

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 16, 2015

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

v.

HIDDEN SPLENDOR RESOURCES, INC.
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2009-209
A.C. No. 42-02074-168807-02

Horizon Mine

DECISION ON REMAND

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration (“MSHA”) against Hidden Splendor Resources, 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 “Mine Act”). Following an evidentiary hearing in this and other Hidden Splendor cases, I issued my decision on the merits. 34 FMSHRC 3310 (Dec. 2012). The Secretary appealed several issues to the Commission. On December 23, 2014, the Commission issued its decision. 36 FMSHRC _____. It affirmed and reversed portions of my decision. The Commission also remanded one issue to me, as discussed below.

In my decision, I affirmed Citation No. 6685833 in all respects. 34 FMSHRC at 3378-80. I assessed a civil penalty of \$5,000 whereas the Secretary proposed a penalty of \$6,458. The Commission remanded “the penalty associated with Citation No. 6685833 [to me] for further explanation consistent with” its decision. Slip. op at 7. The Commission did not vacate the penalty I assessed but asked for a more detailed explanation.

The citation alleged that there was an area of bad roof in a secondary escapeway in the Horizon Mine in violation of 30 C.F.R. § 75.202(a). I affirmed the violation, determined that the violation was of a significant and substantial nature (S&S), and that the violation was the result of Hidden Splendor’s high negligence. I rejected Hidden Splendor’s argument that the citation was duplicative of an unwarrantable failure order that the inspector also issued.

I assessed a penalty of \$5,000.00 based upon the six penalty criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). In accordance with the Commission’s order of remand, my supplementary analysis is as follows:

1. History of Previous Violations

I find that Hidden Splendor had a moderate history of previous violations for an underground coal mine of its size. Between September 2, 2006 and August 2, 2008, Hidden Splendor was issued 392 citations and orders, 81 of which were designated as S&S by the Secretary. (Ex. G-89). At the time of the hearing, it had paid the penalties for 149 of these citations and orders. Those that remained unpaid were designated as “Treasury” or “Chapter 11” on the Secretary’s Assessed Violation History Report under the column entitled “Last Status.” *Id.* On Exhibit A of the Petition for Assessment of Civil Penalty, the Secretary listed the history at 218. The Secretary assigned 12 history points under 30 C.F.R. § 100.3 (Table VI), which is in the middle of the range for history.

2. Appropriateness of the Penalty to the Size of the Mine Operator

The mine was a small to medium underground coal mine. The Secretary assigned 10 penalty points for the size of the Horizon Mine and 4 penalty points for the size of the controlling entity. (Exhibit A to Petition for Assessment of Penalty; Section 100.3 Tables I and II).

3. Whether the Mine Operator was Negligent

As stated in my opinion, I determined that Hidden Splendor’s negligence was high. 34 FMSHRC at 3380.

4. The effect of the Penalty on the Operator’s Ability to Continue in Business

I find that Hidden Splendor did not establish that the \$5,000 penalty I assessed would negatively affect its ability to continue in business. At the time of the hearing, Hidden Splendor stipulated that, if paid in monthly installments, the proposed penalties would not affect its ability to continue in business. 34 FMSHRC at 3381. After the hearing record was closed but before I issued my decision, Hidden Splendor requested to reopen the record so it could introduce evidence concerning its ability to continue in business. I denied the motion. 33 FMSHRC 3249 (December 2011). Hidden Splendor argued that the SEC filings of America West Resources, Inc., the parent company of Hidden Splendor, revealed that its financial position had deteriorated since the date of the hearing. America West Resources has now filed for bankruptcy under Chapter 11 of the Bankruptcy Code. I am not aware of the current status of this proceeding.

5. The Gravity of the Violation

I determined that the violation was serious and S&S. I affirmed Inspector Bloomer’s determinations that a fatal accident was reasonably likely assuming continued normal mining operations and that one person would be affected by the violation.

6. The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

The evidence established that Hidden Splendor demonstrated good faith in achieving rapid compliance with the safety standard.

ANALYSIS

Considering section 110(i) of the Mine Act, I find that a penalty of \$5,000.00 is appropriate for Citation No. 6685833. I am not bound by the penalty proposed by the Secretary or by the Secretary's penalty point system. "[N]either the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984). Instead, I must consider the six penalty criteria in section 110(i) of the Mine Act based upon the evidence that is presented at hearing.

The initial penalty proposed by the Secretary is based, in large part, upon the observations of the issuing MSHA inspector. He enters his determinations on the citation form and his determinations are assigned penalty points by MSHA's Office of Assessments. By necessity, an MSHA inspector spends limited time at each location while performing a regular E01 inspection. He must quickly evaluate the area and then continue his inspection. MSHA inspectors are experienced, well trained, and generally draw the correct conclusions in an efficient manner. Nevertheless, they do not have the time to deliberate upon each of the penalty factors set forth on the citation form. Commission judges, however, review the evidence presented by both parties and have the experience and legal expertise to thoroughly consider the application of each penalty criterion. This analysis is not a mechanical, penalty point calculation.

I considered a number of factors in assessing the \$5,000 penalty. In dollar terms, the difference between the proposed penalty and the penalty I assessed was not significant. The size of the mine and the company's financial condition were two of the factors I relied upon when assessing the penalty. The Horizon Mine was not a large underground coal mine. It was not secure financially. America West Resources was not a large national mining corporation. America West Resources subsequently filed for bankruptcy in early 2013. Information at MSHA's website shows that the mine has not produced any coal since the third quarter of 2012 and that the mine has been idled since that time. Although Hidden Splendor did not meet its burden to establish that a civil penalty would adversely affect its ability to continue in business, I considered the size of the mine, the size of the operator, and the financial condition of the operator at that time in my penalty assessment.¹

The level of negligence demonstrated by Hidden Splendor was high with respect to this violation.² There was no showing, however, that management knew about the hazardous condition and failed to abate it. Although I rejected Hidden Splendor's argument that the citation duplicated Order No. 6685828, that order involved the same roof conditions and I assessed a

¹ I note that according to information at MSHA's website, Hidden Splendor is delinquent with respect to most of the penalties assessed over the past several years. Given its bankruptcy filing, it is not clear if the Secretary will be able to collect the penalty I assessed for the subject citation.

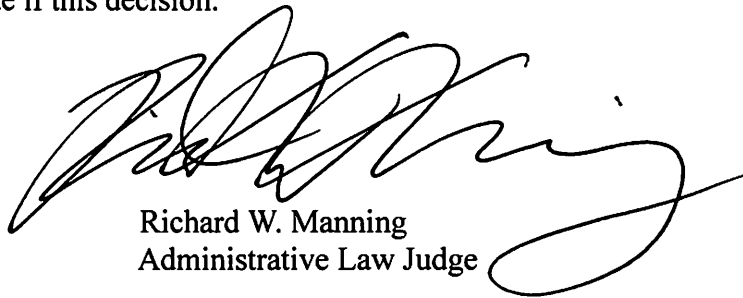
² Although I cited the Secretary's definition of "high negligence" elsewhere in my opinion, I am not bound by that definition. 34 FMSHRC 3312; 30 C.F.R. § 100.3(d). See *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 n. 4 (Aug. 2014); *Hidden Splendor Resources*, 36 FMSHRC ___, Slip op. at 11, Commissioner Cohen concurring (Dec. 23, 2014).

penalty of \$60,000 for a violation of section 75.380(d)(1) based upon my unwarrantable failure and high negligence findings. Thus, a significant civil penalty was assessed for the hazardous roof conditions. Finally, the hazard presented by the condition set forth in Citation No. 6685833 would have only affected one miner, the weekly examiner. Weekly examiners are trained to look for bad roof as they make their rounds.

My assessment of a penalty of \$5,000 was fair, reasonable and consistent with section 110(i) of the Mine Act.³

ORDER

I assess a civil penalty of \$5,000 against Hidden Splendor Resources for the violation set forth in Citation No. 6685833. Hidden Splendor is **ORDERED** to pay that amount to the Secretary within 30 days of the date of this decision.⁴



Richard W. Manning
Administrative Law Judge

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³ After I received the remand order from the Commission I asked the parties whether they wished to participate in this remand proceeding. Counsel for the Secretary indicated that she would not provide any input and counsel for Hidden Splendor did not respond to my inquiry.

⁴ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. The payment should reference WEST 2009-209, A.C. No. 168807.