

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 3, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-73
Petitioner	:	A.C. No. 36-01555-03507
v.	:	
	:	Stiteler Strip
ROSTOSKY COAL COMPANY,	:	
Respondent	:	
	:	

DECISION

Appearances: Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent;
Mr. Joseph Rostosky, Rostosky Coal Company, Monongahela, Pennsylvania, *pro se*.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Rostosky Coal Company ("Rostosky Coal"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

A hearing was held in Washington, Pennsylvania in which Joseph Rostosky represented himself, assisted by his son, Peter Rostosky, who is co-owner. The Secretary's post-hearing brief is of record. For the reasons set forth below, the citation and order at issue shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. Stiteler Strip is leased and operated by the Respondent in this case, Rostosky Coal Company.

2. Stiteler Strip is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over the proceedings, pursuant to section 105 of the Act.

4. The citations and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date and place stated therein and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits, but not to the relevance or the truth of the matters asserted therein.

6. The operator had one (1) assessed violation for the twenty-four month period prior to issuance of the subject citation.

7. The imposition of the proposed civil penalty will have no effect on the Respondent's ability to remain in business.

8. Rostosky Coal Company produces approximately 17,628 tons of coal annually in all of its operations.

9. Stiteler Strip produces 17,628 tons of coal annually.

II. Factual Background

Rostosky Coal operates and leases the Stiteler Strip, a surface coal mine, in which father and son co-owners, Joseph and Peter Rostosky, are the primary working employees, with some aspects of the mining process, such as blasting and "gopher" duties, subcontracted to other individuals (Tr. 85, 183, 190, 195-98, 203-04, 211).

The record establishes that MSHA Inspector Randy Myers, assigned to the Kittanning Field Office, was "lent" to the Waynesburg Field Office to inspect the Stiteler Strip, in order for Waynesburg to complete mandatory inspections of the mines under its jurisdiction by March 31, 1998 (Tr. 23-25, 46, 49, 62-63).

On March 17, 1998, Inspector Myers arrived at the Stiteler Strip at 6:00 a.m. to conduct a Triple A inspection of the mine, including noise and dust sampling (Tr. 23-31). When the Rostoskys arrived some forty minutes later, Peter Rostosky remained in the truck while his father opened up the mine (Tr. 26-28). When Inspector Myers approached Joseph Rostosky at the mine entrance, identifying himself and his mission, Rostosky became visibly agitated and argumentative and, joined by his son who, in like fashion but lesser in degree, supported his

father's position, denied the inspector entry to the mine (Tr. 28-31). It is undisputed that the Rostoskys did not ask to see Myers' credentials and believed him to be an MSHA inspector, despite the fact that they had never met him before (Tr. 141-42). Consequently, without issuing a citation or order, Myers left the mine at approximately 7:00 a.m. (Tr. 32).

Inspector Myers proceeded to the Washington Field Office, reported the incident to Supervisory Inspector Robert Newhouse, and was instructed by Newhouse to return to Kittanning to write his field notes and a memorandum of what had transpired that morning (Tr. 33; Exs. G-1, G-2).

On instructions from MSHA District Manager Joseph Garcia, Inspector Newhouse, accompanied by Inspector William Wilson, arrived at the Stiteler Strip around 9:15 the same morning, for the purpose of investigating the earlier incident and proceeding with an inspection by Wilson, operator permitting (Tr. 121-23). Upon entering the pit, the inspectors were met by Joseph Rostosky, very angry to the point of screaming and poking Inspector Newhouse in his chest, who asserted, among other things, that MSHA should have assigned an inspector, known to the Rostoskys, from the neighboring Washington Field Office (Tr. 76-78, 86-87, 127-28, 187-90). As a consequence of being denied access to inspect the mine, Inspector Wilson issued 104 (a) Citation No. 3681379 to Joseph Rostosky, alleging a non-significant and substantial violation of section 103(a) of the Act, describing the conduct as follows:

On Tuesday, March 17, 1998, Joseph Rostosky, operator, refused to allow Randy Myers, an authorized representative of the Secretary, entry into the Stiteler Strip Mine for the purpose of conducting an inspection of the mine, pursuant to Section 103(a) of the Act. Mr. Rostosky stated that the Federal Inspector could not enter the mine to conduct his inspection

(Tr. 79-81; Ex. G-4). Joseph Rostosky, in turn, tore up the citation and threw it to the ground (Tr. 82). Peter Rostosky then called District Manager Garcia from the pit, and despite Garcia's explanation to him that MSHA was shorthanded and that the Rostoskys were required by law to permit inspection, irrespective of their level of comfort with MSHA's choice of inspector, the Rostoskys remained steadfast in their refusal to allow the inspectors access to the mine (Tr. 92-93, 202-03). After retreating from the property to their government vehicle and allowing the Rostoskys thirty minutes to cool off and reconsider their position, Inspectors Newhouse and Wilson returned to the pit and renewed their request to conduct an inspection (Tr. 93). Upon the Rostoskys' continued refusal, Inspector Wilson issued 104 (b) Order No. 3681380, for failure to abate the citation, describing the conduct in the following manner:

Joseph Rostosky, operator, continued to deny an authorized representative of the Secretary the right of entry into the Stiteler Strip for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the Act on 3/17/98, after a reasonable time allowed for Mr. Rostosky to comply

(Ex. G-5; Tr. 94-99). Thereafter, Inspectors Newhouse and Wilson left the mine.

Subsequently, on March 24, 1998, pursuant to civil injunction, Inspector Myers, accompanied by another inspector, inspected the Stiteler Strip Mine and terminated the order (Ex. G-3; Tr. 37-39).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

The instant citation and order charge a non-significant and substantial violation of section 103(a) of the Act, which provides in pertinent part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any persons In carrying out the requirements . . . of this subsection, the Secretary shall make inspections of each . . . surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary . . . shall have the right of entry to, upon, or through any coal or other mine.

It is well settled that Congress intended section 103(a) of the Act to give “a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under” the Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977), *reprinted in* Legislative History of the Federal Mine Safety and Health Act of 1977, at 615 (1978). Furthermore, the Secretary’s broad right-of-entry under this standard, including the prohibition of advance notice to operators prior to inspection, has passed constitutional muster. *Donovan v. Dewey*, 452 U.S. 594, 598-608 (1981). Consistent with *Dewey*, the Commission has held that the failure of an operator to permit entry for inspection constitutes a violation of section 103(a). *Waukesha Lime and Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *United States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). In so holding, the Commission has rejected the argument that injunctive relief under section 108(a)(1) is the sole remedy available to the Secretary. *Waukesha*, 3 FMSHRC at 1704. Moreover, the Commission has emphasized that

denial of access is at the operator's legal peril and "is an action not to be taken lightly." *Tracey and Partners, Randy Rothermel, Tracey Partners*, 11 FMSHRC 1457, 1464 (August 1989).

The Commission has directly spoken to the circumstances surrounding the instant matter in *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985). In that case, the Commission found that, upon arrival at the mines, the inspectors properly identifying themselves, informed management of their purpose and the inspection requirements of the Act and, thereafter, were told that they were trespassing and needed the operator's written permission before inspecting. In affirming a violation of section 103(a), the Commission concluded that "MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect." *Id.* at 1157.

I credit Inspector Myers' testimony that he properly identified himself, explained his purpose for coming to the Stiteler Strip and discussed with the Rostoskys MSHA's responsibility to conduct two inspections annually. Indeed, the Rostoskys' rendition of the incident is essentially the same. I find Inspector Myers' premature departure from the mine reasonable, given his apprehension that conducting the inspection could possibly result in an altercation, given the Rostoskys' display of animus toward MSHA in general, and their antagonism toward him, in particular. I also credit the testimony of Inspectors Newhouse and Wilson that Joseph Rostosky displayed extremely aggressive, threatening behavior, including screaming, poking his finger in Newhouse's chest, and tearing up and throwing away the citation. I also credit the inspectors' assertions that they made numerous attempts to reason with the Rostoskys and persuade them to permit an inspection. Moreover, in the telephone conversation between Peter Rostosky and District Manager Garcia, the Rostoskys were given an explanation for the inspection and assignment of Myers by higher authority, warned that they were in serious violation of the law, and urged to permit inspection by the Wilson-Newhouse team.

The Rostoskys simply chose not to believe that MSHA was shorthanded. Their cumulative testimony amounted to discomfort with inspectors that "didn't know their job operation," and displeasure that they had been denied advance notice. Furthermore, the Rostoskys expressed their opinion that MSHA is harassing them by conducting inspections, since the Act does not apply to a two-man operation, and since their surface operation, as opposed to an underground mine, does not come under the definition of "mine." While I find the Rostoskys to be sincere, although incorrect, in their beliefs, I also find them totally lacking in deference to MSHA's authority and, therefore, closed to all suggestion of conduct that would have brought them into compliance with the law. Moreover, the Act does not exempt Rostosky Coal from inspection, or entitle the company to advance notice or "inspector shopping."

There was no confusion by the Rostoskys that Myers, Newhouse and Wilson were MSHA inspectors. They were given a full explanation, repeatedly, as to why inspection was required, as well as why Myers had been assigned to their operation. They were provided a copy of section 103(a) of the Act, explained the consequences of non-compliance, and referred to the district manager, who explained the mission of all three inspectors and advised the Rostoskys of their

duty to comply with the law. I credit the testimony of Newhouse and Wilson that the Rostoskys were put on notice that they had one-half hour to calm down and reconsider their position before the failure to abate order was issued, primarily because this rendition of events is consistent with the overall evidence of the inspectors' efforts to resolve any problems that may have existed and accomplish inspection. Moreover, the Rostoskys' testimony, that they would have permitted Newhouse and Wilson to inspect had they been asked, suggests a spirit of cooperation that the weight of the evidence does not support. In any event, it is evident that Joseph's Rostosky's level of and hostility and aggression, together with his son's lesser but, nevertheless, antagonistic posture, required the course that the inspectors ultimately took--abandoning the mission and accomplishing inspection at a later date through civil injunctive relief. It is also abundantly clear that the Rostoskys are lacking in understanding of the protective purposes of the Act and the duties required of them as mine operators, thereunder. Accordingly, based on the totality of the evidence, I find that the Rostoskys denied the inspectors access to the Stiteler Strip Mine and, therefore, violated section 103(a) of the Act, as alleged.

B. Penalty

While the Secretary has proposed a civil penalty of \$3, 000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Rostosky Coal is a very small operator, with only one assessed violation for the twenty-four month period prior to the issuance of the subject citation, not for the standard at issue in this case (Ex. G-7). As stipulated by the parties, the proposed penalty will not affect Rostosky Coal's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Rostosky Coal in causing it. I find the gravity to be very serious. Lack of regard for the Secretary's authority to inspect the mines without interference and intimidation, if tolerated, would undercut the very purpose of the Act, by disabling the mechanism by which it is enforced. Considering that, multiple times, the Rostoskys disregarded warnings by Inspectors Myers, Newhouse, Wilson and Garcia that denial of access by federal inspectors to conduct inspections is an egregious violation of the Act, and unreasonably continued to deny access in a hostile and intimidating manner until the court's intervention, I find this conduct intentional and tantamount to an aggravated lack of care that is more than ordinary negligence. Consequently, I ascribe high negligence to Rostosky Coal. It is also my finding that the Rostoskys' hostile, combative behavior is rooted in misconceptions of the Act, and that good faith communication between the Rostoskys and MSHA, intended to foster a professional working relationship, is necessary. Having duly considered Rostosky Coal's very small size, good history of prior violations, seriousness of the violation, high degree of negligence, failure to abate in good faith and no other mitigating factors, I find that a penalty of \$2,000.00 is appropriate for a company

the size of Rostosky Coal, with the caveat that any future violation of this nature would suggest an unconscionable disregard for the Act and MSHA's enforcement authority that may result in significant escalation in penalty.

ORDER

Accordingly, it is **ORDERED** that Citation No. 3681379 and Order No. 3681380 are **AFFIRMED**, and Rostosky Coal Company is **ORDERED** to pay a civil penalty of \$2,000.00 within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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