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SOL (MSHA) V. LITTLE COAL
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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
v.	Docket No. Assessment Control No.
LITTLE BILL COAL COMPANY, INC., RESPONDENT	KENT 81-102 15-11645-03016 KENT 81-103 15-11645-03017 No. 4 Mine KENT 81-104 15-11838-03009 KENT 81-105 15-11838-03010 No. 5 Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, for Petitioner
Herman W. Lester, Esq., Combs & Lester, Pikeville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of rescheduling of hearing dated March 29, 1982, a hearing in the above-entitled consolidated proceeding was held on April 22 and 23, 1982, in Prestonsburg, Kentucky, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

The issues considered at the hearing were whether respondent had violated any mandatory health and safety standards and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. At the hearing, respondent used one of the six criteria, namely, whether payment of penalties would cause it to discontinue in business, as its primary defense against payment of the civil penalties which had been proposed by the Assessment Office.

The Defense of Inability to Pay Penalties

Respondent presented two witnesses in support of its claim that being required to pay the total penalties of \$5,565 proposed by the Assessment Office in this consolidated proceeding would require it to file a petition in bankruptcy (Tr. 34). The first witness was Mr. John H. McGuire who is one of respondent's co-owners. Mr. McGuire testified that respondent was operating one mine, the No. 5 Mine, at the time of the hearing held in April 1982. Mr. McGuire stated that he had had to close two other mines within the 3-month period preceding the hearing and that the reason he had had to close the other mines was that he could not find a buyer for the

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coal he was producing. Mr. McGuire states that he was producing a rock seam about 57 inches thick along with a coal seam approximately 58 inches thick. The result was that the purchaser of his coal, Utility Coal Company, rejected about 50 percent of the material delivered to it. Although Mr. McGuire was paid \$18 per ton for clean coal, the rejection of 50 percent of the total amount delivered meant that he was actually receiving \$9 for each ton of material delivered to the purchaser (Tr. 20; 40-41).

Mr. McGuire is under contract to sell all the coal he produces to Utility Coal Company. Although Utility, at the time of the hearing, was paying respondent \$18 per ton for clean coal, Mr. McGuire has been notified that the price was going to be reduced by \$2 to only \$16 per ton. Mr. McGuire said that he was steadily losing money at the rate of \$18 and that the further reduction in the price he was receiving for coal would almost certainly force him to discontinue in business. Respondent now owes about \$450,000 in debts, of which an amount of about \$300,000 is owed to the First National Bank of Pikeville and the remainder to companies for supplies and equipment (Tr. 21-22). Mr. McGuire further stated that he would sell everything respondent owns to anyone who would be willing to assume the debts which respondent currently owes (Tr. 22).

The No. 5 Mine, which was in operation at the time the hearing was held in April 1982, produces about 250 tons of coal per day and has 17 employees, including the two co-owners who work in the mine along with their employees. Respondent has to pay its miners about \$450 per week and the two co-owners pay themselves \$500 per week when there are sufficient funds for them to do so; they do not pay themselves at all if funds are not available (Tr. 39). The No. 4 Mine, which was closed in January 1982, produced only 100 tons per day when it was in operation (Tr. 36).

In addition to the generalized testimony given by Mr. McGuire, respondent also presented some detailed financial exhibits which were prepared by a certified public accountant named Fred G. Roark and which were explained at the hearing by an accountant named Gregory A. Reynolds who worked for Mr. Roark's accounting firm at the time the hearing was held in April 1982. Mr. Reynolds introduced as Exhibit A a balance sheet and statement of income for the 5-month period ending February 28, 1982. Mr. Reynolds also supplied a copy of respondent's 1980 Federal income tax return which was received in evidence as Exhibit B. The income tax return shows that respondent made no profit in 1980 and paid no taxes.

Exhibit A shows that respondent has assets of \$321,971.00 and liabilities of \$466,572.53 (Tr. 115). Since respondent's assets are considerably less than its liabilities, the only way respondent's balance sheet could be prepared was to use \$195,326 in negative stockholders' equity to offset the amount by which respondent's liabilities exceeded its assets. The ironic aspect of respondent's financial presentation was that Exhibit A happens to show that respondent operated at a profit of \$48,833.97 for

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the 5-month period ending February 28, 1982 (Tr. 118-119). Although a profit of \$48,833.97 was reflected by Exhibit A, that figure did not reflect depreciation for the 5-month period of \$16,352.04 which, when properly subtracted from the \$48,833.97 in profit, showed a reduced profit of \$32,481.93 (Tr. 120).

Even though Exhibit A shows a profit for the period from September 1981 through February 1982, the exhibit quite clearly shows that the profit was used to reduce the negative stockholders' equity shown on the balance sheet. If the profit had not been so used, the balance sheet would have had to reflect a negative stockholder's equity of \$193,434, instead of the negative amount of \$144,601.53 which the balance sheet does show (Tr. 144). Moreover, any profit which respondent might make would have to be applied to a reduction of respondent's indebtedness of \$466,572.53 (Tr. 145). Perhaps the most impressive statement about respondent's true financial condition was made by Mr. Reynolds when he pointed out that respondent has a debt ratio of 145 percent. In other words, respondent not only owes 100 percent of its total assets to its creditors, but owes an additional 45 percent in assets which it does not even have (Tr. 117).

Although Exhibit A reflects a profit of \$32,481.93 for the 5-month period ending February 28, 1982, the exhibit also shows that for the month of February respondent operated at a loss of \$29,978.99 which is consistent with Mr. McGuire's testimony that he cannot presently find a market for his coal and that he was losing money at the rate he was being paid for the diminished amount of coal which he was producing in April 1982 (Tr. 19; 22-23; 141). According to Mr. Reynolds, there was a very poor market for coal throughout the industry in April 1982 and Mr. Reynolds stated that the 5-month profit was entirely the result of respondent's operations in the latter months of 1981 because the price for coal and the market for coal had dropped considerably after January 1982 (Tr. 147; 152).

I find, on the basis of the evidence discussed above, that respondent has clearly shown that payment of large penalties would have an adverse effect on its ability to continue in business.

Failure of Respondent To Provide Supplemental Data

The true significance of respondent's financial data was not fully comprehended by me until I had spent a complete day in reviewing the transcript and the exhibits. At the hearing, therefore, it appeared to me that respondent should present some additional data showing such things as a monthly breakdown of sales and operating expenses as well as a schedule indicating the monthly amounts respondent is required to pay on its indebtedness (Tr. 153). Mr. Reynolds and respondent's counsel agreed at the hearing that such data would be supplied for the record (Tr. 162). After the transcript of the hearing had been received, I wrote a letter on June 7, 1982, to respondent's counsel requesting that he provide me with the supplemental data at his

earliest convenience. When I did not receive any

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reply to the letter of June 7, I issued a show-cause order on July 23, 1982, requiring respondent's counsel to submit the supplemental information by August 23, 1982. Respondent's counsel filed on August 23, 1982, a reply to the show-cause order. The response stated that Mr. Reynolds, the witness who had agreed to prepare the supplemental data, no longer works for the accounting firm of Fred G. Roark and that respondent's counsel did not know when the supplemental information could be compiled or submitted.

At the time I received the response to the show-cause order, I had not performed as thorough a review of respondent's Exhibit A and supporting testimony as I have now made. In view of respondent's failure to submit the supplemental data, it appeared to me that the Secretary's counsel might wish to withdraw the settlement agreement which he had submitted at the hearing (Tr. 157-161). Therefore, I called the Secretary's counsel and asked him to state whether his position with respect to settlement had changed as a result of respondent's failure to submit the supplemental data. The Secretary's counsel stated that he believed he had given sufficient reasons to justify the settlement despite respondent's failure to submit the supplemental data and that he did not intend to withdraw the settlement agreement or change it in any way.

I also called respondent's counsel and asked him if he could give me any information about his failure to furnish the supplemental data which he had not included in his response to the show-cause order. I concluded from the remarks of respondent's counsel that the wife of one of the co-owners is now performing some bookkeeping with respect to respondent's operations and that her records are not sufficiently maintained to enable respondent's counsel, or the accounting firm of Fred G. Roark, to provide any accurate financial information beyond that which was presented at the hearing.

I have hereinbefore discussed respondent's financial exhibits and testimony presented in support of the exhibits and I have found that the existing evidence in the record is ample to support a finding that payment of large penalties would cause respondent to discontinue in business, if it has not already done so. Therefore, I find that it is unnecessary for respondent's counsel to submit any of the supplemental data which Mr. Reynolds agreed to provide at the hearing (Tr. 153).

CONTESTED VIOLATIONS IN DOCKET NO. KENT 81-102

Testimony was presented by counsel for the Secretary and counsel for respondent with respect to four violations prior to the time when the parties entered into a settlement agreement. I made findings of fact and assessed penalties at the hearing with respect to those four violations. I stated at that time that penalties would be assessed on the basis of five of the six criteria and that the penalties assessed at the hearing would be further reduced if the financial data, to be submitted by respondent on the next day,

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proved that the penalties should be reduced under the sixth criterion of whether payment of penalties would cause respondent to discontinue in business (Tr. 47).

Citation No. 734427 10/31/80 75.1704-2(c)(2) (Exhibit 2)

Findings. Section 75.1704-2(c)(2), among other things, requires the person who makes weekly examinations of escapeways to record the results of such examinations in an approved book. The inspection was made on October 31, 1980, and the last entry regarding the examinations had been made on October 9, 1980. Respondent's witness did not controvert the inspector's testimony to the effect that the results of the examinations had not been recorded. Therefore, the violation occurred. The inspector's testimony shows that the violation was nonserious because the escapeway was the intake used by the miners to go in and out of the mine and the escapeway was passable. There was a high degree of negligence because the mine foreman admitted that he had not kept the books up to date because he had been preoccupied by the breakdown of equipment (Tr. 48).

Conclusions. As to other criteria, the parties stipulated that respondent operates a small business and that respondent demonstrated a good-faith effort to achieve compliance. Exhibit 1 in this proceeding was a computer printout listing previous violations which have occurred at respondent's mine. That exhibit does not reflect that respondent has previously violated section 75.1704-2(c)(2). A penalty of \$15 was assessed at the hearing on the basis of the foregoing findings of fact (Tr. 50). Since I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10 for the violation of section 75.1704-2(c)(2).

Citation No. 734428 10/31/80 75.305 (Exhibit 4)

Findings. Section 75.305 requires, among other things, that the results of weekly examinations for methane and hazardous conditions be recorded in an approved book. The evidence showed that a violation occurred because the inspection was made on October 31, 1980, and respondent's witness did not controvert the inspector's testimony that no entry had been made in the book since October 6, 1980. The violation was moderately serious because the inspector observed water accumulations in one entry and the section foreman, if he had been making the proper inspections, would presumably have had the water pumped from the entry. There was a high degree of negligence (Tr. 69).

Conclusions. In view of the fact that a small operator is involved, that a good-faith effort to achieve compliance was made, and that respondent has not previously violated section 75.305, a penalty of \$20 was assessed at the hearing. The penalty will be reduced by \$5 to \$15 under the criterion that payment of large penalties will cause respondent to discontinue in business.

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Citation No. 734429 10/31/80 75.512 (Exhibit 6)

Findings. Section 75.512 requires that a weekly examination of electrical equipment be made and that the results of the examinations be recorded in an approved book. A violation occurred because the inspection was made on October 31, 1980, and no record of the results of weekly electrical examinations had been made since October 9, 1980. The violation must be considered nonserious because the inspector did not know whether any of the electrical equipment was defective and there is insufficient evidence to show that the examinations were not being made. There was a high degree of negligence (Tr. 82).

Conclusions. Since a small operator is involved, a good-faith effort was made to achieve compliance, and no history of previous violations of section 75.512 had been shown, a penalty of \$15 was assessed at the hearing (Tr. 83). Because I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10.

Citation No. 734430 11/3/80 75.326 (Exhibit 8)

Findings. Section 75.326 requires, among other things, that belt haulage entries be separated from intake and return air courses. A violation occurred because respondent's witness did not controvert the inspector's statement that a hole existed in the stopping between the intake and belt entries. The violation was nonserious because the inspector observed water in the belt entry and did not believe that a fire would be likely to occur so as to allow smoke to enter the intake and be transported to the working face. There was ordinary negligence because the hole in the stopping was about 1200 feet from the working face and even the inspector had not observed the hole when he had traveled the belt entry a few days prior to his traveling the intake entry. There is no history of a previous violation of section 75.326. The violation was abated in good faith (Tr. 101).

Conclusions. Based on the findings above and the operator's small size, I assessed a penalty of \$15 at the hearing, but since I have hereinbefore found that payment of penalties will have an adverse effect on respondent's ability to continue in business, the penalty will be reduced by \$5 to \$10.

SETTLEMENT

After testimony had been presented by counsel for both parties with respect to the four citations considered above, and counsel for respondent had presented detailed facts regarding respondent's financial condition, the parties presented an oral motion for approval of settlement with respect to the remaining 41 alleged violations involved in this proceeding. Inasmuch as I had already heard evidence with respect to four of the citations, it was agreed that the penalties I had assessed would be paid as to

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those violations and that respondent would additionally pay a total of \$1,000 for the remaining 41 alleged violations, instead of the penalties of \$5,287 which had been proposed by the Assessment Office for those 41 alleged violations. The motion for approval of settlement was made after an evaluation of the types of violations which had been alleged in the remaining 39 citations and two orders and counsel for the Secretary stated that he did not believe that the negligence and gravity associated with the remaining 41 violations were sufficiently great to warrant penalties greater than those agreed upon by the parties in their settlement negotiations. The Secretary's counsel thought the settlement penalties were additionally justified by the fact that respondent is a small operator whose financial condition is very critical (Tr. 157).

Docket No. KENT 81-102

The most serious violations involved in this proceeding were alleged in the citations and orders which were the subject of the proposal for assessment of civil penalty filed in Docket No. KENT 81-102. The other three cases involved in this consolidated proceeding seek assessment of civil penalties for relatively minor violations alleged in citations, whereas the proposal for assessment of civil penalty filed in Docket No. KENT 81-102 seeks assessment of penalties with respect to violations alleged in two orders issued under section 107(a), or the imminent-danger provisions of the Act. Specifically Order No. 734435 was issued on November 11, 1980, and alleged seven different violations of the mandatory health and safety standards, the most serious one being for a violation of section 75.1725 which alleged that the No. 1 underground conveyor belt contained 37 bottom stuck rollers that would not turn when the belt was in operation. Another serious alleged violation was that the roof was in bad condition near Spad No. 2516. In view of the gravity of the violations alleged in Order No. 734435, the parties agreed that penalties of \$360 should be paid for the violations alleged in Order No. 734435.

A penalty of \$100 was also agreed upon by the parties with respect to Order No. 734563 which alleged a violation of section 75.517 because of the existence of an exposed power conductor in the trailing cable for the Wilcox continuous mining machine. The parties also agreed upon the payment of a penalty of \$55 for the violation of section 75.301-4 cited in Citation No. 734561 which pertained to an alleged violation for failure to provide the required velocity of air for the No. 2 entry at a time when the Wilcox mining machine was cutting coal. The primary reason for the relatively high penalty agreed upon in this instance is that the inspector had issued a withdrawal order under section 104(b) in the belief that respondent had failed to make a good-faith effort to abate the violation within the time provided for in the inspector's citation.

The remaining violations alleged in Docket No. KENT 81-102 are of a much less serious nature than those discussed above and I find that the parties, with respect to the remaining alleged

violations, have agreed upon

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settlement penalties which are consistent with the facts when evaluated in light of the six criteria.

Docket No. KENT 81-103

Eleven violations are alleged by the proposal for assessment of civil penalty filed in Docket No. KENT 81-103. Most of them pertain to electrical matters, such as the failure to use a proper shield at one place on a high-voltage cable, failure to maintain a permanent splice so that it would exclude moisture, failure to maintain a deenergization device in an operable condition, and failure to maintain a ground check monitor circuit in an operable condition. Some nonelectrical violations pertained to failure to guard a tail roller properly and failure to maintain a slippage switch in an operable condition. The Assessment Office had proposed penalties of \$1,000 for the 11 violations involved in this docket, whereas the parties have agreed to settle for payment of reduced penalties of \$160.

When it is realized that the co-owners of the mine also work in it and are generally able to testify rather extensively in support of their invariable opinions that no violation is ever serious for a multitude of reasons, it is unlikely that penalties greater than the settlement amounts would have been assessed by me if testimony had been received from both parties with respect to the 11 violations alleged in this docket. Therefore, I find that the settlement agreement should be accepted, especially in light of respondent's evidence showing that payment of large penalties would cause it to discontinue in business.

Docket No. KENT 81-104

The proposal for assessment of civil penalty filed in Docket No. KENT 81-104 alleges five violations of the mandatory health and safety standards. The Assessment Office proposed penalties totaling \$356 for the five alleged violations, whereas respondent has agreed to pay penalties totaling \$55. The violations were all relatively nonserious in that they involved such matters as an inoperative methane monitor in a mine in which no methane has been detected, an inadequately guarded tail roller, lack of a sufficient number of outlets for hoses on the water line, inadequate insulation on the cable reel on the roof-bolting machine, and failure of the fire sensor to identify the conveyor flights properly. I find that the settlement penalties agreed upon are acceptable in view of respondent's small size and the fact that payment of large penalties will have an adverse effect on its ability to continue in business.

Docket No. KENT 81-105

The proposal for assessment of civil penalty filed in Docket No. KENT 81-105 alleges nine violations for which the Assessment Office proposed a total of \$852 in civil penalties, whereas respondent has agreed to pay penalties totaling \$155. Several of the alleged violations were nonserious in

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nature, such as failure to record results of examinations of electrical equipment in an approved book and lack of permissibility on some equipment in a mine in which no methane has been detected. In another instance, a miner was not wearing his self-rescue device because he had forgotten it and left it in his car when he drove to work. Some of the alleged violations, however, were for serious matters such as allowing accumulations of coal and float coal dust to exist in some areas of the mine. Despite the seriousness of some of the alleged violations, I believe that the reduced settlement penalties of \$155 are justified in light of respondent's evidence showing that it cannot continue in business if it has to pay large civil penalties.

In addition to asking that the reduced penalties agreed upon by the parties be accepted, respondent has requested that it be given a period of 60 days within which to pay the penalties resulting from this proceeding. I find that the extended payment period has been justified.

WHEREFORE, it is ordered:

(A) Respondent, within 60 days from the date of this decision, shall pay civil penalties totaling \$45.00 which are allocated as follows to the violations alleged in the four citations listed below:

Docket No. KENT 81-102

Citation No. 734427	10/31/80	75.1704-2(c)(2)	.....	\$ 10.00
Citation No. 734428	10/31/80	75.305	.....	15.00
Citation No. 734429	10/31/80	75.512	.....	10.00
Citation No. 734430	11/3/80	75.326	.....	10.00

Total Penalties Assessed After Evidentiary Presentations 45.00

(B) The oral motion for approval of settlement made at the hearing is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, respondent, within 60 days from the date of this decision, shall pay civil penalties totaling \$1,000.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 81-102

Citation No. 734431	11/3/80	75.1704-2(d)	.....	\$ 20.00
Citation No. 734432	11/3/80	75.400	.....	15.00
Citation No. 734433	11/3/80	75.1100-2	.....	20.00
Citation No. 734434	11/3/80	75.807	.....	10.00
Order No. 734435	11/4/80	75.1725	.....	160.00
Order No. 734435	11/4/80	75.400	25.00
Order No. 734435	11/4/80	75.517	15.00
Order No. 734435	11/4/80	75.1103-4	20.00

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Order No. 734435	11/4/80	75.316	\$	25.00
Order No. 734435	11/4/80	75.200		100.00
Order No. 734435	11/4/80	75.326		15.00
Order No. 734437	11/6/80	75.523-2	.....		15.00
Citation No. 734438	11/6/80	75.316	.....		20.00
Citation No. 734561	11/7/80	75.301-4	.....		55.00
Order No. 734563	11/7/80	75.517	.....		100.00
Citation No. 734508	11/13/80	75.1100-3	.....		15.00

Total Settlement Penalties in Docket No. KENT 81-102 \$630.00

Docket No. KENT 81-103

Citation No. 734509	11/13/80	75.804(a)	.....	\$	15.00
Citation No. 734510	11/13/80	75.313	.....		10.00
Citation No. 734511	11/13/80	75.503	.....		10.00
Citation No. 734512	11/13/80	75.902	.....		15.00
Citation No. 734564	11/13/80	75.1100-2(b)	.....		20.00
Citation No. 734565	11/13/80	75.1722	.....		15.00
Citation No. 734566	11/13/80	75.400	.....		20.00
Citation No. 734567	11/18/80	75.603	.....		15.00
Citation No. 734568	11/18/80	75.1722	.....		15.00
Citation No. 734569	11/18/80	75.1102	.....		15.00
Citation No. 734570	11/18/80	75.604	.....		10.00

Total Settlement Penalties in Docket No. KENT 81-103 \$160.00

Docket No. KENT 81-104

Citation No. 734751	12/11/80	75.313	.....	\$	10.00
Citation No. 734754	12/12/80	75.1722	.....		15.00
Citation No. 734755	12/12/80	75.1100-2	.....		10.00
Citation No. 734756	12/12/80	75.503	.....		10.00
Citation No. 734757	12/12/80	75.1102-4	.....		10.00

Total Settlement Penalties in Docket No. KENT 81-104 \$ 55.00

Docket No. KENT 81-105

Citation No. 734744	12/11/80	75.512	.....	\$	5.00
Citation No. 734745	12/11/80	75.316	.....		25.00
Citation No. 734746	12/11/80	75.1100-3	.....		5.00
Citation No. 734747	12/11/80	75.1714-2	.....		10.00
Citation No. 734748	12/11/80	75.400	.....		25.00
Citation No. 734749	12/11/80	75.403	.....		20.00
Citation No. 734750	12/11/80	75.503	.....		15.00
Citation No. 734752	12/11/80	75.400	.....		25.00
Citation No. 734753	12/12/80	75.400		25.00

Total Settlement Penalties in Docket No. KENT 81-105 \$155.00

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Total Settlement Penalties in This Proceeding \$1,000.00

(D) Respondent is excused from having to submit the supplemental financial data which was requested at the hearing (Tr. 153; 162).

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