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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 PROCEEDINGS

Docket No. KENT 86-126
A.C. No. 15-12295-03533

v.

Docket No. KENT 86-127
A.C. No. 15-12295-03534

J.C. LONDON COAL COMPANY,
INC.,
RESPONDENT

No. 1 Mine

DECISIONS

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals 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 for 18 alleged violations of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations.

The respondent contested the proposed civil penalty assessments, and pursuant to notice served on the parties, a hearing was convened in Paintsville, Kentucky, on Thursday, September 24, 1987. The petitioner appeared, but the respondent did not. Under the circumstances, the hearing proceeded without the respondent and the petitioner presented testimony and evidence with respect to the violations in question.

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

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those violations based on the criteria found in section 110(i) of the Act. The matters concerning the respondent's failure to appear, and its purported bankruptcy status, are discussed in the course of these decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Å164, 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. The record reflects that the initial hearing notice, and subsequent amendments notifying the parties of the time and place of the hearing were duly served on the respondent. The postal service return certified mail receipts reflects that each of the notices were served on the respondent's corporate president Harold C. Hale, and Mr. Hale signed each of the mailing receipts.

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 had an ample opportunity to refute the alleged violations and proposed civil penalty assessments filed by the petitioner. However, since the respondent is no longer in business and has previously indicated that it was either in bankruptcy or had contemplated filing for bankruptcy, it seems obvious to me that it no longer wishes to litigate this matter. Under the circumstances, I find the respondent to be in default, and I have considered its failure to appear at the hearing as a waiver of its right to be heard on the merits of the violations and the proposed civil penalty assessments.

Respondent's Bankruptcy Status

In response to an Order to Show Cause issued by Chief Judge Paul Merlin, Mr. Hale indicated that he was "in the process of going or filing bankruptcy," and he furnished the name and address of the attorney who was representing him in the bankruptcy proceeding. A subsequent letter of record from this attorney reflected that the attorney had done some legal work for Mr. Hale in the past, but the attorney clearly stated that he was not representing Mr. Hale in the instant proceedings.

During the course of the hearing, petitioner's counsel produced a copy of the respondent's 1986 Federal tax return (exhibit PÄ2), furnished by Mr. Hale. Counsel stated that based on information furnished by Mr. Hale's former attorney, although the respondent had contemplated filing for bankruptcy, it has not done so and no bankruptcy proceeding has been formally initiated or finalized.

In view of the respondent's failure to appear at the hearing or to further communicate with petitioner's counsel in this matter, no further information has been forthcoming with respect to the respondent's bankruptcy status. However, the fact that the respondent may be in bankruptcy does not divest the Commission or its judges of jurisdiction to proceed with the adjudication of these cases. 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 these matters.

Petitioner's Testimony and Evidence

In support of the violations in question, petitioner presented the testimony of MSHA Inspectors John Smallwood and Charles Slone. The inspectors testified that Mr. Hale operated the mine for approximately 6 months after purchasing an existing coal mining lease on the property. The information provided by the inspectors reflects that the respondent ceased its mining operation in approximately April or May, 1986, and that the mine is now idle and all of the equipment had been removed from the mine and reclaimed by the company who leased it to the respondent. The inspectors confirmed that to their knowledge, Mr. Hale is not mining at any other locations within their enforcement jurisdiction.

The record reflects that in Docket No. KENT 86Ä126, the respondent was served with nine section 104(a) citations for

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violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. Three of the citations were non-significant and substantial (S & S), and five were designated as "S & S" violations by the inspectors who issued them.

The record reflects that in Docket No. KENT 86Ä127, the respondent was initially served with eight section 104(a) citations for violations of certain mandatory safety and health standards found in Parts 70 and 75, Title 30, Code of Federal Regulations. An additional section 104(a) citation was issued in conjunction with a section 107(a) imminent danger order. Five of the citations were non-S & S violations, and four were issued as S & S violations. Further, the record reflects that when the inspector next returned to the mine he found no one there, and since the violations had not been abated, he issued section 104(b) withdrawal orders for non-abatement of the cited conditions.

Inspectors Smallwood and Slone confirmed that they issued the citations and orders in question, and they confirmed that they were issued in the course of their regular inspections of the mine. The inspectors confirmed that the citations were served on a representative of the respondent who was at the mine when it was in operation, and they testified as to the conditions or practices which caused them to issue the violations. They also confirmed their negligence and gravity findings as shown on the face of the citations.

In Docket No. KENT 86Ä126, the inspectors testified that the violations in question were timely abated by the respondent in good faith, and Inspector Smallwood testified that the respondent was a cooperative mine operator who made a good faith effort to comply with MSHA's mandatory safety and health standards.

With regard to Docket No. KENT 86Ä127, Inspector Smallwood confirmed that the section 104(b) orders which were issued for eight of the section 104(a) citations were served on the respondent by certified mail. Mr. Smallwood explained that when he next returned to the mine on May 5, 1986, to abate the citations, the mine was idle and no one was there. He made several subsequent trips to the mine and attempted to contact the respondent by telephone in an effort to ascertain whether or not the cited conditions had been abated. Mr. Smallwood stated that he was unable to contact the respondent, and that the respondent did not contact him to discuss the matter. Under the circumstances, Inspector Smallwood issued the section 104(b) withdrawal orders, and he confirmed

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that this was his normal procedure. He conceded that it was possible that the cited conditions were corrected before his May 5, 1986, visit to the mine, but since it was idle and he could not gain access to the mine, he had no way to confirm whether or not the violations had been abated.

Findings and Conclusions

Fact of Violations

Although given an opportunity to rebut the violations, the respondent has not done so. Accordingly, on the basis of the record in these proceedings, including the testimony of the inspectors who issued the citations, I conclude and find that the petitioner has established each of the violations, and the citations ARE AFFIRMED as issued by the inspectors.

History of Prior Violations

The respondent's history of prior violations is reflected in an MSHA computer print-out (exhibit PÅ1). The print-out reflects that for the period January 29, 1986 to April 13, 1986, the respondent was served with 18 violations, 12 of which were "significant and substantial" (S & S) violations. The respondent paid the civil penalty assessments for six of the violations. I cannot conclude that the respondent's past compliance record is such as to warrant any additional increases in the civil penalty assessments made for the violations which have been affirmed in these proceedings.

Good Faith Compliance

In Docket No. KENT 86Å126, the record establishes that the respondent timely abated the cited violations in good faith. I take note of Inspector Smallwood's testimony that the respondent was a cooperative mine operator who attempted in good faith to comply with the law, and I have taken this into consideration in my adjudication of these cases.

With regard to Docket No. KENT 86Å127, although it is true that the inspector issued section 104(b) withdrawal orders for failure by the respondent to abate the conditions, I take note of the fact that at the time of his abortive return visits to the mine, the inspector found that it was abandoned and he could find no one to confirm whether or not the violations had been corrected. I take note of the fact that in one instance (Citation No. 2769497), 2Åmonths passed before the inspector next returned to the mine, and in the remaining instances, approximately 3Åweeks passed before the

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inspector returned to the mine. I also take note of the fact that Inspector Smallwood conceded that it was possible that the conditions had been corrected prior to his subsequent mine visits, but he simply could not confirm this since he was unable to communicate with the respondent, and the respondent did not return his telephone calls. However, based on the inspector's credible testimony that he considered the respondent cooperative, and the fact that prior citations were timely abated, I have given the respondent the benefit of the doubt and I cannot conclude that the respondent acted in bad faith in this case.

Negligence

The inspectors found moderate or low negligence with respect to all of the citations issued in these proceedings. Under the circumstances, I conclude and find that all of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

Docket No. KENT 86Ä127

In this case, the inspector found that Citation Nos. 2769497, 2769648, 2769649, 2769650, and 2769651 were non-S & S and that an injury or illness was unlikely to occur as a result of the cited conditions. He also found that the cited conditions would not reasonably be expected to result in any lost workdays. Under these circumstances, I conclude and find that these violations were non-serious.

With regard to the remaining citations, the inspector found that an injury or illness was reasonably likely to occur, and in the case of the section 104(a)Ä107(a) citation-imminent danger order, he found that an injury or illness was highly likely to occur. Under these circumstances, I conclude and find that the violations were serious. I also affirm the inspector's S & S findings with respect to these violations.

Docket No. KENT 86Ä126

In this case, the inspector found that Citation Nos. 2769641, 2769642, and 2769652 were non-S & S and that an injury or illness was unlikely to occur as a result of the cited conditions. He also found that the cited conditions would not reasonably be expected to result in any lost workdays.

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Under these circumstances, I conclude and find that these violations were non-serious.

With regard to the remaining citations, the inspector found that an injury or illness was reasonably likely to occur. Accordingly, I conclude and find that these violations were serious. I also affirm the inspector's S & S findings with respect to these violations.

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

MSHA's proposed civil penalty assessment information filed with its pleadings reflects that when the mine was in operation it had an annual production of 62,500 tons. The information provided by the inspectors who inspected the mine and issued the citations in this case reflect that when the mine was in operation there were approximately 10 miners working underground, and approximately two or three working on the surface. Petitioner's counsel agreed that the mine was a small-to-medium sized operation when it was producing coal, and I concur in this conclusion.

It seems clear to me that the respondent is no longer in business at the mine in question. Although a copy of the respondent's 1986 tax return reflects that the mine operated at a loss for that year, the respondent's failure to appear at the hearing or to otherwise provide any credible information as to its present financial condition and ability to pay the civil penalty assessments for the violations in question precludes any finding by me that the respondent is unable to pay those penalties. Based on the information of record, it does not appear that the respondent is in bankruptcy or that the respondent or Mr. Hale, as its corporate president, is in fact bankrupt. Further, I take note of a letter dated July 13, 1987, to Mr. Hale from the petitioner's counsel, which is in the official record of this case, indicating that Mr. Hale's offer to settle these cases was rejected by the petitioner.

Civil Penalty Assessments

In view of the foregoing findings and conclusions, I believe that the petitioner's proposed civil penalty assessments in Docket No. KENT 86Ä126 are appropriate and reasonable, and they ARE AFFIRMED.

With respect to Docket No. KENT 86Ä127, I take note of the fact that in the initial civil penalty assessments levied

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by the petitioner's Office of Assessments, no consideration was given for the respondent's good faith compliance. The five non-S & S citations which are normally assessed as "single penalty assessments" pursuant to the petitioner's assessment regulations, were assessed at higher monetary amounts, and the remaining citations were assessed without regard to any good-faith compliance. I believe that one can conclude that the increased civil penalty assessments resulted from the fact that the inspector issued section 104(b) orders when he found that the mine was not in operation, and he could find no one to confirm whether or not the violations had in fact been abated.

It is well-settled that I am not bound by the petitioner's proposed civil penalty assessments, nor am I bound by its civil penalty assessment regulations found in Part 100, Title 30, Code of Federal Regulations. Civil penalty proceedings before the Commission and its judges are adjudicated de novo on a case-by-case basis, and any civil penalty assessments levied by a judge are based on his independent findings and conclusions with respect to the particular case. On the facts of this case, given my findings with respect to the respondent's good faith compliance, I conclude and find that some reduction with respect to the civil penalty assessments proposed by the petitioner in Docket No. KENT 86Ä127 are reasonable and warranted in the circumstances.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed in these proceedings:

DOCKET NO. KENT 86Ä126

Citation No.	Date	30 C.F.R. Section	Assessment
2769641	04/09/86	75.1805	20
2769642	04/09/86	75.1403	20
2769684	04/09/86	75.400	50
2769644	04/10/86	75.604(b)	50
2769645	04/10/86	75.1719Ä1(d)	54
2769688	04/10/86	75.604	50
2769689	04/10/86	75.17228	50
2769652	04/14/86	75.1103Ä4(a)	20
2769653	04/14/86	77.504	50

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DOCKET NO. KENT 86Ä127

Citation No.	Date	30 C.F.R. Section	Assessment
2769497	02/10/86	75.313	35
2769686	04/09/86	75.514	140
2769646	04/10/86	75.1725	150
2769647	04/10/86	75.400	100

2769690	04/10/86	70.400	100
2769648	04/14/86	75.503	50
2769649	04/14/86	75.1107Ä4(a)(2)	35
2769650	04/14/86	75.316	35
2769651	04/14/86	75.1713Ä7(b)	50

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ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
TOP Administrative Law Judge