

CCASE:  
SOL (MSHA) V. MOUNTAINTOP RESTORATION  
DDATE:  
19940223  
TTEXT:

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,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-505
Petitioner	:	A. C. No. 15-17241-03501
v.	:	
	:	Docket No. KENT 93-638
MOUNTAINTOP RESTORATION, INC.,	:	A. C. No. 15-17236-03505
Respondent	:	
	:	Docket No. KENT 93-961
	:	A. C. No. 15-17236-03508

DECISION

Appearances: Darren L. Courtney, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Danny Patton, Safety Director, Mountaintop Restoration, Inc., Paintsville, Kentucky, for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Mountaintop Restoration, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petitions allege 24 violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, I find that Mountaintop committed all of the violations as alleged.

The cases were heard on December 22, 1993, in Paintsville, Kentucky. Inspector Danny Tackett testified on behalf of the Petitioner. Mountaintop's Safety Director, Danny Patton, testified on behalf of the Respondent.

FINDINGS OF FACT

With respect to Docket Nos. KENT 93-505 and KENT 93-638, the Respondent admitted that the violations had occurred as alleged, i.e. that the violations were committed by Mountaintop and that they were of the gravity and degree of negligence indicated on the citations (Tr. 8-9). Therefore, the only issue at the hearing with regard to the 23 citations in those two dockets was the assessment of appropriate civil penalties for the violations.

~401

The evidence concerning Citation 4029809 in Docket No. KENT 93-961 was undisputed. Inspector Tackett testified that he went to Mountaintop's Deep Mine No. 1 during the midnight shift on April 8, 1993, to perform a quarterly inspection. The mine's check-in/check-out board indicated that two people were in the mine. In fact, there were six people in the mine, none of whom were the two listed on the board. The two listed on the board worked on the day shift.

As a result, Inspector Tackett issued Citation 4029809 which stated that:

The operators (sic) established check in - check out system was not kept in an accurate condition because (6) employees of the owl shift were underground and not checked in [,] (2) day shift employees were check in (sic) but were not on mine property.

The violation was promptly abated by placing the employees' tags on the proper place on the check-in/check-out board.

Mr. Patton testified that all employees are instructed on the proper use of the check-in/check-out board, but that it is hard to get them to use it. He said that the mine is wet, muddy and sloppy so that the first thing a miner thinks about coming out of the mine is getting out of his muddy clothes and going home. He also said that because of the condition of the mine they had a hard time keeping employees.

FURTHER FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

Section 75.1715 of the Secretary's Regulations, 30 C.F.R. 75.1715, is taken verbatim from Section 317(p) of the Act, 3 U.S.C. 877(p), and requires, in pertinent part, that:

Each operator of a coal mine shall establish a check-in and check-out system which will provide positive identification of every person underground, and will provide an accurate record of the persons in the mine kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazard.

Obviously, Mountaintop's check-in/check-out system did not provide positive identification of the six men underground on the midnight shift on April 8, 1993. Nor did it provide an accurate record of the persons in the mine. Accordingly, I conclude that the Respondent violated Section 75.1715 of the Regulations.

The inspector determined that this violation was the result of high negligence on Mountaintop's part. He based this on the fact that the company had been cited for the same violation at the same mine just three months earlier (Gov. Ex. 2). In fact, the current violation involved some, if not all, of the same employees as the previous one (Tr. 18). Based on this evidence, I agree that this violation resulted from the Respondent's high negligence.

#### CIVIL PENALTY ASSESSMENT

The Secretary has proposed a total of \$3,150.00 in penalties for the 24 citations in these three cases. With respect to the statutory criteria to be considered in assessing civil monetary penalties, which is set out in Section 110(i) of the Act, 30 U.S.C. 810(i), the parties have stipulated that: (a) Deep Mine No. 1 is a small mine with an average annual production of 62,832 tons, (b) all of the mines owned by B. W. McDonald (the owner of Mountaintop Restoration) have an average annual production of between 1,500,000 and 2,000,000 tons and (c) the Respondent demonstrated good faith in abating the violations (Tr. 4-5).

The Respondent asserts that payment of the proposed forfeitures will adversely affect its ability to continue in business. It further specifically challenges the appropriateness of the special assessment for Citation 4029809.

The burden of establishing that payment of civil penalties would adversely affect a company's ability to stay in business is on the company. See *Sellersburg Stone Co. v. Fed. Mine Safety and Health*, 736 F.2d 1147, 1153 n.14 (7th Cir. 1984). To meet this burden, Mountaintop has offered an income statement for the period ending December 31, 1992 (Resp. Ex. A), a balance sheet and income statements for the period ending August 31, 1993 (Resp. Ex. B), and three Payment Default Notices from Caterpillar Financial Services Corporation dated December 2, 1993 (Resp. Exs. C, D and E). In addition, Mr. Patton testified that Mountaintop is no longer operating Deep Mine No. 1 (Tr. 29).

Mountaintop's evidence fails to demonstrate that it's ability to continue in business would be adversely affected by imposition of the proposed forfeitures. The financial statements

~403

are unaudited. Although Mr. Patton stated that they had been prepared by "[t]he company's CPA" (Tr. 28), they are not only not certified, they are not even signed by the "CPA." In fact, Mountaintop and its owner, B. W. McDonald, have steadfastly refused to provide any meaningful information concerning its or its owners financial situation (Tr. 30-33, Gov. Exs. 3 and 4). Consequently, I conclude that imposition of the proposed forfeitures would not adversely affect the company's ability to remain in business.

Mountaintop argues that the proposed \$500.00 penalty for Citation 4029809 is unwarranted for what is essentially a technical violation (Tr.23-24, 38). Section 100.5 of the Regulations, 30 C.F.R. 100.5, permits the special assessment of civil penalties when any of eight special circumstances are present. Of those eight circumstances, this case could only come within the purview of Section 100.5(h), "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

I conclude that the special assessment was appropriate in this case. Mountaintop committed the same violation at least twice within four months. As Mr. Patton stated: "It's a Government law. You have to abide by the Government laws. And it's a common notice issued at every underground coal mine" (Tr. 25). He further acknowledged that most mines made sure the check-in, check-out procedure was followed by having someone monitor the shifts entering and leaving the mine (Tr. 25). Yet Mountaintop's concern for this common problem was so lacking that not one miner had properly checked in for the midnight shift, the exact same shift that had previously been cited. In the event of a disaster, there was no way that Mountaintop could be sure who was, or was not, in the mine.

Mountaintop has not demonstrated that the proposed civil penalties would adversely affect its ability to remain in business, nor has it shown that the proposed \$500.00 penalty for Citation 4029809 was unmerited or excessive. Taking into consideration all of the criteria in Section 110(i) of the Act, I conclude that the \$3,150.00 in civil penalties which the Secretary has proposed in these cases is condign.

#### ORDER

Citation Nos. 4029511, 4029513, 4027026, 4027027, 4027028, 4027029, 4027030, 4027031, 4027032, 4027034, 4027036, 4027037, 4027040, 4030222, 4030223, 4030224 and 4030225 in Docket No. KENT 93-505; Citation Nos. 4030256, 4030257, 4030258, 4030259,

~404

4030401 and 4030403 in Docket No. KENT 93-638; and Citation No. 402809 in Docket No. KENT 93-961 are AFFIRMED as written. Mountaintop Restoration, Inc. is ORDERED to pay civil penalties in the amount of \$3,150.00 for these violations within 30 days of the date of this decision. On receipt of payment, these proceedings are DISMISSED.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Darren Courtney, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Danny Patton, Mountaintop Restoration, Inc., P.O. Box 940, Paintsville, KY 41240 (Certified Mail)

/lbk