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SOL (MSHA) V. STERLING ENERGY  
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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

Docket No. KENT 82-44  
A.O. No. 15-11652-03015

v.

Ely Hollow Deep

STERLING ENERGY, INC.,  
RESPONDENT

DECISION

Appearances: Carole M. Fernandez, Attorney, U.S. Department of Labor,  
Nashville, Tennessee, for the petitioner  
Ralph Ball, Corbin, Kentucky, pro se, President, Sterling  
Energy, Inc., respondent

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 11 alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on August 24, 1982, in London, Kentucky, and the parties appeared and participated fully therein.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of

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such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. 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 C.F.R. 2700.1 et seq.

#### Discussion

Citation No. 987853, October 19, 1981, 30 CFR 75.1715, states as follows:

The check-in and check-out system at the mine did not provide positive identification of every person underground at the mine.

Citation No. 987854, October 19, 1981, 30 CFR 75.200, states as follows:

The operator's roof control plan requiring roof bolts to be installed when loose or drummy roof are encountered was not being followed in that loose roof was present at one location in the No. 3 intake roadway entry located about 300 feet inby the portal.

Citation No. 987855, October 20, 1981, 30 CFR 75.400, states as follows:

Loose coal and float coal dust were deposited on rock dusted surfaces in the No. 2 belt conveyor entry beginning at the portal and extending inby for a distance of about 350 feet.

Citation No. 987857, October 20, 1981, 30 CFR 75.503, states as follows:

The lights on the permissible type mark 20 Wilcox Continuous mining machine being used in the face area of 001 working section was inoperative.

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Citation No. 987858, October 20, 1981, 30 CFR 75.523-1, states as follows:

The Wilcox roof bolting machine in 001 working section was not provided with a deenergization device.

Citation No. 987859, October 20, 1981, 30 CFR 75.326, states as follows:

The main intake and the conveyor coal haulage belt was not separated, in that rock had fallen and crushed out a portion of the 5th stopping inby the intake portal.

Citation No. 988361, October 21, 1981, 30 CFR 75.316, states as follows:

The operator's ventilation methane and dust control plan requiring at least 20 water sprays to be operative on the Wilcox continuous mining machine was not being followed in that none of the water sprays were operating.

Citation No. 988364, October 21, 1981, 30 CFR 75.1103, states as follows:

The sensor cable to the automatic fire warning devices on the No. 1 main belt conveyor was not maintained in that the sensor cable was broken in to and laying on the mine floor.

Citation No. 988365, October 23, 1981, 30 CFR 75.1725, states as follows:

There were 14 bottom belt conveyor rollers stuck on the No. 1 Mine belt conveyor.

Citation No. 988367, October 26, 1981, 30 CFR 75.316, states as follows:

The operator's ventilation methane and dust control plan requiring permanent stoppings up to and including the third open cross cut outby the face area was not being followed, in that permanent stoppings had not been installed in the third open cross cut outby the face area in first right 001 section.

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Citation No. 988369, October 27, 1981, 30 CFR 75.400, states as follows:

Loose coal and float coal dust was deposited on rock dusted surfaces beginning at the belt drive and extending inby for a distance of about 150 feet. This condition existed in the No. 2 entry 001 first right section.

#### Stipulations

The parties stipulated that the respondent's mine is subject to MSHA's enforcement jurisdiction (Tr. 5). In addition, the respondent indicated that it does not contest citations 987855, 988365, and 988367, and admits the fact of violations insofar as those citations are concerned (Tr. 6).

#### MSHA's testimony and evidence

MSHA Inspector Robert Sawyers confirmed that he inspected the mine in question in October 1981, and he confirmed that he issued all of the citations which are the subject of these proceedings. He testified as to the conditions and practices which he observed, and which led him to issue each of the citations. He also testified as to the negligence, gravity, and good faith abatement concerning each of the citations (Tr. 8-19; 19-28; 35-49; 50-68; 68-85).

#### Respondent's testimony and evidence

Mine operator Ralph Ball appeared pro se in this case and was given a full opportunity to present testimony and evidence in defense of all of the citations, including an opportunity to cross-examine the inspector as to all of his findings. Aside from the fact that he was not present on at least two occasions when the inspector conducted his inspections, Mr. Ball asserted that the citations resulted from the fact that he was in the process of moving his mining equipment from one underground mine area to another. However, he candidly admitted that on the days the citations issued work was in fact being performed in the mine and that the areas which were cited were active working areas of the mine (Tr. 94).

Inspector Sawyers testified that during the days of his inspections which resulted in the issuance of the citations in question in this case the mine was operating and producing coal. The haulage road was in use, the main belt conveyor haulage system was operational, the continuous mining machine was in operation cutting coal, and the roof bolter and other mine equipment was in use during the coal producing shifts (Tr. 53-57, 77, 21-35, 44). In addition, Mr. Sawyers indicated that the mine is still considered an active mine by MSHA (Tr. 83), and that if this were not the case he would not have conducted the inspections in question (Tr. 35).

## Findings and Conclusions

### Fact of violations

I conclude and find that the testimony and evidence adduced by MSHA in these proceedings establishes the fact of violations as to each of the citations issued, and all of the citations are therefore AFFIRMED.

### Negligence

The inspector testified that the respondent had a mine foreman who was required to insure that all of the areas cited were preshifted or inspected sometime during the daily mining operations so as to preclude the conditions or practices cited (Tr. 11, 12, 22-23, 30, 69, 78). I conclude and find that the conditions cited resulted from the respondent's failure to exercise reasonable care, and that this failure on its part constitutes ordinary negligence as to all of the citations which have been affirmed.

### History of prior violations

MSHA's counsel asserted that for the period October 19, 1979 to October 18, 1981, the mine had 8 citations issued against it, five of which were assessed civil penalties for which payment was made (Tr. 90). Respondent's prior history of violations appears to indicate a satisfactory safety record for an operation of its size, and I cannot conclude that additional increases in the assessments made are warranted.

### Good Faith Abatement

Inspector Sawyers testified that with the exception of Citation No. 987854, all of the remaining citations were abated within the time fixed and that the respondent demonstrated good faith compliance (Tr. 9-12, 15, 29, 37, 53, 69, 78).

With regard to Citation No. 987854 for failure to roof bolt a loose roof area in the roadway, Mr. Sawyers testified that he gave the respondent until the next morning to bolt the area. However, when he returned the next morning and found that the bolting had not been done, he was concerned that the loose roof could fall and therefore issued an order. Abatement was then immediately achieved (Tr. 22). In defense of this lack of timely abatement, Mr. Ball testified that it took longer than the time originally fixed by the inspector because roof bolting equipment had to be moved down to the area of loose roof (Tr. 26). The inspector did not dispute this fact, but there is nothing to suggest that anyone from mine management indicated that more time was required to abate the loose roof conditions (Tr. 27).

In view of the foregoing, I conclude and find that all of the conditions and practices cited by the inspector in this case were corrected by the respondent in good faith and timely compliance was achieved. With

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regard to the situation which necessitated the issuance of an order to achieve compliance, I have considered the fact that the equipment necessary to achieve rapid compliance had to be moved to the affected roof area and that immediate compliance was then achieved. Under these circumstances, and in view of the inspector's agreement with the fact that an equipment problem may have existed, I cannot conclude that the respondent exhibited a total lack of good faith in achieving compliance once the order issued.

Gravity

Citation 988367

The inspector indicated that the conditions cited could have resulted in a serious interruption to the mine ventilation (Tr. 9).

Citation 988365

The inspector stated that stuck rollers constitute a fire hazard in that they could heat up when not turning properly, and while the mine is wet, a fire hazard was still present (Tr. 10-11).

Citation 987855

The Inspector indicated that the loose coal and float coal in the cited areas presented a possible fire or explosion hazard in the event methane or float coal dust were present. Although he detected no methane, he still considered the conditions cited to be hazardous (Tr. 12-13).

Citation 987853

The inspector believed that the lack of a positive individual miner identification system did not per se present any danger, and was not likely to cause any injury (Tr. 15).

Citation 987854

The inspector stated that the lack of roof bolts at the loose roof area on the roadway where men and equipment traveled presented a dangerous situation and exposed miners to possible injuries or death (Tr. 21).

Citation 987857

The inspector believed that the lack of lights on the continuous mining machine exposed anyone in the area to a possible hazard since all they would have for illumination would be their cap lamps (Tr. 29-31).

Citation 987858

The inspector believed that the lack of a "panic bar" on the

roof bolting machine would prevent the operator from stopping or controlling



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it sufficiently in the event of any emergency. The machine had been used to bolt the roadway, and the machine operator would have been exposed to a hazard if the machine were in motion and could not be stopped (Tr. 38-40).

Citation 987859

The inspector stated that the rock fall here crushed out a portion of the ventilation stopping, thereby resulting in the interruption to the mine ventilation system in that no separation was maintained between the intake and return aircourses. This could have short-circuited the ventilation (Tr. 54).

Citation 988361

The inspector indicated that the lack of required water sprays on the miner prevented the proper suppression of mine dusts, and the miners would be exposed to this dust (Tr. 56-57).

Citation 988364

The inspector believed that the broken sensor cable to the automatic fire warning device on the same belt which had stuck rollers presented a hazard in that in the event of a fire the sensor would not give any warning or activate the surface warning device (Tr. 68-71).

Citation 988369

The inspector indicated that the presence of loose coal and float coal dust at the belt drive and entry in question presented a possible explosion hazard which would have affected the eight men on the section (Tr. 78-79).

In view of the foregoing testimony and evidence presented by the inspector, I conclude and find that all of the citations except for one constituted serious violations of the cited safety standards. I conclude that citation 987853 is nonserious.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Inspector Sawyer testified that at the time the citations issued, the mine was operating two production shifts and one maintenance shift, employing approximately eight miners on each of the production shifts (Tr. 17; 81). He also indicated that the mine was first opened in 1979, and was operated by a prior owner (Tr. 51). Mine production was approximately 140 tons of coal a shift and when he last visited the mine in June 1982, mine production was down to one shift (Tr. 82). The mine is still active, and respondent is still in the mining business (Tr. 83).

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Mine operator Ball testified that he became the operator of the mine when he leased it on July 1, 1981, and he confirmed that mine production averaged about 140 tons of coal for each production shift, or approximately 280 tons a day when the mine is working (Tr. 86-87).

Mr. Ball testified that it could be difficult for him to pay the civil penalties proposed by MSHA in this case because he is not producing or selling as much coal as he has in the past. Due to the depressed coal market, he is not certain that he can remain in business for the "next few weeks" (Tr. 87-90).

MSHA's counsel stated that she had no reason to question the economic state of respondent's mining operation, and that the inspector confirmed that he observed little mining activity going on when he last visited the mine and that mine production had been reduced (Tr. 91).

I conclude and find that the respondent is a small mine operator. Although respondent did not produce any credible evidence to support a conclusion that the assessment of civil penalties will put him out of business, his testimony that his mining operation is marginal remains unrebutted by the petitioner. Further, the asserted decrease in mine production is supported by the testimony of the inspector.

It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, made pursuant to Part 100, Title 30, Code of Federal Regulations. It is clear that I am not bound by those initial assessments, and the penalty assessments which I have imposed have been made after full consideration of the record evidence concerning the respondent's small size, its reduced mine production, and its marginal mining operation, as well as the other statutory criteria found in section 110(i) of the Act.

#### Penalty Assessments

On the basis of the foregoing findings and conclusion, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate for the citations which have been affirmed:

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Citation No.	Date	30 CFR Section	Assessment
987853	10/19/81	75.1715	\$ 10
987854	10/19/81	75.200	100
987855	10/20/81	75.400	40
987857	10/20/81	75.503	15
987858	10/20/81	75.523-1	30
987859	10/20/81	75.326	45
988361	10/21/81	75.316	35
988364	10/21/81	75.1103	42
988365	10/23/81	75.1725	60
988367	10/26/81	75.316	35
988369	10/27/81	75.400	30
			\$ 442

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner this matter is DISMISSED.

George A. Koutras  
Administrative Law Judge