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SOL (MSAH) v. RAMAR COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 91-69 A.C. No. 44-03441-03520
v.	
RAMAR COAL COMPANY, INCORPORATED, RESPONDENT	Ramar Tipple No. 1

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
James Ashby, President, Ramar Coal Company, Inc., Oakwood, Virginia, pro se, for the Respondent.

Before: Judge Koutras

STATEMENT OF THE CASE

This proceeding concerns 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 three alleged violations of certain mandatory safety standards found in Parts 71 and 77, Title 30, Code of Federal Regulations. The respondent filed a timely answer and contest, and a hearing was held in Grundy, Virginia. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made in the course of the hearing in my adjudication of this matter.

ISSUES

The parties settled two of the violations (Citation Nos. 9975365 and 9975366), and the settlement was approved from the bench. With regard to the remaining contested violation, the issues presented include the fact of violation, the appropriate civil penalty assessment for the violation taking into account the civil penalty criteria found in section 110(i) of the Act, and whether or not the inspector's S&S finding is supportable. Additional issues raised by the parties are identified and disposed of in the course of this 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. 30 C.F.R. 77.1607(c).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Section 104(a) non-"S&S" Citation No. 9975365, issued on October 11, 1990, cites an alleged violation of 30 C.F.R. 71.208(a), and the cited condition or practice states as follows:

> The operator did not take one valid respirable dust sample from designated work position 004-0 347 for the bimonthly sampling period of August-September 1990. Required sample is to be collected and submitted to the Richlands MSHA Lab.

Section 104(a) non-"S&S" Citation No. 9975366, issued on October 11, 1990, cites an alleged violation of 30 C.F.R. 71.208(a), and the cited condition or practice states as follows:

> The operator did not take one valid respirable dust sample from designated work position 005-0 374 for the bimonthly sampling period of August-September 1990. Required sample is to be collected and submitted to the Richlands MSHA Lab.

The respondent confirmed that it did not wish to contest the two respirable dust citations and agreed to pay the full amount of the proposed civil penalty assessments (Tr. 3).

The remaining alleged violation, section 104(a) "S&S" Citation No. 3352852, issued by MSHA Inspector Clifford F. Lindsay on October 4, 1990, cites an alleged violation of 30 C.F.R. 77.1607(c), and the condition or practice cited is described as follows:

> The operating speed of a large hauler was not prudent and consistent with conditions of the roadway. The large refuse hauler almost collided with my vehicle as he was descending a rain-slick steep section of the haul road returning from the refuse area. The hauler operator could not bring the vehicle to a stop even after locking the rear wheels until he was well past my vehicle. He avoided colliding with my vehicle by only

> the smallest of margins and largest of luck. Imminent danger Order No. 3352853 is issued in conjunction with this citation, therefore no termination date is set.

Stipulations

The parties agreed to the following (Tr. 5-9):

> 1. The respondent (James Ashby) is the owner and operator of the Ramar Tipple No. 1, which is a small mine operation.
>
> 2. The respondent is subject to the Act and agrees that the presiding judge has jurisdiction to hear and decide this case.
>
> 3. The contested citations were duly served on the respondent by MSHA Inspector Clifford F. Lindsay, an authorized representative of the Secretary of Labor, while acting in his official capacity.

Bench Ruling

The record reflects that Inspector Lindsay issued a section 107(a) Imminent Danger Order No. 3352853, in conjunction with the contested Citation No. 3352852. A copy of the order was included as part of the pleadings filed by the petitioner and it states that it was issued "to close all of the refuse haul road until such time as all refuse hauler operators can be instructed to maintain safe speeds under all conditions of the roadway".

The parties were under the impression that the respondent had contested the validity of the imminent danger order and that it was in issue in this civil penalty proceeding (Tr. 17). However, I take note of the fact that the petition for assessment of civil penalty seeks a civil penalty assessment only for the contested section 104(a) citation, and the respondent conceded that it did not timely contest the validity of the imminent danger order (Tr. 16).

Commission Rule 21, 29 C.F.R. 2700.21(a), requires a mine operator to file an application for review of a section 107(a) imminent danger order within thirty (30) days of its receipt. In this case, there is no evidence that the respondent sought timely review of the validity of the order. Under the circumstances, I issued a bench ruling that the validity of the order was not an issue in this case and that I would not decide the validity of the order (Tr. 16-19). My bench ruling is herein REAFFIRMED.

Petitioner's Testimony and Evidence

Clifford F. Lindsay testified that he is employed by MSHA as an impoundment pile specialist. He is a mining engineer and an

authorized representative of the Secretary of Labor and he has regularly inspected the respondent's waste impoundment and refuse area to insure compliance with MSHA's regulations. He holds a BS degree in chemistry from William and Mary College, and an MS degree in mining engineering from Virginia Tech.

Mr. Lindsay confirmed that he was at the mine on October 4, 1990, to inspect the waste pile and the entry gate off the county road was open. The gate was routinely opened when the facility was in operation but it would otherwise be locked. There were three signs posted around the gate area, and one of the signs stated "keep right-do not pass".

Mr. Lindsay stated that he stopped at the plant office as required to contact a representative of the respondent and to review the plant inspection records. There was no one in the office, which was not unusual, and he left to drive to the impoundment area. It was an overcast rainy day and he was driving a standard government Cherokee jeep. The haulage road conditions were "wet and messy" and refuse spillage from the trucks was on the roadway, and it was similar to "black mud". The roadway surface consisted of a combination of dirt, gravel, and refuse.

Mr. Lindsay stated that as he proceeded along the haulage road up to the impoundment site he observed no other traffic on the road. The roadway was not as wide as a standard 2-lane road, and he was driving "slightly to the right". As he proceeded to enter the "sharp hairpin" turn on the right inside curve he heard the truck air horn sounding steadily and he turned his jeep as close as he could to the right inside portion of the roadway next to the berm. He saw the truck coming down the roadway in a partial slide with its wheels locked. The truck was approximately two-feet away from his jeep when it passed him and he was looking half-way up the truck tires as the truck passed him.

Mr. Lindsay was of the opinion that the truck driver was not in full control of his vehicle. Although the driver was able to steer the truck, he could not slow it enough to bring it to a stop in a timely manner. If he had not seen the truck or heard the driver sound his horn, which prompted him to move his jeep out of the way and to the right side of the road, there was no doubt that an accident would have occurred and the truck would have struck the jeep and run over it.

Mr. Lindsay stated that after the truck passed by he immediately turned the jeep around to block and control access to the roadway because he did not at that time know who else may have been using the roadway and he was afraid that an accident would occur.

Mr. Lindsay identified five photographs of the haulage road which he took on May 4, 1992, (Exhibits P-1-a through P-1-e). He confirmed that exhibits P-1-d and P-1-e show the location of the incident of October 4, 1990. He also identified exhibit P-3, as a copy of the notes which he made on that day.

Mr. Lindsay confirmed that he issued the contested citation in question (Exhibit P-2), and cited a violation of mandatory safety standard 30 C.F.R. 77.1607(c). He stated that the fact that the truck nearly collided with his vehicle led him to conclude that it was being operated at an unreasonable speed given the wet conditions of the roadway. He confirmed that the roadway was well-bermed, and he assumed that the truck brakes were in good working condition since they locked when the driver applied them and he eventually stopped the truck after it passed by him.

Mr. Lindsay stated that he based his "S&S" finding on the fact that he had a near collision with the truck. He also considered prior MSHA accident reports which he has reviewed concerning vehicle collisions under similar conditions, vehicles colliding with trees, boulders, and other objects in the roadway, and accidents resulting from truck drivers driving too fast. Although such prior incidents have not occurred at the respondent's mine, he considered the fact that he could have been run over by the truck in question, and that in the course of normal mining operations, a driver operating his truck too fast could collide with another truck, with resulting serious injuries. He confirmed that the roadway was normally traveled by other inspectors, contractor vehicles, other company service vehicles, and refuse hauling trucks.

Mr. Lindsay stated that during a subsequent mine inspection visit on November 28, 1990, Mr. Ashby discussed the citation with him and informed him that the only solution to the problem was to post signs restricting access to the haulage road. Mr. Ashby also mentioned the fact that he had a recent "problem" with a tanker truck which was on the roadway without the knowledge of the haulage truck drivers, but he did elaborate further as to what the "problem" was all about. Mr. Lindsay identified Exhibit P-4, as a copy of his notes documenting his conversation with Mr. Ashby.

Mr. Lindsay confirmed that he based his "moderate" negligence finding on the fact that the respondent may not have been aware that the truck driver was driving too fast for the existing road conditions. He also considered the fact that the drivers need to maintain and complete their haulage cycle in a timely manner in order to keep up with the refuse haulage trip from the storage bins to the waste impoundment pile.

Mr. Lindsay believed that the haulage truck operating procedures at the time of his inspection were typical of the procedures followed under dry roadway conditions. However, he believed that the drivers needed to adjust their travel speed when the road conditions are wet and slippery. He confirmed that on subsequent mine visits he has observed that the drivers are operating at slower speeds than the speed of the cited truck on the day of his inspection.

Mr. Lindsay stated that he issued a section 107(a) imminent danger order to temporarily block access to the roadway until he could contact the respondent's representative to instruct the drivers to slow down. He also considered the fact that he did not know who else might be using the roadway and he was concerned that an accident would occur if normal mining operations were allowed to continue before he could speak to the respondent and take further corrective action (Tr. 24-68).

On cross-examination, Mr. Lindsay confirmed that he has inspected the respondent's operation since 1985, and although he has "dodged" and "backed up" away from trucks from time-to-time, he was never involved in any prior "near collisions" and was not aware of any prior haulage road accidents. He also confirmed that he was aware of the steep grade over which the cited truck in question was travelling on the day in question, and he agreed that people should be careful on slick roadways.

Mr. Lindsay confirmed that he was not familiar with the "mechanics" of haulage trucks and that he did not know the speed at which the truck was travelling on the day of the incident in question. He has since "clocked" the trucks at 20-25 miles per hour under dry road conditions. He believed that it was the respondent's responsibility to establish safe truck operation speeds for the haulage roads on its property. He confirmed that a 25 m.p.h. speed limit sign is posted on the level roadway portion (Exhibit R-1-C), but did not see one posted on the "high road". He also stated that he has never had to pull over to the left side of the road to allow a truck to pass him.

Mr. Lindsay stated that he had no knowledge as to whether or not the respondent had ever instructed the truck drivers about safe travel speeds prior to his inspection on October 4, 1990, and although he saw a bulletin board in the mine office he saw no roadway safety rules or procedures posted. He confirmed that he did not initially see the truck in question because of the angle of the road, but that he did hear the air horn (Tr. 68-91).

Respondent's Testimony and Evidence

Bobby Joe Austin testified that he is employed by the respondent but is currently laid off and receiving unemployment compensation. He stated that he served in the army as a heavy

equipment operator and has worked in strip mining operating heavy equipment and 10-ton trucks since 1968. He confirmed that he was driving the empty truck in question on October 4, 1990, and that Inspector Lindsay was driving in the center of the road and then moved to the right after he sounded the truck air horn. Mr. Austin stated further that all of the other MSHA inspectors who travel the roadway usually drive to the left at the curve in question so they can look up the incline to see any traffic coming down the road.

Mr. Austin confirmed that he applied his truck brakes when he saw Mr. Lindsay and that the transmission retarders automatically lock the wheels. He stated that large trucks and other vehicles have passed each other at the location where he encountered Mr. Lindsay's vehicle. Mr. Austin denied that he was operating the truck in a reckless manner. He stated that he was aware of the fact that he should drive slower under wet road conditions, and he believed that he had the truck under control on the day in question.

Mr. Austin stated that the respondent has conducted regular safety talks with all truck drivers and has instructed them to drive carefully, particularly under wet road conditions. He stated that he and Mr. Ashby cautioned Mr. Ashby's son about driving to fast on the roadways, and Mr. Ashby confirmed that he fired his son for driving too fast. Mr. Austin believed that the respondent's safety record and procedures, as compared to other mine operators, was "pretty high". He stated that no one has ever instructed him to drive fast or to hurry so that he could keep up with the refuse cycle (Tr. 92-104).

On cross-examination, Mr. Austin explained that his job was to drive the haulage trucks back and forth from the plant refuse bins to the refuse impoundment pile. He has also trained new drivers pursuant to the respondent's 8-hour training program. He stated that the refuse tipple has a daily 5 or 6 truck capacity and that the haulage cycle consists of a continuous loading, haulage, and dumping cycle. He confirmed that he has never been disciplined for allowing too much refuse material to accumulate in the bins or for violating any company driving safety rules.

Mr. Austin stated that he was operating the truck in third gear while descending the roadway in question, and that the truck can go 20 miles per hour in third gear. However, he never "hits the curve wide open", and he could not have driven any slower on the day in question (Tr. 104-118).

Inspector Lindsay was recalled and he testified that he was not aware of any company rule or policy stating that he was to stay on the left side of the road when approaching a curve or an incline. He confirmed that he has never driven on the left side of the road in any of his visits to the mine site and he believed

that the company practice and rule was "right side traffic all of the time". He confirmed that he drives at a slow rate of speed and listens for any haulage trucks on the roadway.

Mr. Lindsay stated that based on his observations of the truck at the time of the incident in question he believed that the driver could have driven much slower given the conditions of the roadway so that he could bring the truck to a stop within a reasonable distance to avoid a collision. Mr. Lindsay stated that he instinctively drives inside the curve because of his belief that a large vehicle coming at him around the curve would have an easier time going to the outside broad radius of the curve. He stated that "I still can't picture a large hauler with its rear wheels locked and sliding being able to negotiate a tighter turn as opposed to a broader turn" (Tr. 121).

Mr. Lindsay stated that from his subsequent observations of haulage trucks using the haul road in question, the trucks traveled at a slower rate of speed on dry days than the speed the truck was travelling on the wet day when he issued the citation (Tr. 122). In his opinion, in order for a driver to be driving prudently and consistently with the road conditions "the vehicle should be driven slowly enough so that in negotiating this curvy, steep road, the operator could bring the vehicle to a stop in a resonable length to avoid colliding with any object in the road" (Tr. 123).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.1607(c), which states as follows:

> Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used.

Truck driver Austin testified that he had the truck under control, and he denied that he was operating it in a "reckless manner" on the day in question. He further testified that he had the truck in "normal" third gear while coming down the inclined roadway in question approaching the curve where Mr. Linday's vehicle was located. Although Mr. Austin initially stated that in third gear "no matter how much fuel you give it, it will go a certain speed" (Tr. 108), he later confirmed that the speed of the truck can reach 20 miles an hour in third gear, and that if he wanted to "slide the truck" around the curve in question he could "hit it at twenty". However, he denied that he would ever do this because "you show that curve respect" (Tr. 115).

Inspector Lindsay did not allege that Mr. Austin was operating the truck in question in a reckless manner. The inspector's credible testimony reflects that he issued the citation after observing the truck coming down the haulage road in a partial slide with its wheels locked. The day in question was rainy and overcast, and the roadway surface was wet and consisted of a combination of dirt, gravel, and refuse, and the inspector described this material as "black mud". He also indicated that it was raining hard enough so that "I wouldn't want to stand out in it very long", and "the water on the road would make it slippery" (Tr. 31, 34).

Mr. Lindsay testified that he had no doubt that Mr. Austin did not have full control of the truck even through he was able to steer it some. Mr. Lindsay stated that he observed the truck in a partial slide with its rear wheels locked up coming down the road towards the curve where he was located. He concluded that Mr. Austin had apparently applied the brakes after seeing his vehicle in the curve, but instead of the truck slowing down or coming to a stop, the rear wheels were simply locked up and sliding (Tr. 36). Mr. Lindsay stated further that the driver's side left rear very large wheel, which was locked up and sliding, missed the front of his vehicle by approximately two feet, and he was looking up at it as the truck passed by "very close". If the truck had slid slightly sideways towards him it would have collided with his vehicle (Tr. 37).

Mr. Lindsay testified that Mr. Austin could not have stopped the truck even if he had wanted to because the wheels were locked and sliding, and as the truck passed by, it was sliding and not stopping at any significant rate. Mr. Lindsay believed that if he had driven a little further around the curve in the roadway he would have been in the direct path of the truck, and it would have been difficult for Mr. Austin to avoid colliding with his vehicle. Mr. Lindsay stated that if a collision had occurred, "he very likely could have absolutely run over me" (Tr. 39). Under all of these circumstances, and given the prevailing wet and slippery road conditions, Mr. Lindsay concluded that the truck was being operated at an unreasonable speed. He issued the citation and charged the respondent with a violation of section 77.1607(c), because of his belief that the truck was being operated at a speed which was not prudent or consistent with the existing wet and slippery conditions of the roadway.

There is no direct evidence as to precisely how fast Mr. Austin was driving on the day in question. Inspector Lindsay testified that he has "clocked" the trucks traveling at 20 to 25 miles an hour coming down the grade in question under normal dry road conditions, but that after the incident in this case, the drivers drive slower (Tr. 74, 82). Mr. Ashby agreed that there is a potential for an accident or a fatality when the trucks are on the road in question and that he has cautioned drivers to go

slower on wet days (Tr. 141). Mr. Austin confirmed that after the incident in question, he was cautioned to drive slower, but that he continued "in a manner" to drive "at a normal speed" (Tr. 108). He believed that his speed on the day in question was typical of his speed on any other "normal rainy day" (Tr. 111-112).

Mr. Austin conceded that there was a need to drive slower under wet road conditions, and he confirmed that when driving at a "normal rate of speed" he can "judge the rock trucks", but he acknowledged the need to be aware of the presence of other vehicles that are normally not on the roadway (Tr. 97). Mr. Austin asserted that he was operating the truck "in a normal safe capacity", and he stated that the truck cannot travel slower than five (5) miles an hour and that it would have been impossible for him to go any slower "without plumb stopping the truck and just barely letting the wheels turn at a degree that would take me all day to move" (Tr. 111).

Mr. Austin's suggestion that he was travelling at a slow rate of speed and that if he travelled any slower, the truck would probably have come to a stop if it reached five miles an hour is rejected as less than credible. Based on the credible testimony of the inspector, I conclude and find that Mr. Austin was probably travelling in excess of 20 to 25 miles and hour down the slippery and wet inclined roadway in question and that when he initially observed the inspector's vehicle heading uphill approaching the curve in the road, he applied his brakes. This sudden braking action, which caused the wheels to lock, coupled with the automatic stopping action of the transmission retarder, resulted in the truck going into a slide, and it was sliding as it passed dangerously close to the inspector's vehicle, nearly colliding with it before slowing down or stopping after it was well past the inspector's vehicle.

Mr. Austin testified that he sounded his air horn when he initially observed the inspector's vehicle in the middle of the roadway coming up the hill before the inspector moved completely to the right hand side of the road as far as he could (Tr. 93-94). If Mr. Austin were travelling as slow as he suggested, I believe that one can reasonably conclude that he should have been able to at least slow down his empty truck, or at least control it from sliding and nearly colliding with the inspector's vehicle which was "tucked in" on the right inside of the roadway curve next to the berm. However, this was not the case. Under all of these circumstances, I conclude and find that the preponderance of the credible evidence presented by the petitioner establishes that the cited truck in question was being operated at a speed which was not prudent or consistent with the existing grade, traffic, and roadway conditions. Accordingly, I

further conclude an find that the petitioner has established a violation of 30 C.F.R. 77.1607(c), and the contested citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designed significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc, 7 FMSHRC 1125, 1129, (August 1985) the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine

involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Lindsay based his "S&S" finding on the fact that he had a near collision with the truck being operated by Mr. Austin. He testified that Mr. Ashby told him that he "was lucky" that he was not run over by the truck, and Mr. Ashby alluded to a prior incident involving another truck on the same haulage road under circumstances similar to the instant case (Tr. 51-55). Mr. Lindsay also took into consideration prior MSHA accident reports, the fact that other vehicles, such as contractor and service vehicles, and inspectors vehicles, used the roadway, and he was concerned that in the normal cause of mining operations, a truck driver operating a truck too fast for the prevailing road conditions would be involved in an accident. Under the circumstances, Mr. Lindsay concluded that "there was a pretty good probability that at some point an accident of this kind could happen", and that if it did, it could result in serious and fatal injuries (Tr. 47).

After careful review and consideration of all of the evidence in this case, I conclude and find that a measure of danger to safety was contributed to by the violation, and that it is reasonably likely that the operation of a truck on an inclined roadway which is wet an slippery at a speed which not prudent or consistent with the prevailing road conditions, and with the presence of other vehicles on the roadway, would reasonably likely result in an accident or collision. If this were to occur, I further conclude that it is reasonably likely that it would result in injuries of a serious or fatal nature. Under all of these circumstances, I conclude and find that the inspector's "S&S" finding was reasonable and justified, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period beginning on October 3, 1990, the respondent paid civil penalty assessments totally $2,036, for 49 violations, all of which were issued as section 104(a) citations. Thirty-seven (37) of the citations were assessed under MSHA's "regular formula" assessment procedures, and twelve (12) were assessed under MSHA's "single penalty" procedures. None of the violations were "specially assessed".

I take note of the fact that the respondent's compliance record does not include any prior violations of 30 C.F.R. 77.1607(c). I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increase in the civil penalty assessment which I have made for the contested violation in this case.

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

The parties have agreed that the respondent is a small coal tipple operator (Tr. 5). The pleadings filed in this case include an MSHA proposed assessment Form 1000-179, which reflects "2,161 production tons or hours worked per year" and the size of the mine as "o production tons or hours worked per year". A copy of a "Proposed Assessment Data Sheet" (Exhibit P-7), reflects that for the calendar year 1989, the respondent's total "Hrs/tonnage" was 2,161, and no hours or production for calendar year 1990.

Respondent's owner and operator James Ashby stated that any civil penalty assessments in this case would have to be paid from his personal funds and that the company has no money to pay. He stated that he currently employs fourteen people and operates one-to-three days a week processing 7,500 to 23,000 tons of coal through the preparation plant and tipple. However, the coal has been stockpiled awaiting shipment to the Pittston Coal Company which is his only customer at this time. Although the haulage trucks drivers are employed by his company, the Pittston Company permits him to use their trucks. He confirmed that he does not own or operate any other mining operations, and that when he is in full production he processes approximately 45,000 to 50,000 tons a month (Tr. 12-13; 134-137).

Mr. Ashby further indicated that he had previously agreed to pay the two $500 civil penalties for the respirable dust violations and that he advised an MSHA official that "I've got no problem with that. I'll pay it" (Tr. 11). In response to a question as to whether or not the payment of the full amount of civil penalties assessed for the three citations in question would put him out of business, Mr. Ashby replied "It would be tough. It would hurt a lot" (Tr. 9).

After careful review and consideration of all of the evidence in this case, I cannot conclude that the payment of the civil penalty assessments in this case will put the respondent out of business. However, I have considered the respondent's unrebutted assertions with respect to his current mining operation and have adjusted the initial proposed civil penalty assessment for Citation No. 3352852.

Negligence

The evidence establishes that Mr. Ashby had posted some speed limit and other signs on his property and that he had cautioned Mr. Austin to be careful and to keep his truck under control while driving the haulage roads (Tr. 114). Mr. Ashby confirmed that he fired his own son for driving too fast on the property, and Mr. Austin confirmed that Mr. Ashby conducted

regular safety meetings with drivers and instructed them to drive carefully. Inspector Lindsay confirmed that he based his "moderate" negligence finding on the fact that the respondent may not have been aware of the fact that Mr. Austin was driving too fast for the existing road conditions. Under all of these circumstances, I conclude and find that the cited violative condition was the result of a moderate-to-low degree of negligence on the part of the respondent and I have taken this into consideration in the civil penalty assessment which I have made for the violation.

Gravity

Based on all of the testimony and evidence adduced in this case, including my "S&S" findings, I believe that the inspector was most fortunate in avoiding a collision with the truck in question. Accordingly, I conclude and find that the violation was very serious.

Good Faith Compliance

The evidence establishes that the respondent timely abated the violation in good faith, and the inspector confirmed that the respondent responded in a positive and cooperative manner by instructing all truck drivers to maintain safe speeds under all roadway conditions. I have taken this into consideration in this case.

Civil Penalty Assessments

As noted earlier, the respondent agreed to settle the two respirable dust violations by paying the full amount of the proposed civil penalty assessments. With respect to the remaining citation, which I have affirmed, and on the basis of the foregoing findings and conclusions concerning the civil penalty criteria found in section 110(1) of the Act, I conclude and find that a civil penalty assessment of $125 is reasonable and appropriate.

ORDER

The respondent IS ORDERED to pay the following civil penalty assessments within thirty (30) days of this decision and order. Payment is to be made to MSHA, and upon receipt thereof, this matter is dismissed.

Citation No.	Date	30 C.F.R. Section	Assessment
9975365	10/11/90	71.208(a)	$500
9975366	10/11/90	71.208(a)	$500
3352852	10/4/90	77.1607(c)	$125

George A. Koutras
Administrative Law Judge