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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. WEST 81-383 A.C. No. 05-03648-03001
v.	Big 3 Mine
RICHARD KLIPPSTEIN AND W. O. PICKETT, JR., RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner Mr. Richard Klippstein, Rifle, Colorado, Pro Se

Before: Judge Carlson

This civil penalty proceeding arises out of respondents' alleged operation of a coal mine near Rifle, Colorado. The matter is before me under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The five alleged violations for which the Secretary now seeks civil penalties were cited in a federal mine inspector's imminent danger withdrawal order under section 107(a) of the Act. Although given notice, respondents failed to appear at the hearing scheduled for 8:30 a.m. on October 8, 1982. I personally contacted respondent Klippstein to remind him of the time and date. He then appeared, and the hearing began two and one half hours late.

Petitioner filed a post-trial brief, to which respondent Klippstein replied.

Issues

1) Was W.O. Pickett, Jr. properly named as co-respondent in this proceeding?

2) Was a MSHA inspector's entry and inspection of the Big 3 Mine proper?

3) Were exploration activities at the Big 3 Mine sufficient to mandate compliance with the Act and its safety regulations, and if so, did the alleged violations occur and were the assessed penalties appropriate?

SUMMARY AND DISCUSSION OF THE EVIDENCE

General Background

The undisputed evidence shows that the Big 3 coal mine was first worked in the 1920's, and was operated a second time during the 1940's. The mine consisted of a single drift some 1300 feet in length, contained several coal seams, and ended at a 40 foot seam of unmined coal.

The evidence shows that in 1980 Klippstein purchased the land upon which the mine was located. His intent, he testified, was to build and sell houses on the new property, which was adjacent to the rural acreage upon which his own home was located. The building project appeared promising at the time because of the proximity of the mine to a large public reservoir. Statements by Klippstein in his written pleadings and at the hearing showed that he re-opened the mine drift for a dual purpose: to develop a water right to spring water in the mine and to assess the coal deposits. A confirmed water source was necessary to provide water to the proposed housing project. In re-opening the drift, respondent, with the occasional help of his two sons, did drilling and blasting, and used a front-end loader to remove debris.

In January 1981, MSHA inspector Villegos and a supervisor learned of apparent mining-related activities on Klippstein's property, and entered the land to further investigate. Once there, they observed an independent contractor and two crew members using a front-end loader and dump trucks to remove piles of mine tailings. The inspector was told that two men had been seen on another day going up to the mine to remove coal.

When Villegos approached the mine portal, he observed a front-end loader near the mine. The machine was covered with coal dust and its tracks led into the mine. Since no mine representative could be found, Villegos entered the mine without one. Inside, he testified, he discovered signs of recent activity; electrical wiring for lighting, blasting caps, and signs of drilling were noted. In addition, two piles of coal (each about 250 to 300 pounds) lay beneath a coal seam.

After testing air movement in the drift, Villegos issued a withdrawal order based upon violation of five mandatory standards. The order specified

that it was issued pursuant to sections 107(a) and 104(a) of the Act.(FOOTNOTE 1) The order was issued to both Richard Klippstein and W.O. Pickett, Jr., believed by the inspector to be co-owners and operators of the mine.

Klippstein succeeded in acquiring a conditional water right to the mine's spring water by decree of a Colorado Water Judge on June 18, 1982 (exhibit R-1). He had closed the mine around October, 1981.

Status of Co-respondent Pickett

Undisputed testimony at the hearing indicated that respondent Pickett had no financial interest in the mine, nor any surface or mineral rights to the property. I therefore conclude that Pickett should not have been named as co-respondent, and should suffer no liability for the charges involved in this proceeding. All further discussion in this case will concern respondent Klippstein. The proceeding will be dismissed as to Pickett.

Unauthorized Entry and Inspection of Mine

Respondent denies operating a mine, and maintains that while an access road was open on the day of the inspection, his property was well posted against trespassing. He therefore contends that Inspector Villegos' unauthorized entry onto his property, and inspection of the Big 3 mine, were improper.

In contrast, petitioner contends that the entry and inspection were proper. There was no expectation of privacy, no guard at the mine, nor any mine representative present (Tr. 88).

I accept petitioner's arguments and find Villegos' entry onto Klippstein's property and the mine inspection to be reasonable under the circumstances. Section 103(a) of the Act provides MSHA inspectors with the right of entry to, upon, or through any mine. No advance notice of an inspection need be given. Furthermore, the Supreme Court has ruled that warrantless inspections authorized under section 103(a) do not violate the Fourth Amendment; the certainty and regularity of the Act's inspection program provide a constitutionally adequate substitute for a warrant. Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981).

The propriety of inspections turns, then, on a MSHA inspector's reasonable belief in the existence of a mine and associated mining activities. Inspector Villegos had such a belief when he entered respondent's property and inspected the mine. Removal of mine tailings provided a prima facie indication of mining operations. Furthermore, Villegos was informed (whether correctly or not) that coal was being removed from the mine. The condition of the mine itself gave additional indication of present mining activity: the portal was open, signs of drilling and blasting were evident, and a front-end loader was parked near-by.

Therefore, under the Act's provisions and based upon the evidence, I find the inspection to be proper. I next turn to the issue of MSHA's jurisdiction in the issuance of a withdrawal order, based upon the violation of mandatory standards, and the proposed penalties.

MSHA Jurisdiction

Respondent claims that the Big 3 Mine was not being operated for purposes of mineral extraction at the time of the inspection. He therefore contends that issuance of a withdrawal order and citations was not within MSHA's jurisdiction.

On the other hand, petitioner argues that Klippstein's operation is a mine as defined by the Act, and comes within the Act's coverage by virtue of its affect on commerce. I agree with petitioner, and find that respondent's exploratory activities in the mine were sufficient to invoke MSHA's jurisdiction and mandate compliance with the Act's safety regulations.

Section 3(h)(1) of the Act defines a mine as "underground passageways ... used in, or to be used in, or resulting from the work of extracting [minerals] from their natural deposits." Mines subject to the Act are those whose products enter commerce, or "the operations or products of which affect

commerce ...." 30 U.S.C. 803. The legislative history of the Act(FOOTNOTE 2), and court decisions encourage a liberal reading of such provisions in order to achieve the Act's purpose of protecting miners' safety. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F. 2d 417 (4th Cir. 1979).

Accordingly, the Commission has not limited mining activities covered by the Act to operations involving actual mineral extraction. Instead, attempts to drive a shaft and establish a portal, merely to evaluate a mineral deposit and mining feasibility, have been ruled sufficient activity to involve hazards intended to be regulated by the Act. Cyprus Industrial Minerals Corp., 3 FMSHRC 1 (January 1981), aff'd, 664 F. 2d 1116 (6th Cir. 1981).

I find respondent's activities to involve similar motives of mineral exploration with associated hazards. As admitted in an answer to the Secretary's proposal for penalties, Klippstein re-opened the Big 3 Mine "for two reasons, to secure a water right to the water in the mine and to see if there was any coal in it." Had valuable amounts of coal been discovered, Klippstein testified that he would have sought someone to mine the deposits (Tr. 88). By re-opening the mine to determine the feasibility of mining its coal deposits, Klippstein brought himself within the coverage of the Act.(FOOTNOTE 3)

Respondent cannot avoid MSHA's jurisdiction by claiming to individually perform all work in the mine. The provisions of the Act are applicable even where an owner-operator works a mine. Marshall v. Conway, 491 F. Supp. 1123 (D.C. Pa 1980).

Finally, respondent can not avoid the jurisdiction of the Act by claiming that his activities failed to affect commerce. Unsafe working conditions of one operation, even if in initial and preparatory stages, influence all other operations similarly situated, and consequently affect interstate commerce. Godwin v. Occupational Safety and Health Review Comm., 540 F. 2d 1013 (9th Cir. 1976).

In the present case, Klippstein's exploratory activities involved working conditions governed by the Act, and therefore affected interstate commerce as it relates to the mining industry. The mere fact that the exploratory activity also included development of a water right does not allow respondent to deny an affect on commerce or escape the Act's regulatory powers as they affect mineral development.

Citations and Proposed Penalties

The citations(FOOTNOTE 4) issued for violations of regulations promulgated under the Act, and proposed penalties are as follows:

Citation No.	Violation Charged	Applicable 30 C.F.R.	Proposed Penalty
1127905 A	No mechanical ventilation	75.300	$ 240
1127905 B	Impermissible power connection units	75.507	$ 56
1127905 C	No notice given of mine reopening	75.1721	$ 24
1127905 D	No books or re cording of mine tests	75.1800	$ 24
1127905 E	No notice given of legal identity of operator	41.11(a)	$ 24
		Total	$ 368

The first citation charges respondent with failure to provide mechanical ventilation in the mine. The standard allegedly violated, 30 C.F.R. 75.300, provides as follows:

> All coal mines shall be ventilated by mechanical ventilation equipment installed and operated in a manner approved by an authorized representative of the Secretary and such equipment shall be examined daily and a record shall be kept of such examination.

Villegos testified that at the time of his inspection, no ventilation machinery was in place at the mine. Mechanical ventilation would have been indicated by the presence of fans on the ground's surface.

A second citation was issued for the use of impermissible electrical wiring in the mine. Respondent allegedly failed to supply a proper ground wire when providing electric lighting inside the tunnel. The standard allegedly violated, 30 C.F.R. 75.507, provides:

> Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

Due to the presence of some detectable methane as well as some coal dust in the mine, and respondent's failure to provide proper ventilation and electrical wiring, Villegos felt that an imminent danger of explosion existed. He therefore issued a withdrawal order.

Villegos charged three additional violations because of respondent's alleged failure to comply with certain administrative requirements. Under the Act's regulations, an operator must notify the Coal Mine Health and Safety District Manager before opening an inactive coal mine, and must submit preliminary mining plans for approval before commencing with mine development. 30 C.F.R. 75.1721. The legal identity of the operator must also be filed with MSHA. 30 C.F.R. 41.11(a). Furthermore, certain tests and examinations must be conducted in underground coal mines, and results are to be recorded in books approved by MSHA. 30 C.F.R. 75.1800.

Petitioner shows that respondent failed to satisfy these regulatory requirements. No notice of mine reopening was given, the legal identity of the mine operator was not filed, and no records of mandatory mine tests were kept (Tr. 25-27).

Respondent's defense in this case rested solely on the issue of whether the operation was a mine regulated under the Act. During the hearing, Klippstein did not directly dispute the evidence of the violations, or the appropriateness of the penalties.

In his reply to petitioner's post-trial brief, however, respondent suggests that he was misled into thinking that the purpose of the hearing was to decide only if MSHA did have jurisdiction over the matter. He claims to have believed that specific charges would be dealt with after the jurisdictional decision was made.

I find such beliefs to be unfounded. Klippstein was afforded the opportunity to challenge the citations and penalty assessments at two different points during the hearing - after I informed him that it might be wise to do so in the event that I ruled against him on the jurisdictional issue (Tr. 56, 70).

Respondent's later dissatisfaction with his failure to dispute such charges therefore has no bearing on the outcome of this case.

Since the uncontroverted evidence shows that respondent conducted his exploratory operations in a manner contrary to the Act's regulations, I find that the violations were properly charged.

Penalties

We now turn to the matter of appropriate penalties. Section 110(i) of the Act sets forth six criteria to be considered in determining a reasonable penalty. It provides:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Respondent's mine had no history of previous violations, and would be considered a small operation. Klippstein testified at the hearing that he was unemployed, and owned only the property involved in this case. These facts suggest imposition of even a modest penalty would have a significant deterrent effect.

Respondent's failure to comply with the Act's regulations was negligent. Under the facts of this case, respondent failed to exercise reasonable care in complying with regulatory requirements in the operation of his mine. Nevertheless, the respondent's inexperience with federal mine safety regulation, and seemingly honest belief that his operations were lawful and did not fall within MSHA jurisdiction are mitigating factors in the finding of negligence.

In determining the gravity of the violations, consideration must include the probability of injury, seriousness of potential injury, and the number of workers exposed to such hazard. Lack of proper mechanical ventilation and the possible presence of methane could have resulted in a serious or fatal injury. However, work in the mine was limited in extent and duration, and typically involved only one worker. Consequently, I consider the gravity to be less than originally determined by the Secretary.

There is no indication that respondent abated the hazardous conditions upon notification of the violations and order of withdrawal. Instead, at a chance meeting several months after the citations and order were issued, respondent informed the inspector that he and his sons were still working the mine (Tr. 21). Such factors weigh against respondent.

On balance, however, I conclude that the $368 total of proposed penalties is excessive. Based upon the criteria for assessing civil penalties as set forth in the Act, and the evidence of record, I conclude that the civil penalties for violations should be reduced and assessed as follows:

Citation No.	Reduced Penalty
1127905 A	$ 70.00
1127905 B	28.00
1127905 C	12.00
1127905 D	12.00
1127905 E	12.00
	$134.00

CONCLUSIONS OF LAW

Based upon the findings made in the narrative portion of this decision the following conclusions of law are entered:

1. W. O. Pickett, Jr. should not have been named co-respondent and shall suffer no liability for the charges involved in this proceeding.

2. The mine and exploratory activities of respondent Klippstein were under the jurisdiction of the Act.

3. Respondent violated the standard published at 30 C.F.R. 75.300 as charged in citation 1127905 A

4. Respondent violated the standard published at 30 C.F.R. 75.507 as charged in citation 1127905 B

5. Respondent violated the standard published at 30 C.F.R. 75.1721 as charged in citation 1127905 C

6. Respondent violated the standard published at 30 C.F.R. 75.1800 as charged in citation 1127905 D

7. Respondent violated the standard published at 30 C.F.R. 41.11(a) as charged in citation 1127905 E

8. The appropriate civil penalties total $134.00

ORDER

Accordingly, the Secretary's petition proposing penalties, as modified by this decision, is affirmed, and respondent Klippstein is ORDERED to pay the above assessed penalties, totaling $134.00, within 30 days of issuance of this order.

John A. Carlson
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue

an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 104(a) provides in pertinent part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

2 S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

3 The removal of tailings by an independent contractor was relevant to the issue of the propriety of the inspection. Klippstein testified, in essence, that the contractor approached him and offered a price for the tailings as salvage. There was no evidence linking the tailings salvage to the reestablishment of the drift. Thus, while the tailings activity was among those facts which gave the inspector good cause to suspect that mining was in progress, I must agree with Klippstein that it quite likely may not have constituted mining. The finding on jurisdiction is based on Klippstein's own activities and those of his two sons within the drift.

4 The withdrawal order specified that it was issued under both 107(a) and 104(a) (as is the Secretary's common practice where a 107(a) order is based upon alleged violations of mandatory standards). Thus, MSHA denominated the five violations a "citation" for penalty purposes, and divided it into a sub-part for each standard cited. In the interest of consistency the term "citation" shall be used through the remainder of this decision.