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SOL (MSHA) v. ELLA 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

v.

ELLA COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 84-181
A.C. No. 15-13732-03512

Ella Coal Mine

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville,
Tennessee, for Petitioner;
Ella Smith, President; Alan Smith, Jr.,
Vice-President, Ella Coal Company,
Manchester, Kentucky, Pro Se.

DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals 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), seeking civil penalty assessments in the amount of \$208, for five alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

The respondent filed an answer to the civil penalty proposals and stated that it is a small family owned company mining approximately 75 tons of coal daily "when our equipment isn't broken down." Respondent also stated that it employs "mostly family employees," and that after paying debts, has no money to retain an attorney. Respondent asserts that it timely corrected all of the cited conditions.

This case was originally assigned to Judge Charles C. Moore, Jr., but was reassigned to me upon Judge Moore's retirement. In response to a pretrial order issued by Judge

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Moore, the petitioner's counsel advised him that the mine operator informed counsel that he was having severe financial problems, and that this may merit a reduction of the proposed civil penalty assessments. Counsel also advised that the operator was having a financial statement prepared by his accountant and that pending its receipt, the parties contemplated a settlement of the matter.

An exchange of correspondence in the file reflects that the respondent submitted its income tax return for the year 1982 to the petitioner's counsel, and that counsel rejected it as inadequate to support the respondent's contention that he is unable to pay the assessed penalties. Subsequently, by motion filed May 22, 1985, petitioner's counsel requested that the case be scheduled for trial. Counsel stated that she was informed that the respondent is still in business producing coal.

A hearing was convened in London, Kentucky, on July 25, 1985, and the parties appeared and participated fully therein. Respondent appeared pro se through three of its corporate officers, all members of the same family.
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.

Issues

The respondent has conceded that the violations occurred as charged in the citations issued by the inspector upon inspection of the mine. The only issue presented is whether or not the respondent has established that it is financially unable to pay any of the civil penalties assessed in this case, and whether the payment of such penalties will affect its ability to remain in business.

Discussion

The citations issued in this case are as follows:

Section 104(a) Citation No. 2198132, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. 75.305. The inspector states that the violation was issued because of inadequate records of the weekly hazardous conditions examinations in that the records were not up to date and the last recorded examination was on February 27, 1984.

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Section 104(a) "S & S" Citation No. 2198134, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. 75.1722(a). The inspector states that the belt pulley drive assembly (belt and fly wheels), on an electric water pump located approximately 200 feet outby the No. 2 face in the No. 2 entry on 001 section, was not guarded. The inspector stated that the pump stays "in almost constant use and is attended to regularly, which would require a person to be in close proximity to the drive assembly."

Section 104(a) Citation No. 2198135, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. 75.302(a). The inspector states that the No. 1 and 3 working faces on the 001 section were inadequately ventilated in that no line brattice, or "inadequately installed" brattice, were provided at the faces to provide a perceptible movement of air to the faces.

Section 104(a) Citation No. 2197043, issued on March 26, 1984, cites a violation of 30 C.F.R. 75.316. The inspector states that the mine approved ventilation system and methane and dust control plan was not complied with in the old, abandoned headings on the right of the main entries approximately 300 feet inby the portal, in that (1) three stoppings were missing and no air was reaching the end of the workings, and (2) a crosscut was not provided at the face of 3 of the 5 old faces as required by the plan. The inspector indicates that these entries extend for approximately 500 feet, and are located on the intake-air side of current active workings.

Section 104(a) "S & S" Citation No. 2197044, issued on March 26, 1984, cites a violation of 30 C.F.R. 75.1306. The inspector states that an explosive and detonator storage box located in the last open crosscut between the No. 3 and 4 entries in the 001 section was improperly stored in that it was located 2 feet from two energized trailing cables. The inspector indicted that the box contained 12 tubes of permissible explosives (water gel), and one box of electric detonators, which were stored in separate compartments.

Petitioner's Testimony and Evidence

MSHA Inspector Gary Paul testified that he is currently assigned to inspect the Ella Coal Mine and that he last inspected the mine on the evening of July 24, 1985, as part of his regular weekly inspection. Mr. Paul described the mine as a small non-union family operated underground coal mine employing a total of 14 miners. Two of the employees

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are the son and daughter of Mr. Alan Smith, Sr., and two are his son-in-laws. The remaining 10 employees are non-family members.

Mr. Paul stated that the mine operates on one production shift, and produces approximately 75 to 100 tons a day. During his past two recent inspections he observed that the mine was still in production. Although he has found that the mine has been down in the past during his inspections for 2 hours or so because of equipment breakdowns, it has been a "running and operating" mine.

Mr. Paul stated that the mine is in good condition and that the respondent conducts a safe operation. To his knowledge, all prior citations which have been issued at the mine have always been timely abated and the cited conditions corrected. The citations in question in these proceedings were promptly abated in good faith.

MSHA Inspector James Brashear, confirmed that he issued the citations in question in this case and that they were terminated after the conditions were timely abated by the respondent. Mr. Brashear agreed with Inspector Paul's assessment of the respondent's mining operation. He identified the Wagon Fork Mining Company as another similar small mining operation in his district, and he has heard "through the office grapevine" that it has paid none of the civil penalties which have been assessed by MSHA.

Respondent's Testimony and Evidence

Alan Smith, Sr., stated that he has no connection with the operation of the mine. He confirmed that he owns the equipment, but that he leases it to his son Alan Smith, Jr., who serves as the Vice-President of the company. Mr. Smith stated that the mine is in poor financial condition and that he has received no payments from the company for the leased equipment. He indicated that his son works the mine, and his daughter is also employed there as a surface worker. His son makes \$10 an hour, and his daughter is paid \$5 an hour, and he confirmed that all employees who work underground are paid \$10 an hour, and that surface employees are paid \$5 an hour.

Mr. Smith stated that at one time he operated the mine but turned it over to his son because his son wanted to be a miner. Mr. Smith stated that the mine provides employment for 14 local families, and in his opinion, the company cannot afford to pay any civil penalties. He stated further

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that he has advised his son to get out of the business, and that the company is attempting to sell the mine to someone who is better able to financially support the operation.

Mrs. Ella Smith stated that she is the mother of Alan Smith, Sr., and that she serves as president of the company. She stated that she receives no salary or compensation from the company. She confirmed that the current price of the coal which the company sells is \$28 a ton. She stated that the mine is in poor financial condition, and she could not afford to pay the penalties which have been assessed by MSHA. Although she agreed that the mine is in current operation and is producing, she stated that it was flooded and out of production for 3 months during April or May, 1984, and that it has been out of production for intermittent periods in the past because of equipment breakdowns.

Alan Smith, Jr., stated that he is the Vice-President of the company and is also a salaried employee. The mine provides employment for him, as well as the other miners working there, and he receives a salary for his work. He indicated that while the mine is currently operating, its finances are strained and he is currently negotiating to sell the coal lease and turn the equipment lease over to another operator. He stated that if this is done the company will receive no money compensation, but that he expects to stay on as a salaried employee if the proposed deal is consummated.

Mr. Smith stated that the company retains an accountant to prepare its financial statements, but that it could not afford to pay him to come to the hearing to testify. Mr. Smith stated that he did not bring any financial statements with him to the hearing, and when asked why this was not done, he indicated that he believed that the statements were previously submitted to MSHA's counsel.

Mr. Smith confirmed that the mine employs 14 individuals, and he estimated the daily production as 65 to 75 tons. He also confirmed that he leases the equipment from his father, Alan Smith, Sr. He also indicated that the company cannot afford to pay any amount which may be assessed in these proceedings, and he confirmed that prior assessments have not been paid because the company cannot afford it. He stated that the company has no reserve funds, and that any "extra money" which may be generated by the company is used to keep the equipment operating, and if this were not done he would have to shut down his operation and the miners working there would be without employment.

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Mr. Smith did not dispute the fact that the conditions or practices described by the inspector on the face of the citations constituted violations of the cited mandatory standards. He conceded that the violations occurred as stated by the inspector, and he pointed out that the conditions were promptly corrected and abated.

Findings and Conclusions

Fact of Violations

The respondent did not contest the violations and conceded that the conditions or practices cited by the inspector occurred. Under the circumstances, all of the citations ARE AFFIRMED as issued.

History of Prior Violations

Exhibit G-2, is an MSHA computer print-out which reflects that during the period March 20, 1982 through March 19, 1984, respondent was assessed a total of \$666, for 26 section 104(a) citations issued at the mine. Except for the payment of one \$20 "single penalty assessment," the information provided in the print-out reflects that the respondent has not paid any of the remaining 25 penalty assessments.

Petitioner's counsel confirmed this information, and explained that the respondent has been issued MSHA "default letters" for the unpaid civil penalty assessments, and that they have been forwarded to the Department of Justice for collection action.

Good Faith Compliance

The record here establishes that the cited conditions or practices were promptly abated in good faith by the respondent, and this has been taken into account by me as well as by MSHA's initial civil penalty assessment proposals.

Negligence

The respondent does not dispute the fact of violations and does not take issue with any of the inspectors findings as stated on the face of the citations. Under the circumstances, the inspector's negligence findings are affirmed, and I conclude and find that the violations resulted from the respondent's failure to take reasonable care, and that this amounts to ordinary negligence.

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Gravity

The respondent has not disputed the inspector's gravity findings. Upon review of the cited conditions or practices, I conclude and find that with the exception of the record keeping citation (No. 2198132), the remaining violations were all serious. Although two of those citations resulted in automatic "single penalty" assessments of \$20, this obviously was the results of the inspector's finding that they were not "significant and substantial" violations. However, I am not bound by those findings, and I note that the conditions or practices described deal with lack of adequate ventilation and inadequately stored explosives.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The record establishes that the respondent is a small, family operated mining operation. Petitioner's counsel does not dispute the respondent's contention that the officers of the company receive no compensation in their capacities as officers. Counsel indicated that the only information furnished by the respondent to support its contention that it is unable to pay the \$208 which has been assessed for the five citations in question is a 1982 tax return. Although that return indicated a loss for tax purposes, counsel stated that no current information has been forthcoming from the respondent to indicate any real or net operating losses. Absent this information, counsel is of the view that the respondent has not carried its burden in establishing that it is financially unable to pay the proposed assessments.

Petitioner's counsel also pointed out that the proposed assessments have already taken into account the fact that the respondent is a small operator, and in counsel's opinion the proposed assessments are reasonable. Since the respondent has furnished no additional information concerning its financial condition, counsel is of the view that any additional decreases in the assessments are not warranted.

Petitioner's counsel offered a letter dated October 29, 1984, from Mrs. Ella Smith, exhibit G-1. That letter includes a copy of the respondent's 1982 tax return, and copies of certain payroll taxes information. Although the letter makes reference to a 1984 tax return for the period ending August 31, 1984, it has not been produced.

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Although I have no reason to doubt that this small operation has a cash flow problem and that it has encountered some problems with the mine being down for relatively short periods due to flooding or mechanical breakdowns, it is still a productive mine and there is no evidence that the operators have failed to meet their payrolls or other daily operational expenses, or have had to lay off workers because of their financial condition. Further, the operators identified several of their customers, and Mrs. Smith indicated that the company receives \$28 a ton for its coal. Although Mr. Smith, Jr., indicated that the coal supply may be diminishing, Mr. Smith, Sr., indicated that there is a ready supply of coal reserves, and that the company is negotiating with a potential buyer who may be in a better position to invest more capital in the venture.

The burden is on the respondent to establish that payment of the assessed civil penalties will adversely affect its ability to continue in business. In this case, petitioner's counsel has been most patient with the respondent in her attempts to have the respondent produce more current financial information to support its plea of poverty; all to no avail. In the absence of proof that the imposition of civil penalties will adversely affect its ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Co., 2 MSHC 2010 (1983); aff'd, 736 F.2d 1147 (7th Cir.1984); 3 MSHC 1385 (1984).

On the facts of this case, I conclude and find that the respondent has failed to establish through any credible evidence or testimony that the payment of the \$208 assessments in this case, which I find are reasonable, will adversely affect its ability to continue in business. I remain unconvinced that the respondent will go out of business if it pays these assessments. The respondent has been actively and productively mining coal since at least 1982, and has provided gainful employment for at least 14 individuals and their families. The testimony here establishes that the Smith family operates a safe and relatively efficient mine, and while it appears that they are meeting their expenses, it has paid only one of the civil penalties previously assessed against it. With the exception of three citations, all of the remaining citations have been "single penalty" assessments of \$20 each. However, according to Mr. Smith, Jr., all "extra money" is put back into the business, and he apparently has opted to ignore his obligations to pay these assessments on the ground that they do not contribute to his coal production.

ORDER

On the basis of foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessments made by the petitioner in this proceeding are appropriate and reasonable for the section 104(a) citations which have been affirmed. The respondent IS ORDERED to pay the penalty assessments in question within thirty (30) days, as follows, and payment is to be made directly to MSHA:

| Citation No. | Date | 30 C.F.R. Section | Assessment |
|--------------|---------|----------------------|------------|
| 2198132 | 3/20/84 | 75.305 | \$ 20 |
| 2198134 | 3/20/84 | 75.1722(a) | 63 |
| 2198135 | 3/20/84 | 75.302(a) | 20 |
| 2197043 | 3/26/84 | 75.316 | 20 |
| 2197044 | 3/26/84 | 75.1306 | 85 |
| | | | ----- |
| | | | \$208 |

George A. Koutras
Administrative Law Judge