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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 87-6
A.C. No. 15-13862-03523

v.

Peacock Mine No. 1

ANLO ENERGY, INC.,
RESPONDENT

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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). Petitioner seeks civil penalty assessments in the amount of \$156 for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

The respondent filed a timely notice of contest and requested a hearing. Pursuant to notice served on the parties, a hearing was convened in Owensboro, Kentucky. The petitioner appeared, but the respondent did not. Under the circumstances, the hearing proceeded without the respondent.

Issues

The issues presented in this proceeding are whether the respondent has violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for those violations based on the criteria found in section 110(i) of the Act. The matters concerning the respondent's failure

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to appear, and its bankruptcy status, are discussed in the course of the decision.

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, 20 C.F.R. 2700.1 et seq.

Discussion

Respondent's Failure to Appear at the Hearing

Respondent, who is pro se, failed to appear at the scheduled hearing in Owensboro. Information in the file reflects that the respondent's president, Mr. Jack Anderson, resides in Houston, Texas. During the course of the hearings in several other cases in Owensboro immediately prior to the scheduled hearing in this case, petitioner's counsel advised me that she had spoken with Mr. Anderson, and he informed her that he would not appear at the hearing. I placed a telephone call to Mr. Anderson's home in Houston and he confirmed that he would not appear. Mr. Anderson explained that he is in bankruptcy and that he could not afford the expense of travelling to Owensboro.

Mr. Anderson stated that the Peacock No. 1 Mine is idle, and that it is not closed. He also informed me that he intended to re-open the mine after the conclusion of the bankruptcy proceedings. I informed Mr. Anderson that in view of his failure to enter an appearance, the hearing would proceed without him and that pursuant to the Commission's Rules, he would be defaulted. Mr. Anderson acknowledged and understood that he would be defaulted, had no objection to proceeding in this manner, and he expressed his apology for not appearing at the hearing.

It seems clear to me that the failure of a party-respondent to appear at a hearing pursuant to a duly served order and notice issued by the judge is sufficient ground for the judge to hold the respondent in default and to proceed without him, Williams Coal Co., 1 FMSHRC 928 (July 1979); White Oak Coal Company, 7 FMSHRC 2039 (December 1985); Neibert Coal Company, Inc., 7 FMSHRC 887 (June 1985); Pollard Sand Company, 8 FMSHRC 973 (June 1986).

The respondent has been given an ample opportunity to refute the alleged violations and proposed civil penalties

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filed by the petitioner. However, it seems obvious to me that the respondent does not wish to litigate this matter further because he is in bankruptcy. Under the circumstances, I find the respondent to be in default, and I have treated its failure to appear at the hearing as a waiver of its right to be heard on the merits of the violations.

Respondent's Bankruptcy Status

The fact that the respondent is in bankruptcy does not divest the Commission or its judges of jurisdiction to proceed with the adjudication of this case. Leon's Coal Company, et. al., 4 FMSHRC 572 (April 1982); Oak Mining Company, 4 FMSHRC 925 (May 1982); Stafford Construction Company, 6 FMSHRC 2680 (November 1984). Accordingly, I conclude and find that I have jurisdiction to adjudicate this matter.

Section 104(a) non-"S & S" Citation No. 2837468, issued on June 25, 1986, cites a violation of 30 C.F.R. 75.1204, and the cited condition or practice is as follows: "Peacock Mine No. 1 ID 15Ä13862 has been permanently closed. The operator has not filed with the Secretary a copy of the mine map revised and supplemented to the date of closure."

The inspector fixed the abatement time as 8:00 a.m., July 25, 1986. Subsequently, on July 25, 1986, at 10:00 a.m., he issued a section 104(b) withdrawal order, No. 2837470, and noted that "a reasonable time was given and the citation issued has not been abated."

Section 104(a) non-"S & S" Citation No. 2837469, issued on June 25, 1986, cites a violation of 30 C.F.R. 75.1711, and the cited condition or practice is as follows: "Peacock Mine No. 1 ID 15Ä13862 has been permanently closed and the drift openings have not been sealed in a manner prescribed by the Secretary."

The inspector fixed the abatement time as 8:00 a.m., July 25, 1986. Subsequently, on July 25, 1986, at 10:05 a.m., he issued a section 104(b) withdrawal order, No. 2837471, and noted that "a reasonable time was given and no action was taken to correct the citation."

MSHA Inspector and Ventilation Specialist Paul O. Lee testified that he visited the mine in January, 1986, and spoke with the operator, Mr. Jack Anderson, and another individual. The mine was not in operation, the fan was down, and the power was off. Mr. Lee stated that he advised Mr. Anderson that he needed to file a ventilation plan, and Mr. Anderson advised

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him that he would do so. Since the mine was temporarily abandoned, Mr. Lee informed Mr. Anderson that if he did not start up again, he needed to file a final mine map and a mine sealing plan. Mr. Anderson advised him that he hoped to put the mine back into operation within a week and that a Mr. Woody Sutton would be in touch with him regarding the plans. Mr. Lee stated that the mine had been temporarily abandoned "off and on" for approximately a year prior to January, 1986, and while "sporadic work" was done for a week or so, it would then be abandoned.

Mr. Lee identified an MSHA Mine Status Data Form 2000Ä122, signed by Inspector Larry Cunningham on April 28, 1986, showing the mine as "Temporarily abandoned." He also identified a second form signed by Inspector George W. Siria on May 23, 1986, showing the mine as "Permanently Abandoned." Mr. Lee surmised that Mr. Siria had visited the mine for an inspection and could find no one working there. Mr. Lee stated that subsequently, in June, 1986, he visited another mine operated by Mr. Sutton and discussed the plans for the respondent's mine. Mr. Sutton advised Mr. Lee that he had no connection with the respondent's mine (Tr. 7Ä9).

Mr. Lee confirmed that he went to the respondent's mine site on June 25, 1986, and found the gate locked. However, he walked to the mine and found that the pit had begun to fill with water. He then returned to his office and prepared the two citations in question, and mailed them to Mr. Anderson by registered mail to his last known address in Madisonville, Kentucky, as shown on MSHA's mine legal identify form. However, they were returned by the post office and Mr. Anderson did not accept them (Tr. 9, 16).

Mr. Lee stated that he learned through hearsay that the only work which may have taken place at the mine between January and June 25, 1986, was the recovery of a continuous miner from the mine by a company which had leased it to the respondent, and "maybe a little pumping." Mr. Lee stated that it is MSHA's position that as of June, 1986, the mine had been temporarily, if not permanently abandoned for 90 days (Tr. 10).

Mr. Lee confirmed that Mr. Anderson has never informed his office that he was going to close the mine, and that he is required to notify MSHA "one way or the other or submit a final map and sealing plan," but this has not been done (Tr. 12). Mr. Lee described the mine as an underground "open pit type," and that at the present time it has 20 to 25 feet of water in the pit. He stated that when a mine is temporarily

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abandoned, an operator will still show that people are working there. However, when it is permanently abandoned, not one is working there (Tr. 14). Mr. Lee did not know whether or not Mr. Anderson operated any mines other than the one in question, and MSHA's counsel had no information that this was the case (Tr. 15). He confirmed that the citations are not "significant and substantial" because there is no one at the mine site (Tr. 15).

Petitioner's Arguments

MSHA's counsel argued that during her telephone discussions with Mr. Anderson concerning the citations, he informed her that he was searching for more investors to invest in his company, and that when he is through with the bankruptcy matter and pays off the debts, he will go back into mining. However, counsel took the position that this does not affect the citations because the cited mandatory standard requires a mine operator to file a final mine map and seal it even if it is temporarily abandoned for over 90 days. She asserted that the facts in this case clearly establish that the mine has been at least temporarily abandoned for over 90 days. Assuming that an operator anticipates re-opening the mine at some future time, if it is in an abandoned status for over 90 days, an operator is required to comply with the standard (Tr. 14-15).

With regard to Mr. Anderson's receipt of the citations, MSHA's counsel stated that it seems clear that he received them since he signed the MSHA proposed civil penalty "blue card," and wrote in his telephone number in Texas, and that is how she contacted him there (Tr. 17). With regard to Mr. Anderson's bankruptcy status, counsel asserted that there are distinctions in Chapter 11 and 13 bankruptcy proceedings. In a Chapter 11 proceeding, MSHA would consider this as impacting on the respondent's ability to pay the proposed civil penalty assessments and his ability to continue in business, as well as whether or not he may be able to go back into the mining business. Under Chapter 11, it is considered a final proceeding that would dissolve the corporation, as contrasted to a Chapter 13 proceeding which is merely a reorganization plan and a way to stretch out the corporate debts (Tr. 17). She confirmed that the respondent is in Chapter 11 bankruptcy (Tr. 18-19).

MSHA's position is that on the facts of this case, it is clear that the mine was either closed or abandoned for more than 90 days, and since the inspector found no evidence that the respondent has complied with the requirements of the

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cited standard, the violations have been established and the citations should be affirmed. She confirmed that the subsequent section 104(b) orders were issued because there has been no compliance and the citations have not been abated (Tr. 19Ä20).

Respondent's Arguments

Although the respondent did not appear at the hearing, I have considered the arguments presented by Mr. Anderson in his answer of November 20, 1986, to the civil penalty proposals filed by the petitioner. In that answer, Mr. Anderson takes the position that the mine was not permanently closed, and he states in pertinent part as follows:

The Citation/Order Number's 2837468 and 2837469 are both based on the Peacock Mine No. 1, I.D. 15Ä13862 being alledged (sic) to be permanently closed. That is not the case. A dispute concerning the validity of the coal subleases held by Anlo Energy prevented continued mining and forced Anlo Energy to declare Chapter 11 Bankruptcy and submit the dispute to an adversary proceeding. Consequently, the Peacock Mine No. 1 has been idled, not permanently closed, until a judicial disposition of the dispute issue is made. The bench trial on this issue occurred on April 28, 1986 with no ruling as of this date.

Findings and Conclusions

An initial matter to be addressed is whether or not the respondent received notice of the citations and proposals for assessment of civil penalties. The inspector testified that the citations which were mailed to Mr. Anderson were returned by the post office because Mr. Anderson had moved to another address. On the facts of this case, it seems clear to me that the respondent received the citations and the notice concerning the petitioner's proposed civil penalty assessments for the violations in question. It is also clear that he received the notice of hearing advising him of his opportunity to personally appear and present his case. Further, the record establishes that the respondent, by and through its corporate president, contested the proposed civil penalty assessments and filed a timely answer. Under the circumstances, I conclude and find that all of the statutory and regulatory notice requirements have been met in this case.

Fact of Violations

Citation No. 2837468, issued on June 25, 1986, charges the respondent with a violation of mandatory safety standard 30 C.F.R. 75.1204, which provides as follows:

75.1204 Mine closure; filing of map with Secretary.

[STATUTORY PROVISIONS]

Whenever an operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of more than 90 days, he shall promptly notify the Secretary of such closure. Within 60 days of the permanent closure or abandonment of the mine, or, when the mine is temporarily closed, upon the expiration of a period of 90 days from the date of closure, the operator shall file with the Secretary a copy of the mine map revised and supplemented to the date of the closure. Such copy of the mine map shall be certified by a registered surveyor or registered engineer of the State in which the mine is located and shall be available for public inspection.

Citation No. 2837469, issued on June 25, 1986, charges the respondent with a violation of mandatory safety standard 30 C.F.R. 75.1711, which provides as follows:

75.1711 Sealing of mines.

[STATUTORY PROVISIONS]

On or after March 30, 1970, the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary. Openings of all other mines shall be adequately protected in a manner prescribed by the Secretary to prevent entrance by unauthorized persons.

The regulatory criteria and procedures for the sealing of mine shaft openings, and slope or drift openings pursuant to section 75.1711, are stated in sections 75.1711Ä1 and 75.1711Ä2.

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The respondent takes the position that the mine has not been permanently closed, but simply idled pending final resolution of its bankrupt status. Mr. Anderson has indicated his intent to start mining again sometime in the future, contingent on the availability of investor capital. Respondent's position seems to be that since the mine has not been permanently closed, he need not comply with the requirements of section 75.1204 for the filing of mine map, or the requirements of section 75.1711 requiring the sealing of the drift openings as prescribed by the regulations.

I take note of the fact that on the face of the citations issued in this case, Inspector Lee stated that the mine has been permanently closed. Under the circumstances, one can reasonably conclude that Mr. Anderson has focused on the inspector's assertion that the mine has been permanently closed. However, it seems clear to me that the regulatory language found in section 75.1204 and 75.1711, is not limited to mines which have been permanently closed. The requirements equally apply to mines which have been abandoned or temporarily closed for a period of more than 90 days. Although Mr. Anderson has stated that he intends to start mining again, on the facts of this case, it seems clear to me that the mine has been temporarily closed or abandoned for more than 90 days, and that the petitioner's position constitutes a reasonable interpretation and application of the regulatory requirements found in the cited mandatory standards.

Section 75.1204, requires a mine operator who has temporarily closed or abandoned a mine for a period of more than 90 days to promptly notify MSHA of such closure. It also requires the filing of a mine map with MSHA upon the expiration of a 90-day period from the date of any temporary closure. Respondent has done neither. Section 75.1711 requires sealing of any mine which has been declared inactive by the operator or is abandoned for more than 90 days. In this case, it is clear that the mine has not been sealed. It is also clear from the credible evidence produced by the petitioner in this case that the mine has not been an actively producing coal mine for a period exceeding 90 days. The inspector found no evidence of any active mining, the gate was locked when he visited the mine, the pit was filled with water, and a posthearing mine production computer print-out filed by the petitioner reflects no production or work hours at the mine from 1984 to 1986. Although Mr. Anderson has not specifically declared the mine to be inactive, and takes the position that it is simply idle, I find no reasonable basis for making any distinctions between the terms "idle" and

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"inactive." I further conclude and find the credible evidence produced by the petitioner also establishes that the mine has been abandoned for a period exceeding 90 days. Accordingly, I conclude and find that the petitioner has established both violations, and the citations ARE AFFIRMED.

History of Prior Violations

No testimony was forthcoming from the petitioner with respect to the respondent's prior history of violations. However, an MSHA Proposed Assessment Form 1000-179, dated September 24, 1986, and attached to the pleadings in this case reflects 27 prior assessed violations for 141 inspection days during the preceding 24 months. Absent any further explanation, I find no basis for concluding that the respondent's prior history of violations warrant any additional increases in the civil penalties I have assessed for the citations which have been affirmed.

Good Faith Compliance

Although the violations remain unabated and the inspector issued section 104(b) orders after the expiration of the time fixed for abatement, I have considered the fact that the respondent has financial difficulties which apparently forced him to abandon his mining operation, and the possibility that lack of funds prevented the physical sealing of the mine. As for the filing of the mine map, while I have some doubts that this presented a monumental task on the part of the respondent, I have taken into consideration the fact that the respondent may have believed that compliance was only required if the mine were permanently closed.

Negligence

The inspector found "moderate negligence" with respect to both citations. I agree, and I conclude that the respondent knew or should have known of the requirements for filing a map and sealing the mine when it is temporarily closed or abandoned for more than 90 days. However, I have also considered the fact that the respondent may have believed that the requirements of section 75.1204 and 75.1711 only applied to mines which have been permanently closed. I conclude and find that the violations were the result of ordinary negligence by the respondent.

Gravity

The inspector found that both violations were not significant and substantial, and that it was unlikely that any injury would result. Further, the evidence establishes that the mine in question has been non-productive for a long period of time, that the gate is locked, and during several visits by MSHA's inspectors, they found no one there. Under all of these circumstances, I cannot conclude that the violations presented any particular serious hazard to miners.

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

The respondent is no longer actively engaged in the mining of coal, and while the 27 prior citations which were assessed sometime during the 24-month period prior to the issuance of the two citations on June 25, 1986, suggest some mining activity, it would appear to me that the respondent had a small mining operation when the mine was productive.

It seems clear to me that the respondent is no longer in business at the mine in question. The petitioner has presented credible documentation confirming the respondent's financial inability at this time to continue in business. The petitioner has furnished a copy of the respondent's 1985 tax return which shows an income loss of \$591,763. Petitioner has also furnished copies of records from the United States Bankruptcy Court for the Western District of Kentucky, dated March 13, 1986, confirming the fact that the respondent is in Chapter 11 bankruptcy. Under the circumstances, I have considered the respondent's financial status in mitigation of the proposed civil penalty assessments of \$78 for each of the violations, and have reduced them accordingly.

Penalty Assessments

In view of the foregoing findings and conclusions, I believe that civil penalty assessments in the amount of \$20 for each of the two violations in question are appropriate and reasonable in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$40 for the violations in question

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within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge