

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-550
Petitioner	:	A.C. No. 48-01248-117512
	:	
v.	:	
	:	KFX Plant LLC
EVERGREEN ENERGY, INC.,	:	
Respondent	:	

DECISION ASSESSING A CIVIL PENALTY
BASED ON THE PARTIES’ JOINT MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The parties filed a “Joint Motion for Administrative Law Judge to Assess Appropriate Penalty and Parties’ Stipulation of Facts.” I construe this motion as a joint motion for summary decision under Rule 67 of the Commission’s Procedural Rules. 29 C.F.R. § 2700.67.

I. STIPULATIONS OF THE PARTIES

The case involves Order No. 7610463 issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on January 25, 2007, under section 104(d)(1) of the Act. The order alleges that Evergreen Energy (“Evergreen”) failed to record the results of the on-shift examinations as required by section 77.1713(c). The order states, in pertinent part:

On 12/30/2006 day shift and 12/31/2006 day shift, no examination for the KFX plant was recorded. Rick Friesen, shift supervisor, was responsible for conducting the examination for the days affected. This constitutes more than ordinary negligence in that he was aware of the requirements of the standard for documenting hazards to minimize the dangers.

The parties entered into the following stipulations, as corrected for minor errors:

1. Attached is the correct violation history for the 24-month period preceding the date of the inspection.

2. Respondent stipulates to the facts and findings that are set forth in the order at issue in this case (No. 7610463), including but not limited to the findings regarding the nature of the violation and gravity.

3. If this citation had been regularly assessed according to the regular assessment formula that was in effect on the date the citation was issued (January 25, 2007), the proposed penalty would have been \$306.00.

4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (the "Act").

5. The Administrative Law Judge has jurisdiction in this matter.

6. The operator demonstrated good faith in abating the violation.

7. Respondent operates a coal mine. The mine produced 87,263 tons of coal during calendar year 2006. The controlling entity produced a total of 606,962 tons of coal during calendar year 2006. (See 30 C.F.R. 100.3(b) (2006)).

8. Respondent's payment of the penalty proposed by MSHA (\$3,500.00) would not impair Respondent's ability to continue in business.

In the motion, the Secretary set forth her position, as follows:

It is the Secretary of Labor's position that violations of section 77.1713(c) should be treated seriously because the purpose of the recording requirement is to ensure that any hazards found during inspections are timely abated. See 30 C.F.R. 77.1713(d). It is the Secretary of Labor's position that under all the circumstances, the proposed penalty is appropriate.

Evergreen provides the following argument:

Attached hereto is Respondent's letter explaining why Respondent believes that the proposed penalty is too high. As

noted in the letter, the violation is not significant and substantial. It is Respondent's position that the violation was the result of a paperwork error, in that the inspection was not recorded. It is Respondent's position that the violation should not have been specially assessed and that the proposed penalty is excessive.

Respondent's letter attached to the motion makes the same arguments and stresses that the penalty should be reduced because the inspector did not mark the order as significant and substantial. The letter also states that although "the inspection was conducted and not recorded, this failure to record the inspection does not necessarily endanger miners in their work place."

II. ASSESSMENT OF A CIVIL PENALTY

As a general rule, Commission judges are accorded broad discretion in assessing civil penalties under the Act. Such penalties must reflect proper consideration of the six penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-95 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). If a judge significantly changes the penalty from that proposed by MSHA, he must provide "sufficient explanation" for the penalty assessed. *Sellersburg*, at 293; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

The record shows that Evergreen operates a small to medium-sized mine. The controlling entity is small. The record shows that Evergreen has paid penalties for 13 violations in the previous two years. Eleven of these citations were designated as non-significant and substantial. It received a section 104(d)(1) citation on December 22, 2006, for an alleged violation of section 48.25(a), but a penalty has not yet been assessed for the citation. Evergreen has a relatively low history of previous violations taking into consideration the size of the mine. The negligence of the operator was high and the violation was a result of Evergreen's unwarrantable failure to comply with the safety standard. The inspector determined that it was unlikely that the violation would lead to an injury and that the violation was not of a significant and substantial nature. He also determined that if an accident were to occur as a result of this violation, it could result in a fatality. A penalty up to the amount of MSHA's proposed penalty will not affect Evergreen's ability to continue in business. The violation was rapidly abated in good faith.

I agree with the Secretary that failing to record pre-shift and on-shift examinations has the potential to allow a hazardous condition to continue unabated. On the other hand, if a condition that is hazardous is detected during an on-shift examination, the mine operator has the duty to correct it. As stated in section 77.1713(a), a certified person must conduct the examinations and requires that "any hazardous conditions noted during such examinations shall be reported to the operator and *shall be corrected by the operator.*" (emphasis added). There is no allegation in this case that Evergreen failed to correct any hazardous conditions found by Mr. Friesen, the shift supervisor, during his examinations on the dates in question. Thus, the violation was not especially serious. The record shows, however, that Evergreen previously violated section

77.1713(c) on December 13, 2005. This helps to substantiate the Secretary's high negligence determination.

The Secretary proposed the penalty under her special assessment regulations at 30 C.F.R. § 100.5. As a consequence, it is difficult to determine exactly how she arrived at the \$3,500.00 proposed penalty. As stated above, the MSHA inspector determined that it was unlikely that the violation would lead to an injury and he marked the violation as non-significant and substantial. In the "Narrative Findings for a Special Assessment," however, the Secretary states that the "gravity of the violation was considered serious." Although the parties stipulated to the "facts and findings" set forth in the citation, including the inspector's "findings regarding the nature of the violation and gravity," they did not stipulate to the narrative special assessment findings. In assessing a civil penalty, I rely on the inspector's determinations, as marked on the citation, rather than on the conclusions set forth in the Secretary's narrative special assessment findings. Based on the above and the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I find that a penalty of \$2,000.00 is appropriate.

III. ORDER

For the reasons set forth above, Order No. 7610463 is **AFFIRMED** and Evergreen Energy, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,000.00 within 30 days of the date of this decision. Payment should be sent to MSHA's new address: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

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