Stipulations

The parties stipulated to the following:

1. Davis Coal Company owns and operates the Marie No. 1 Mine and both are subject to the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.
3. Davis Coal Company is a small company producing 87,251 production tons annually, when the Marie No. 1 Mine is operating.
4. Marie No. 1 Mine is the only mine owned by Davis Coal Company, and the mine is not currently producing.
5. All of the citations and terminations thereof were properly served on the respondent by duly authorized representatives of the Secretary.

Findings and Conclusions

WEVA 82-111

Fact of Violation

The section 104(d)(1) order no. 876571, was issued on December 10, 1980, and charged the respondent with a violation of mandatory safety standard 30 CFR 77.506 because proper overload and short circuit protection was not provided for the No. 12, 4 conductor cable, because the fuses were bridged out. Respondent does not dispute the violation and the citation is AFFIRMED.

The parties stipulated that the violation resulted from ordinary negligence, that the gravity was moderate, and that the respondent demonstrated ordinary good faith in abating the citation. The parties also agreed that the respondent had a history of three prior violations of section 77.506.

WEVA 82-112

Fact of Violations

The parties stipulated that Citation No. 9915472 was issued because the respondent violated 30 CFR 70.207(a) on September 11, 1981, by failing to submit a required respirable dust sample during the July-August 1981 cycle for a mechanized mining unit. They also stipulated that Citation Nos. 9915534, 9915535, and 9915577 were issued because the operator violated 30 CFR 70.208(a) on October 13, 1981, by failing to submit three required respirable dust samples during the July-August, 1981 bi-monthly sampling cycle for three designated areas.

Respondent does not dispute the fact that the citations issued constituted violations of the cited safety standards. Accordingly, all of the citations are AFFIRMED.

The parties stipulated that the respondent demonstrated ordinary negligence with respect to each of the aforementioned citations, that the gravity of the violations was null in that there was no probability of any injury occurring as a result of said citations, and that no action was required to abate the citations because bi-monthly sampling requirements can only be satisfied during the established bi-monthly period. They also stipulated that the respondent has a history of 2 violations of 30 CFR 70.207(a) and 9 violations of 30 CFR 70.208(a).

WEVA 82-206

Fact of Violations

The parties stipulated that Citation No. 9915251 was issued because the respondent violated 30 CFR 70.508 on April 8, 1981, because a

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periodic noise level survey had not been taken for the period October 1, 1980 to December 1, 1980. The parties also stipulated that Citations Nos. 9915683, 9915684, and 9915685 were issued because the respondent violated 30 CFR 70.208(a) on December 9, 1981, because of a failure to submit respirable dust samples for three employees during the October-November 1981, bi-monthly sampling cycle. The citations are all AFFIRMED.

With regard to Citation No. 9915251, the parties stipulated that the respondent demonstrated ordinary negligence, that the gravity of this violation was null in that there was no probability of any injury occurring to any miner as a result of this violation, and that the respondent demonstrated ordinary good faith in abating this violation. They also stipulated that the respondent has a history of no violations of 30 CFR 70.508.

With regard to the remaining citations, the parties stipulated that the respondent demonstrated ordinary negligence, and that the gravity was null in that it was improbable that any injury would have occurred. They also agreed that the respondent did not have to abate the violations because of the bi-monthly sampling cycle. Twelve previous citations were issued.

The parties stipulated that the respondent demonstrated ordinary negligence with respect to the citation, that the gravity of the violation was null in that it was improbable that any injury would have occurred as a result of this violation, and that no action was required to abate this citation because bi-monthly sampling requirements can only be satisfied during the established bi-monthly period. They also stipulated that the respondent had a history of 4 violations of 30 CFR 70.208(a).

WEVA 82-231

#### Fact of Violations

The parties stipulated that Citation No. 914357 was issued when the respondent violated 30 CFR 77.509(c) on December 14, 1981, because the fence surrounding the transformers was not at least six feet high in places, and was not at least 3 feet from high voltage energized parts. Citation No. 914359 was issued when the respondent violated 30 CFR 77.1103(d) on December 14, 1981, because the area surrounding the transformers located near the mine portal was not kept free of dry grass and weeds. All of the citations are AFFIRMED.

The parties stipulated that the respondent demonstrated low negligence with respect to citation no. 914357 in that a lock had been placed on the gate but someone had it removed. They also stipulated that the gravity of the violation was low in that while it was probable that one miner could enter the station, no injuries of any type were expected as a result of this violation, that the respondent demonstrated extraordinary good faith efforts in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.509(c).

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With regard to Citation No. 914358, the parties stipulated that the negligence was low, that the gravity of the violation was null in that it was improbable that the one miner in the area would suffer any type of injury as a result of this condition, that the respondent demonstrated extraordinary good faith in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.509(a).

With regard to Citation No. 914359, the parties stipulated that the respondent demonstrated ordinary negligence, that the gravity was low in that no injuries of any type were expected to affect the one miner in the area, that the respondent demonstrated extraordinary efforts in abating the violation, and that the respondent had a history of no violations of 30 CFR 77.1103(d).

The Effect of Civil Penalties on the Respondent's Ability to Remain in Business. (Applicable to all dockets).

In the previous Davis cases, evidence and testimony was adduced concerning the respondent's current financial condition; See: pgs. 23-25, of my previous decisions of June 25, 1982. As noted in that decision, respondent filed a petition in bankruptcy on June 16, 1982, and I concluded that payment of the full penalty assessments in the previous dockets would adversely impact on respondent's ability to remain in business. I incorporate by reference in the instant proceedings all of the previous testimony and evidence concerning respondent's financial condition, included my previous findings and conclusions concerning this issue.

#### Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

Docket No. WEVA 82-111

| Citation No. | Date     | 30 CFR Standard | Assessment |
|--------------|----------|-----------------|------------|
| 876571       | 12/10/80 | 77.506          | \$ 100     |

Docket No. WEVA 82-112

| Citation No. | Date     | 30 CFR Standard | Assessment |
|--------------|----------|-----------------|------------|
| 9915472      | 9/11/81  | 70.207(a)       | \$ 25      |
| 9915534      | 10/13/81 | 70.208(a)       | 25         |
| 9915535      | 10/13/81 | 70.208(a)       | 25         |
| 9915577      | 10/13/81 | 70.208(a)       | 25         |

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Docket No. WEVA 82-206

| Citation No. | Date    | 30 CFR Standard | Assessment |
|--------------|---------|-----------------|------------|
| 9915251      | 4/8/81  | 70.508          | \$ 25      |
| 9915683      | 12/9/81 | 70.208(a)       | 30         |
| 9915684      | 12/9/81 | 70.208(a)       | 30         |
| 9915685      | 12/9/81 | 70.208(a)       | 30         |

Docket No. WEVA 82-207

| Citation No. | Date    | 30 CFR Standard | Assessment |
|--------------|---------|-----------------|------------|
| 9915748      | 1/13/82 | 70.207(a)       | \$ 35      |

Docket No. WEVA 82-231

| Citation No. | Date     | 30 CFR Standard | Assessment |
|--------------|----------|-----------------|------------|
| 914357       | 12/14/81 | 77.509(c)       | \$ 20      |
| 914358       | 12/14/81 | 77.509(a)       | 20         |
| 914359       | 12/14/81 | 77.1103(d)      | 30         |

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me in these dockets, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are DISMISSED.

George A. Koutras  
Administrative Law Judge