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SOL (MSHA) v. HICKORY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
Docket No. PENN 90-49
A.C. No. 36-07783-03516

v.
HICKORY COAL COMPANY,
RESPONDENT

Slope No. 1 Mine

DECISION

Appearances: Anthony O'Malley, Jr., Esq., Office
of the Solicitor, U.S. Department
of Labor, Philadelphia, PA, for the
Secretary of Labor;
Mr. William Kutsey, Owner, Hickory
coal company, Pine Grove, PA, pro
se.

Before: Judge Fauver

The Secretary of Labor seeks civil a penalty for an alleged
violation of the Federal Mine Safety and Health Act of 1977, 30
U.S.C. 801 et seq.

Having considered the hearing evidence, oral arguments, and
the record as a whole, I find that a preponderance of the
substantial, reliable, and probative evidence establishes the
following Findings of Fact and further findings in the Discussion
below:

FINDINGS OF FACT

1. At all relevant time, William Kutsey, doing business as
Hickory Coal Company, operated an underground coal mine known as
Slope No. 1 Mine in or near Ravine, Schuylkill County,
Pennsylvania, where he produced coal for sales in or affecting
interstate commerce.

2. On September 19, 1989, Federal Mine Inspectors arrived at
Respondent's Slope No. 1 Mine for the purpose of providing
technical assistance and to conduct a 101(c) petition for
modification investigation. When Mr. Kutsey was informed that the
underground investigation would also include enforcement

~1072

action (i.e. citations or orders issued under the Act) for any outstanding or unabated violations, he shut down the hoist engine and informed the inspectors that no further underground work would occur that day, and that the inspectors would not have access to the underground mine.

3. The action taken by Respondent on September 19, 1989, prevented the inspectors from performing their official inspection and investigative duties under the Act. Because of such action by Respondent, Inspector Charles C. Klinger issued Citation No. 2676993, on September 19, 1989, charging a violation of 103(a) of the Act.

4. On September 21, 1989, the inspectors returned to the mine and Mr. Kutsey continued to deny the inspectors entry to the mine. Because of this conduct, Inspector Klinger issued a withdrawal order (No. 2676995), on September 21, 1989, forbidding any persons to enter the mine until entry by inspectors was permitted by Respondent.

5. Because of Respondent's denial of entry to the mine, inter alia, the Secretary brought a civil action in the United States District Court for the Eastern District of Pennsylvania, Secretary of Labor v. William Kutsey, t/a Hickory Coal Company (Civil Action No. 89-7874). On February 1, 1990, after an evidentiary hearing, the Court found that, on September 19, 1989, and September 21, 1989, defendant had refused entry to the mine and was continuing to operate a front-end loader in violation of a prior withdrawal order. The Court issued a preliminary injunction, enjoining defendant from denying authorized representatives of the Secretary entry to the mine and from interfering with, hindering, or delaying the Secretary of Labor or her authorized representatives in carrying out the provisions of the Act. The Court also enjoined defendant from permitting any person, except persons referred to in 104(c) of the Act, from entering the mine until the Secretary terminated, modified or withdrew Order No. 2676995.

6. Respondent, acting through William Kutsey, had denied Federal Mine Inspectors access to the subject mine before September 19, 1989, and had direct knowledge of the requirements of 103(a) of the Act before such date.

DISCUSSION WITH FURTHER FINDINGS

William Kutsey has had a longstanding dispute with MSHA over the requirements for adequate roof-control at the subject mine. He has not agreed to certain provisions that MSHA would require for approval of a roof-control plan at his mine. Also, Mr. Kutsey appears to have a personal conflict with one of the MSHA inspectors. These conflicts apparently gave Mr. Kutsey the misguided belief that he could obtain a resolution of his differences with MSHA by denying the inspectors entry to the mine until his disputes were settled. This, of course, is an

~1073

inappropriate reaction and one that is unlawful under this statute. Section 103(a) of the Act provides:

Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to the Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

The allegations of Citation No. 2676993 and Order No. 2676995 are sustained by a preponderance of the reliable evidence.

~1074

In arriving at a civil penalty, I will consider Respondent's financial condition, the size of the operation, and the other criteria for civil penalties in 110(i) of the Act. I note that Government Exhibit 4, the print-out of Respondent's prior violation charges and civil penalties from March 1, 1986, to November 26, 1990, shows total assessments of \$7,842.00 in back penalties with zero payment of penalties. The payment or non-payment of final civil penalties (i.e., those that are not pending litigation) is part of the operator's history of compliance in 110(i) of the Act. In light of Respondent's total delinquent history as to Government Exhibit 4, I will give Respondent an opportunity to propose to the Secretary a settlement and schedule of payments of the back penalties before assessing a penalty for the violation found in this case. If a suitable agreement is not reached by the parties for the payment of back penalties, I will consider Respondent's delinquent status as an adverse factor in assessing a penalty in this case.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent violated 103(a) of the Act as alleged in Citation No. 2676993 and Order No. 2676995.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2676993 and Order No. 2676995 are AFFIRMED.
2. Pending assessment of a civil penalty for the violation found herein, Respondent shall have 15 days from this Decision and Order to propose a settlement and schedule of payments to the Secretary of Labor, regarding the arrearage of \$7,842.00 in back penalties. The parties shall file a report of the results of any negotiations concerning such matter, not later than July 22, 1991.

William Fauver
Administrative Law Judge