FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-216
Petitioner	:	A. C. No. 36-01555-03508
v.	:	
	:	Stiteler Strip
JOSEPH ROSTOSKY COAL COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C.§815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Joseph Rostosky Coal Co. ("the company") for an alleged violation of 30 C.F.R. §48.29(c). The standard is one of several mandatory safety standards pertaining to the training and retraining of miners. The standard requires that "[c]opies of training certificates for currently employed miners shall be kept at the mine site for 2 years, or for 60 days after termination of employment." The Secretary alleges the violation occurred at the company's Stiteler Strip Mine, a surface coal mine located in Washington County, Pennsylvania. She proposes the company be assessed a civil penalty of $55 for the alleged violation.

In answering the Secretary, the company denies that it violated the standard. It asserts that it cannot keep copies of the certificates at the mine site, due to vandalism. Therefore, it keeps copies at the home of its owner. The company also argues alternatively that the proposed penalty is excessive.

Following the filing of the company's answer, the matter was scheduled for trial. In a September 29, 1999 teleconference, counsel for the Secretary and the representative of the company advised me they believed they could stipulate to all of the pertinent facts, except those relating to the effect of any penalty on the company's ability to continue in business (see Judge's Note To File (September 29, 1999)). I advised the parties that there was no need for an evidentiary hearing, and if they presented me with stipulations and such other documentary evidence as they might have bearing on the ability to continue in business criterion, I would issue a decision based on the written record. The parties indicated they preferred to proceed in this

manner, and they effectively waived their right to a hearing.[1]

On October 6, 1999, I received a copy of the parties' stipulations. A copy of Joseph Rostosky's 1998 Schedule C, in which he reported to the Internal Revenue Service the company's profit or loss from that year, was included as an attachment to the stipulations (Stip.).

THE ISSUES

The issues are whether the company violated section 48.29(c), and, if so, the amount of the civil penalty that must be assessed.[2]

THE VIOLATION

Citation No. 3937426 states in pertinent part, "Copies of training certificates . . . [were] not available at the mine site for inspection" (Stip. Exh. 1 at 1). The parties stipulated that the violation existed as charged but acknowledged as a fact, and as the answer asserted, that the copies were not kept at the mine because of the possibility of vandalism (Stip. 7). Based on the stipulations, I find the referenced copies were not at the mine as required and that the violation existed as charged.

THE PENALTY CRITERIA

In assessing a civil penalty, I must consider the criteria set forth in section 110(i) of the Act (30 U.S.C. §820(1)(i)).

The parties agreed that in the 24 months prior to March 25, 1999 (the date Citation No. 3937426 was issued), the company had one assessed violation (Stip. 9; Stip Exh. 2). This is a negligible prior history.

The parties further agreed that MSHA documents showed the mine's annual production of

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[1]Although the company's owner, Joseph Rostosky, entered an appearance on behalf of the company, he was not available for the teleconference and the company was represented by his wife. Mrs. Rostosky assured counsel for the Secretary and me that she spoke for the company unless we received a subsequent notification from Joseph Rostosky nullifying her representations and agreements. No such notification was received, and Mr. Rostosky signed the stipulations upon which this decision is based.

[2]As I explained to Mrs. Rostosky, if I find a violation occurred, I have no authority to waive the civil penalty (30 U.S.C. 820(a)).

coal was approximately 16,647 tons (Stip. 10; Stip. Exh. 3). They recognized the company believes that its production was less and that the company was free to submit evidence to that effect. Because the company has not submitted such evidence, I find that the mine's annual production was 16,647 tons and that the operator is small in size.

The parties do not dispute the gravity and negligence findings made by the inspector -- that the company's negligence was "low", that any resulting injury or illness would involve "no lost workdays", that two persons were affected by the violation, and that the violation was not a significant and substantial contribution to a mine safety hazard (Stip. 8). Therefore, I find that the violation was due to the company's low negligence and that the violation was not serious.

In the teleconference, I explained to the company's representative that the burden of proof with regard to the ability to continue in business criterion was on the company. The company's 1998 Schedule C shows that Joseph Rostosky reported a profit of $5,973 for 1998, after reporting a gross income of $254,923 and total expenses of $247,268. (Of the total expenses, $17,505 was depreciation (Stip. at 4).) The financial data establishes that a modest penalty of the amount proposed will not effect on the company's ability to continue in business.

Finally, although the parties did not stipulate as to the good faith of the company in attempting to achieve rapid compliance, the violation was terminated when the company timely moved copies of the training certificates to the mine. This constituted good faith compliance (Stip. Exh. 1 at 2).

PENALTY ASSESSMENT

I credit the company's concerns about vandalism at the mine. The company's representative explained repeatedly that the problem had resulted in the loss of company property. She was sincere in her belief that it was better to keep the company's records (including copies of its training certificates) at the Rostosky home rather than risk their destruction at the mine. Because the standard is specific in requiring copies of the certificates (and other records) to be kept at the mine site, the company may want to pursue a modification of section 48.29(c) (and other standards) to allow for the retention of documents elsewhere than at the mine (30 U.S.C. §811(c)). However, this is a matter for the company and the Secretary to resolve.

Given the fact that the company's negligence was low and the violation was not serious, and given the small size of the company, its minimal history of previous violations, and its good faith in complying, I conclude that a nominal civil penalty of $25 is warranted.

ORDER

Within 30 days of the date of this decision, the company **WILL PAY** the Secretary $25 for its violation of section 48.29(c) as set forth in Citation No. 3937426, and upon payment of the penalty this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution:

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