

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 25 2016

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

v.

LOCUST GROVE, INC.,
Respondent

CIVIL PENALTY PROCEEDING:

Docket No. KENT 2015-296
A.C. No. 15-19638-372766

Mine: Ben's Branch Mine

DECISION AND ORDER

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for Petitioner

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLX,
Lexington, Kentucky, for Respondent

Before: Judge David Barbour

In this proceeding arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. §§ 815, 820, the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of civil penalties against Locust Grove, Inc. ("Locust Grove"), a corporation that operates Ben's Branch Mine, a surface bituminous coal mine located in Perry County, Kentucky. The Secretary charges Locus Grove with two violations of the Secretary's mandatory safety standards for surface coal mines, namely 30 C.F.R. § 77.1730(a) and 30 C.F.R. § 77.1001. Section 77.1713(a) requires a certified person designated by the operator conduct an examination for hazardous conditions in each active working area of a mine at least once during each working shift. It also requires any hazardous condition to be reported and corrected.¹ Section 77.1001 requires the operator of a surface coal mine to strip loose, hazardous material a safe distance from the top of

¹ The standard states:

At least once during each working shift, or more often if necessary for safety, each activating working area shall be examined by a certified person designated by the operator . . . for hazardous conditions and any hazardous conditions noted during such examinations shall be corrected by the operator.

a highwall.²

The Secretary charges that on June 27, 2014, MSHA Inspector Larry Stubblefield found that Locus Grove failed to strip loose, hazardous material a safe distance from the top of the active highwall at its Ben's Branch Mine. The Secretary asserts that Inspector Stubblefield observed numerous rocks of various sizes lying or hanging near the crest of the highwall and saw three miners working approximately 10 feet from its bottom. The inspector found that the condition was highly likely to result in the miners' deaths and was a significant and substantial contribution to a mine safety hazard (an "S&S" violation) caused by the company's reckless disregard and unwarrantable failure to comply with section 77.1101. In addition, the Secretary charges that the preshift and onshift examination records for the first and second production shifts of June 23, 2014, through the inspection of June 27 did not note the presence of the loose rocks at the top of the highwall, an indication that the examinations were inadequate and therefore in violation of section 77.1713(a). The inspector found that the inadequate examination were highly likely to result in three fatalities (the same three miners who Inspector Stubblefield saw working within 10 feet of the bottom of the highwall). The inspector also found the alleged violation was caused by Locust Grove's reckless disregard and unwarrantable failure to comply with of section 77.1713(a). Inspector Stubblefield cited the alleged violation of section 77.1713(a) in a citation issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1)), and the alleged violation of section 77.1001(a) in an order issued pursuant to the same section of the Act. The Secretary proposed penalties of \$178,900 for each alleged violation. The Secretary then filed the instant petition seeking assessment of the penalties as proposed. For its part, the company denied it committed the alleged violations and challenged Inspector Stubblefield's findings and the Secretary's penalty proposals.

After Locust Grove's answer was received, the Commission's Chief Judge assigned the case to the court, which in turn ordered counsels to confer to determine if all or part of the case could be settled. Counsels worked diligently to resolve their differences but were unable to do so. Therefore, the case went forward as scheduled in Corbin, Kentucky. At the hearing the Secretary's counsel stated that the Secretary would call Inspector Stubblefield as a witness. Counsel for the company stated he would call three management officials. The Secretary moved that the witnesses be sequestered. The motion was granted, and the inspector was called to the stand. Tr. 22-23.

The inspector explained the conditions he found on June 27, 2014, and he stating the reasons why he made his various findings. However, as his testimony developed, it became clear that the inspector had serious second thoughts about the number of miners affected by the cited

² The standard states in pertinent part:

Loose hazardous material shall be stripped for a safe distance from the top of pit[s] or highwalls[.]

conditions, the degree of likelihood that the conditions would result in an injury or injuries, and about management’s degree of culpability for the cited conditions. Therefore, after counsel for the Secretary finished her direct examination and before counsel for Locust Grove began his cross examination, the court asked counsels to approach the bench for a side bar discussion. When the discussion concluded a recess was taken and counsels left the court room to continue discussing the case. Upon their return, counsel for the Secretary announced that counsels agreed to settle the case by modifying the gravity and negligence findings on the citation and order from the conditions making it highly likely three persons would suffer fatal injuries to the conditions making it reasonably likely one person would suffer a fatal injury, and to change the allegations of reckless disregard to high negligence, but to retrain the findings of unwarrantable failure. Counsel for the Secretary explained that the changes warranted significant reductions in the proposed penalties, to wit \$7,500 for each violation. Tr. 72-74. After the agreement was explained, the settlement was approved on the record by the court. Tr. 74.

ORDER

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>	<u>Date</u>
8390397	6/27/24	77.1713(a)	\$178,900	\$7,500
8390398	6/27/24	77.1001	\$178,900	\$7,500

The settlement has been approved (Tr. 74) and within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 8390397 and Order No. 8390398 at line 10 by deleting the “highly likely” findings and making them “reasonably likely,” by deleting the number of persons affected as three and making them one, and at line 11 by deleting the “reckless disregard” findings and making them “high.” In addition, within the same 30 days, Locust Grove **IS ORDERED** to pay a civil penalty of \$7,500 for each violation, a total of \$15,000.³ Upon modification of the citation and order and payment of the penalties, this proceeding is **DISMISSED**.

David F. Barbour
 David F. Barbour
 Administrative Law Judge

³ Payment shall be sent to: The Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, Missouri 63197-0290.

Distribution: (Certified Mail)

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