

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

27 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		: Civil Penalty Proceedings : : Docket No. KENT 80-134
	Petitioner	: A/O No. 15-11014-03004
	v.	:
		: Docket No. KENT 80-137
		: A/O No. 15-11014-03005
H & H COAL COMPANY,		:
	Respondent	: Freedom No. 1 Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Byron W. Terry, Safety Director, H & H Coal Company, Hartford,
Kentucky, for Respondent.

Before: Judge Cook

On February 1, 1980, the Mine Safety and Health Administration (Petitioner) filed proposals for penalties in the above-captioned cases pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act). Answers were filed by H & H Coal Company (Respondent) on February 25, 1980. Subsequent thereto, a prehearing order was issued and the matter was scheduled for hearing on the merits to commence at 11 a.m. on June 24, 1980, in Owensboro, Kentucky.

The hearing convened as scheduled with representatives of both parties present. Petitioner thereupon moved for approval of settlements. Thereafter, Petitioner amended the motion in Docket No. KENT 80-134.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlements and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The proposed settlements are identified as follows:

A. Docket No. KENT 80-134

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Assessment</u>	<u>Settlement</u>
799615	9/27/79	77.1302(c)	\$ 34	\$ 34

B. Docket No. KENT 80-137

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Assessment</u>	<u>Settlement</u>
799617	9/26/79	77.404(a)	\$ 66	\$ 66
799616	9/27/79	77.1605(b)	60	60

The following reasons were advanced in support of the proposed settlements:

A. Docket No. KENT 80-134

MR. DRUMMING: Your honor, the parties have worked out another settlement [in] which the Respondent agrees to pay the fully assessed penalty of **[\$34]**. The 'standard involved [is] standard **77.1302C**. Okay, the following, the discussion [of the] criteria. Number 1 is a small operator. The annual tonnage for both the mine and company is 15,544 tons. The previous history is not excessive [in] that within the [preceding] 24 months there [have] been 9 [assessed] violations and **18 inspection** days. The degree of negligence is ordinary negligence. The seriousness is rated, [at] not serious [in] that **it** involves the sign, the citation as written cited Respondent for not having * * * posted a warning sign that a truck was containing explosives. The not having up the sign itself **is not** serious, not that It could occur as far as having something [happen] to the truck itself or whatever, not having a sign posted.

JUDGE COOK: **Alright.**

MR. DRUMMING: The Respondent exhibited good faith in abating it and that he posted a sign to the truck and the payment of the **[\$34]** penalty will not have an adverse effect upon his ability to continue with business.

JUDGE COOK: Very well. **Alright**, now. Mr. Terry, is that agreeable with you?

MR. TERRY: Yes, Your Honor. That's agreeable with **us**.

JUDGE COOK: **Alright**. Then, take it, **Mr.** Drumming, you want to move for approval of that.

MR. DRUMMING: Yes, Your Honor. Based upon the above criteria we respectively move for approval [of the negotiated] settlement.

B. Docket No. KENT 80-137

MR. DRUMMING: H i i H Coal Company and parties have worked out a settlement, agreed to a settlement in which the Respondent will pay the assessed penalty. It involves two violations. Citation No. 799617 involving standard **77.404A** * * * was assessed at \$66. Citation No. **799616** involving standard **77.1605B** and it was assessed at \$60. As to the [sic] criteria No. 1 is a small operator.

JUDGE COOK: You don't have to go through the size or the history or well, size and history you've already repeated in the other docket.

MR. DRUMMING: Yes, it remains the same. And the degree of negligence of each was listed as ordinary negligence. As to Citation No. 799616 the violation was a lack of a muffler on an explosives truck. I have determined this violation as not serious and that the lack of a muffler itself would not lead to any type of physical injury to the employee, but as it is not, it was not the proper piece of equipment upon the truck itself and it is a violation of the standard. However, as to Citation No. 799616 termed this to be a serious **violation**. There was a lack of a parking [brake] on an explosives truck and [had this] not been corrected could have resulted in some type of **an** accident involving explosives had there been someone in the truck and the (brake) itself had failed.

JUDGE COOK: **Alright**, just one question. **Why** is the fine larger on the first one, \$66, and **smaller** on the second one, **\$60?**

MR. DRUMMING: Your Honor, this would require looking, do you have-a copy of ...

JUDGE COOK: Not in front of me at the moment.

MR. DRUMMING: Okay. I have an extra copy.

JUDGE COOK: Can you just give me some idea of what that reason is?

MR. DRUMMING: No, Your Honor. The assessment officer did it primarily on a point system and the negligence with the muffler was rated as number 11. It was given 11 points. The negligence for the lack of a parking [brake.] was assessed at 10 points. So, the total [points on the] **first violation**, the muffler, was 26 and on the truck it comes out to \$66, and one point less of 25 is generally a \$60 penalty.

JUDGE COOK: **I see.**

MR DRUMMING: And since it was not a special assessment, there was no discussion from the assessment officer to determine how he arrived at the different numbers.

JUDGE COOK: **How** about on gravity? That was an area where you thought there was a distinction. How did they rate the gravity?

MR. DRUMMING: Well, on the gravity, they gave each one 10 points and the probability of occurrence they have each one rated as or assigned 3 points.

JUDGE COOK: **Alright.**

MR. DRUMMING: But in my opinion, the lack of a parking [brake] is much more serious on an explosives truck than lack of a muffler.

JUDGE COOK: Right. However, **I** presume **Mr.** Terry has agreed to this type of assessment. ,

MR. TERRY: Yes, Your Honor. I have agreed with Mr. Drumming on the assessment.

JUDGE COOK: How about the good faith on both cases, both charges?

MR. DRUMMING: [In] this **particular** docket the Respondent exhibited good faith in abating the violations and was [given] the number 2, or minus 2 which was subtracted from the point total. Bad it not been for that it would have been * * * 28 points and a much larger penalty.

JUDGE COOK: ' Now, how about the question [of affecting] business?

MR. DRUMMING: And as to the ability to continue In business, the payment of these two penalties will not adversely [affect Rspondent's ability] to continue in business and based upon the discussion of this criteria, the Petitioner respectfully [recommends] or moves that the settlement.be approved.

After according the aforementioned reasons due consideration, they have been found to support the proposed settlements. A disposition approving the settlements will adequately protect the public Interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlements, as outlined above, be, and hereby are, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$160 assessed in these proceedings.


John F. Cook
Administrative Law Judge

Distribution:

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