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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. WEVA 81-498 A.C. No. 46-06158-03011 H
v.	Docket No. WEVA 81-508 A.C. No. 46-06158-03007 V
LITTLE-J COAL COMPANY, INC., RESPONDENT	Docket No. WEVA 81-509 A.C. No. 46-06158-03008
	Docket No. WEVA 81-510 A.C. No. 46-06158-03009 V
	Docket No. WEVA 82-86 A.C. No. 46-06158-03014
	No. 1 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Philip A. LaCaria, Esq., Tutwiler, LaCaria & Murensky, Welch, West Virginia, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on January 17, 1984, in Bluefield, West Virginia, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. The parties presented evidence with respect to the petition for assessment of civil penalty filed by the Secretary of Labor in Docket No. WEVA 82-86. At the conclusion of the presentation of evidence, I rendered a bench decision assessing penalties for the nine violations alleged in that proceeding. Thereafter, the parties orally moved that I accept a motion for approval of settlement with respect to the remaining four cases. Under the parties' settlement agreement, respondent would pay penalties totaling $2,790 instead of the penalties totaling $8,370 proposed by the Assessment Office with respect to the remaining four cases. The substance of my bench decision is first set forth below followed by a discussion of the reasons for granting the parties' settlement agreement.

The issues in a civil penalty case are whether a violation of the Act or the mandatory health and safety standards occurred and, if so, what penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. The petition for assessment of civil penalty filed in Docket No. WEVA 82-86 seeks to have penalties assessed for nine violations of the mandatory health and safety standards based on nine violations alleged in Order and Citation No. 897273 issued January 19, 1981, pursuant to sections 107(a) and 104(a) of the Act. The citation portion of the order alleges five different violations of 30 C.F.R. 75.900 which provides as follows:

> Low- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such breakers shall be equipped with devices to provide protection against undervoltage, grounded phase, short circuit, and overcurrent.

The condition or practice given as the basis for each of the five violations of section 75.900 was identical, that is, the inspector stated that "* * * the grounded phase protective device for the 400 ampere circuit breaker" was inoperative with respect to five different types of equipment, namely, the cable to the belt feeder, the trailing cable to the coal-cutting machine, the trailing cables for the standard and off-standard shuttle cars, the cable for the belt conveyor, and the trailing cable for the coal drill.

Before penalties can be assessed, it is necessary to determine whether the alleged violations actually occurred. One of respondent's owners testified in this case and he agreed with the inspector that the protective devices in the power center were inoperative. In such circumstances, I think that there is no question but that the violations of section 75.900 occurred. The Act requires that penalties be assessed on the basis of the six criteria listed in section 110(i) of the Act.

I shall first consider two criteria of general applicability and my findings as to those two criteria will be applicable for determining all penalties in this proceeding. The first criterion pertains to the size of respondent's business. The operator first testified that he had two mines, each of which produced 400 tons of coal per day, but later he stated that the second mine became operative after 1981 when the violations alleged in this case occurred.

There was introduced as Exhibit 3 a cover page for the assessments proposed by MSHA in Docket No. WEVA 82-86, and that exhibit shows that the total company had a production of 79,042 tons on an annual basis in 1981. Those tonnage figures, together with the fact that the mine employed only 24 persons in 1981 on one maintenance and two production shifts, support a finding that a small company is involved in this proceeding and that, insofar as the criterion of the size of respondent's business is concerned, only small penalties should be assessed.

The second criterion to be considered is whether the payment of penalties would cause the operator to discontinue in business. There has been submitted as Exhibit A a copy of respondent's Federal income tax return for 1980 and that shows that respondent made a taxable income of a little over $26,000 in 1980. There was submitted as Exhibit B a Federal income tax return for 1981 and that indicates that respondent lost $22,748 in that year. The operator testified that respondent's financial condition became worse in 1982, and that at the present time, respondent is operating only one mine with a total of 10 employees. There are also some unaudited income and loss statements in Exhibit B, but I have found from past experience that it is not desirable to rely upon unaudited figures. Therefore, I am basing my findings solely on the Federal income tax returns and the operator's testimony which support a finding that respondent is not in good financial condition. I believe that the evidence supports a finding that assessment of large penalties would have an adverse effect on respondent's ability to continue in business.

The third criterion is respondent's history of previous violations. Normally, the Secretary's counsel introduces a printout from a computer showing how many previous violations there have been, but I did not receive such a printout in this case. Sometimes the official files have an indication of respondent's history of previous violations, but in this proceeding, there is nothing in the official files pertaining to respondent's history of previous violations. Since there is no evidence to support findings with respect to respondent's history of previous violations, that particular criterion cannot be evaluated in this proceeding.

The fourth criterion is the question of whether the operator demonstrated a good-faith effort to achieve rapid compliance once a violation was cited. In this instance, the operator did show a good-faith effort to achieve rapid compliance because all of the violations were corrected by the next morning and the inspector terminated the order at that time. Therefore, I find in this instance that respondent made a good-faith effort to achieve rapid compliance.

The two criteria which have the most to do with assessing large or small penalties in most cases are gravity and negligence. Since gravity or seriousness has been addressed more than any other criterion, it is the one to which primary attention should be directed. Counsel for the Secretary, in his summation, appropriately stressed that criterion because the order was issued under imminent-danger section 107(a) of the Act. Counsel for the Secretary discussed the meaning of imminent danger. Section 3(g) of the Act defines an imminent danger as "* * * the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The Commission has not written very many decisions with respect to the meaning of imminent danger. It did find that an imminent danger existed in Pittsburgh and Midway Coal Co., 2 FMSHRC 787 (1980). In that case, the Commission commented that it was not certain that the "probable as not" gloss added to the definition of imminent danger by the former Board of Mine Operations Appeals was necessary and that the Commission would amplify its understanding of the meaning of imminent danger in future decisions.

In several cases the Commission has, of course, pointed out that the validity of withdrawal orders is not an issue in civil penalty cases. In Pontiki Coal Corp., 1 FMSHRC 1476 (1979), the Commission stated that a judge should not vacate orders in civil penalty cases because the issues in civil penalty cases are whether violations occurred and what penalties should be assessed if it is found that they did occur. Consequently, it is not necessary in this proceeding to make a formal finding as to whether the inspector issued a valid or invalid order under section 107(a) of the Act. It is sufficient that I simply determine whether the alleged violations occurred and assess penalties if I find that they did.

The evidence shows that the violations of section 75.900 were serious because the witnesses agreed that if a fault occurred in the equipment which was being supplied with energy from the power center where the protective devices were inoperative, that energization of the frames of the shuttle cars and other equipment could occur, and that a serious shock or electrocution could follow if someone should touch the equipment in an energized condition. The only witness who said that mitigating circumstances existed was the operator who stated that the mine was dry throughout and that there was less danger of electrocution than if the mine had been wet. The inspector was not asked about the wetness or dryness of the mine. Therefore, I find on the basis of the operator's testimony, that there was at least the ameliorating factor that the mine was dry. Nevertheless, the preponderance of the evidence supports a finding that serious violations of section 75.900 occurred.

The sixth criterion is negligence. The record shows that the inspector went to the mine to make an inspection on the basis of a complaint from the union. That complaint is Exhibit No. 1 in this proceeding. The existence of the complaint is some indication that respondent's management should have been aware that some problems in the electrical system were occurring.

Respondent has introduced evidence, however, indicating that the individual who made the report to the union and requested that an inspection be made under section 103(g) of the Act was an individual who had a propensity for causing trouble for the mine owners. Respondent's witness said that at the time the inspection was requested, the person who requested the inspection was trying to get payment for some vacation and sick days and that he wanted to be paid in the first month of the year instead of being paid throughout the year at such times as the days are used for illness or other personal reasons.

The Secretary's counsel has emphasized that I should not consider the above-described type testimony because it is speculative. The Secretary's counsel contends that the violations did occur and that whether there was some sort of animosity on the part of one or more miners toward the operator on account of labor problems should not affect the outcome of this case in any way because the Act was properly working in this instance in that the miners did sense that something was wrong with the electrical system and did make a complaint to MSHA which was investigated with the result that the order here before me was issued. I agree with the Secretary's counsel that the aforesaid events did occur and that the inspector did make an appropriate inspection. In considering the criterion of the operator's negligence, however, I think that the above-described matters are relevant because the operator testified that someone had put paper in some of the protective devices to keep them from working. The inspector agreed that he found paper in at least one of them, although the inspector did not think the paper made the protective device inoperative. The operator has also testified that it is easy to loosen the doors on the protective devices so that they will not work properly. The operator's testimony shows that it would be a very simple matter for a disgruntled employee to sabotage the power center and then make a complaint just to bring about harassment of the operator.

The inspector himself indicated that he had not gone into a situation in which so many of these protective devices were out of order in a single power center, so there is circumstantial evidence to support the operator's claim that the violations of section 75.900 may have been brought about through no fault or knowledge of the operator. Moreover, the operator also testified without contradiction that he had not had any lost-time accidents in his mine and that he had had no other electrical

violations prior to this instance. In such circumstances, I find that the preponderance of the evidence shows that the violations of section 75.900 were associated with a low degree of negligence.

If a large operator in sound financial condition were involved, I might find that the gravity of the violations warrants a penalty of $500 for each violation, but in view of the fact that respondent is a small operator in a very poor financial condition at this time, I believe that a penalty of $50 for each of the violations is appropriate, or $250 for all five violations of section 75.900.

The citation portion of Order No. 897273 also alleges a violation of section 75.601 in that the trailing cable disconnecting devices to the belt feeder, the roof-bolting machine, and the belt conveyor "* * * were not marked for identification". The inspector testified that he did not consider the violation of section 75.601 to be as serious a violation as the inoperative protective devices discussed above. The operator testified that he did have chains hooked to the cables so that they could not be plugged into the wrong circuit breakers, but he agreed that he did not have the required identification on them. He also thought that it might be remotely possible that a shuttle car other than the one desired might be energized in some unusual circumstances. Ordinary negligence was associated with the violation of section 75.601 because it is highly improbable that the miner who asked for the inspection would have gone around taking labels off of the various connecting devices if they had been on the devices in the first place. The facts discussed above support assessment of a penalty of $25 for the violation of section 75.601.

The citation portion of Order No. 897273 also alleged occurrence of two violations of section 75.512 which requires that electrical equipment be maintained in a safe operating condition and also requires that a record of electrical examinations be kept. The first violation of section 75.512 was that the power center itself was not being maintained in a safe operating condition and the second violation of section 75.512 was that a record of weekly electrical examinations had not been made for a period of about 2 weeks.

The operator did not contest the fact that the violations of section 75.512 occurred. Therefore, I find that two violations of section 75.512 did occur. The inspector did not specifically discuss the violation of section 75.512 with respect to the failure to maintain the electrical center in a safe condition because the lack of safety as to the power center related entirely to the five violations of section 75.900 which have previously been discussed above. The same findings as to negligence and gravity made above with respect to the inoperative

protective devices are equally applicable to the failure of the power center to be maintained in a safe operating condition. Since I have, in effect, assessed a penalty for the failure to maintain the power center in a safe operating condition by assessing total penalties of $250 for the inoperative protective devices, it is duplicative to assess a sixth penalty of $50 for the same condition which brought about the $50 penalties for the five inoperative protective devices. Consequently, I shall assess a penalty of $20 for the failure of the power center to be maintained in a safe operating condition.

The second violation of section 75.512 with respect to the failure to record the weekly electrical examinations was associated with ordinary negligence and the inspector did not classify that violation as being particularly serious. Therefore, I shall assess a penalty of $20 for the second violation of section 75.512.

The final violation alleged in the citation portion of Order No. 897273 was a violation of section 75.515 which requires that cables enter metal frames through proper fittings. In this instance, there was no testimony controverting the inspector's allegation that the cable entering the metallic disconnecting device for the roof-bolting machine was not provided with a proper fitting. I find that the violation occurred, that it was associated with ordinary negligence, and that it was relatively nonserious because there was no testimony showing that the cable was worn in any way so as to constitute an immediate electrical hazard at the time the violation was cited. Therefore, a penalty of $20 will be assessed for the violation of section 75.515.

The total penalties assessed above amount to $335 for the nine violations alleged in Citation and Order No. 897273. It should be noted that my bench decision, at transcript page 82, refers to a total amount of $320. That page of the bench decision inadvertently failed to assess a specific penalty for the violation of section 75.515. Therefore, the bench decision has been corrected above to include assessment of a penalty of $20 for the violation of section 75.515.

Consideration of the Parties' Settlement Agreement

As previously indicated, the parties moved at the hearing that I accept a settlement under which respondent agreed to pay penalties totaling $2,790 instead of the penalties totaling $8,370 which had been proposed by the Assessment Office for the remaining four cases in this proceeding as to which no evidence was presented by either party. The primary reason given at the hearing for the settlement agreement is based on the evidence discussed above to the effect that respondent is in poor financial condition and presently is barely continuing to operate with production from a small mine which employs only 10 persons.

I believe that the two criteria of the size of respondent's business and the fact that payment of large penalties would adversely affect respondent's ability to continue in business warrant acceptance of the settlement agreement. It is my practice, however, to allocate specific penalties to each of the alleged violations. Therefore, I shall briefly discuss the violations alleged in each docket for the purpose of allocating specific penalties.

Docket No. WEVA 81-498

The petition for assessment of civil penalty in Docket No. WEVA 81-498 is based on Order No. 886972 issued on February 2, 1981, pursuant to section 107(a) of the Act. Although the order states that the roof-control plan was not being followed because the roof-bolting machine operator and his helper were observed working inby permanent supports, the order appears to be somewhat defective in failing to state specifically that a violation of the roof-control plan is a violation of section 75.200. Additionally, although the order purports to cite a violation, the order does not show that the violation is being cited under section 104(a) of the Act. While it is possible that the order was modified by the inspector at a subsequent time to show that the citation was issued under section 104(a) and that a violation of section 75.200 was intended to be cited, the official file contains no copy of such modification. Moreover, the order claims that all working places are closed as a part of the order, yet the only hazard cited in the order is that the roof-bolting machine operator and his helper were working beyond permanent roof supports in a crosscut to the left of the No. 4 entry.

The official file contains neither narrative findings by the Assessment Office nor a proposed assessment sheet to show how the Assessment Office arrived at a proposed penalty of $2,000 for the alleged violation of section 75.200. In view of the many infirmities in the order as it appears in the official file, I believe that a penalty of $200 is all that should be allocated to the violation of section 75.200 alleged in Order No. 886972.

Docket No. WEVA 81-508

The petition for assessment of civil penalty filed in Docket No. WEVA 81-508 seeks assessment of penalties for six alleged violations. The six violations are alleged in one citation and five orders written under the unwarrantable-failure provisions of section 104(d)(1) of the Act. The citation and two of the orders allege violations of section 75.400 because of the existence of loose coal and float coal dust accumulations in three different areas of the mine. The citation (No. 896226) avers that the accumulations existed along the belt conveyor and were from 1 inch to 14 inches in depth. The citation notes that the preshift reports had indicated that the belt entry needed

cleaning and rock dusting and that the mine superintendent had done some work toward cleaning up the accumulations and had, in fact, reported the condition as corrected. Since the citation itself shows that a difference of opinion existed between the superintendent and the inspector as to whether the accumulations had been cleaned up, it is likely that the operator would have contested the inspector's allegations if a hearing had been held.

The official file does not contain narrative statements or a proposed assessment sheet to show how the Assessment Office derived its proposed penalty of $800, but the penalty proposed for this alleged violation of section 75.400 is less than was proposed for the other two violations of section 75.400. Therefore, I believe that the Assessment Office took into consideration the fact that the operator had made an effort to clean up the accumulations before they were cited by the inspector. In the absence of any information to support a different evaluation, I believe the proposed penalty for the first alleged violation of section 75.400 should be reduced to $200 because the equivocal nature of the allegations made in the citation make it difficult to find that the violation was associated with the high degree of negligence which should accompany a violation cited under the unwarrantable-failure provisions of the Act.

The next two alleged violations of section 75.400 are based on accumulations in all seven entries inby the loading point where the depths are said to have ranged from 1 to 14 inches. The other accumulations were said to exist in the intake entries in depths of from 1/4 to 6 inches. The Assessment Office proposed penalties of $1,200 for each of the violations. The primary basis for the finding of unwarrantability seems to be that the accumulations had not been reported by the preshift or on-shift examiners. Bearing in mind that in settlement cases, I must accept allegations in orders and citations as I find them, without consideration of any defenses which respondent may have, it appears that there is a basis for the inspector's belief that a high degree of negligence existed in the fact that accumulations were found in practically all areas of the mine on January 20, 1981, the day when the citation and orders were written. I believe that the accumulations cited in the face area appear to be more hazardous than the ones cited in the intake entries. Therefore, I am allocating a penalty of $590 for the violation involving accumulations inby the dumping point and $500 for the accumulations in the intake entries.

Both violations of the roof-control plan cited in Order Nos. 896233 and 896234 consisted of an alleged failure to set a minimum of four temporary supports immediately after the loading cycle was completed. The inspector's orders do not say that roof conditions were unstable, but the Assessment Office proposed a penalty of $1,000 for each violation of section 75.200. Most

of the proposed penalty, therefore, must be associated with the inspector's having written the orders under the unwarrantable failure provisions of section 104(d) of the Act. Since there is no indication that anyone had gone under the unsupported roof, I believe that each of the proposed penalties of $1,000 should be reduced to $300.

Order No. 896237 alleges the final violation to be considered in Docket No. WEVA 81-508. That order states that respondent violated section 75.303 by failing to make an adequate preshift examination. The inspector's belief that the preshift examination was inadequate is based on the fact that the conditions cited in the orders previously discussed were not reported by the preshift examiner. It is a fact, however, that the first unwarrantable-failure violation cited by the inspector on January 20, 1981, refers to the fact that the loose coal accumulations in the belt entry had been reported for several shifts and to the fact that the mine superintendent had had some work done on cleaning up the loose coal accumulations. Therefore, if a hearing had been held, it is likely that a difference of opinion would have developed as to the inspector's claim that an adequate preshift examination had not been made. The Assessment Office proposed a penalty of $500 for the alleged violation of section 75.303. In view of the speculative nature of the alleged violation, I believe that a penalty of no more than $100 is warranted.

Docket No. WEVA 81-509

The petition for assessment of civil penalty filed in Docket No. WEVA 81-509 seeks assessment of a single penalty for a violation of section 75.200 based on Order No. 896232 issued January 20, 1981. The violation alleged is that miners were working inby permanent roof supports and the violation is based on the inspector's belief that the miners were using equipment whose controls were so close to the unsupported roof that the operator of the equipment would necessarily have had to have worked under unsupported roof. Here again, the inspector cited the violation of section 75.200 in an imminent-danger order written pursuant to section 107(a) of the Act without showing that the violation was being cited pursuant to section 104(a) of the Act. The inspector may have modified the order to state that the citation was made under section 104(a) of the Act, but no modification was submitted in support of the petition for assessment of civil penalty. There is no proposed assessment sheet in the official file, but despite the fact that the violation was cited in an imminent-danger order, the Assessment Office proposed a penalty of only $170. The infirmities in the order indicate that allocation of a penalty of $100 is adequate for the violation of section 75.200 alleged in Order No. 896232.

Docket No. WEVA 81-510

The petition for assessment of civil penalty filed in Docket No. WEVA 81-510 seeks assessment of a civil penalty for a single violation of section 75.200 alleged in Order No. 896878 issued February 2, 1981, under unwarrantable-failure section 104(d)(2) of the Act. The violation alleged involves the same circumstances as the violation discussed under Docket No. WEVA 81-508 above, that is, failure of the operator to set a minimum of four temporary supports immediately after the loading cycle was completed. In this instance, the inspector's order notes that the condition was reported by the preshift examiner, but the inspector believes that a high degree of negligence existed because five violations of section 75.200 had been cited since January 20, 1981, the date on which the other violations of section 75.200 were cited, as previously described under Docket No. WEVA 81-508, supra.

It appears that the inspector has given sound reasons in this instance for believing that the violation was associated with a high degree of negligence. The inspector does not claim that the roof conditions were particularly hazardous, but consistent failure to set temporary supports is a very bad practice which should be deterred and civil penalties were provided in the Act for that purpose. Therefore, I find that the Assessment Office's proposed penalty of $500 should be allowed in its entirety in this case.

It should be borne in mind that all of the reductions of the penalties proposed by the Assessment Office have been greatly influenced by the fact that a small operator is involved and by the fact that I have found above that payment of penalties would have an adverse effect on respondent's ability to continue in business. For all of the reasons hereinbefore given, the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $335 with respect to the nine violations alleged in Docket No. WEVA 82-86. The penalties are allocated to the respective violations as follows:

Citation and Order No. 897273	1/19/81	75.512	$ 20.00
Citation and Order No. 897273	1/19/81	75.900	50.00
Citation and Order No. 897273	1/19/81	75.900	50.00
Citation and Order No. 897273	1/19/81	75.900	50.00
Citation and Order No. 897273	1/19/81	75.900	50.00
Citation and Order No. 897273	1/19/81	75.900	50.00
Citation and Order No. 897273	1/19/81	75.601	25.00
Citation and Order No. 897273	1/19/81	75.512	20.00
Citation and Order No. 897273	1/19/81	75.515	20.00

Total Penalties Assessed in Docket No. WEVA 82-86 .....$335.00

(B) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $2,790.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 81-498

Citation and Order No. 886972 2/2/81	
75.200	200.00
Total Settlement Penalties in Docket No. WEVA 81-498	200.00

Docket No. WEVA 81-508

Citation No.	896226	1/20/81	75.400	$ 200.00
Order No.	896233	1/20/81	75.200	300.00
Order No.	896234	1/20/81	75.200	300.00
Order No.	896235	1/20/81	75.400	590.00
Order No.	896236	1/20/81	75.400	500.00
Order No.	896237	1/20/81	75.303	100.00

Total Settlement Penalties in Docket No. WEVA 81-508	$1,990.00

Docket No. WEVA 81-509

Citation and Order No. 896232 1/20/81	
75.200	$ 100.00
Total Settlement Penalties in Docket No. WEVA 81-509	$ 100.00

Docket No. WEVA 81-510

Order No.	896878	2/2/81	75.200	$ 500.00

Total Settlement Penalties in Docket No. WEVA 81-510	$ 500.00
Total Settlement Penalties in This Proceeding	$2,790.00

Richard C. Steffey
Administrative Law Judge