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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

V & R COAL CORP.,  
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 81-188  
A.O. No. 46-05166-03015V

Docket No. WEVA 81-189  
A.O. No. 46-05166-03016

No. 19-B Mine

DECISIONS

Appearances: Catherine M. Oliver, Attorney, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the petitioner

Before: Judge Koutras

Statement of the Case

These civil penalty proceedings were initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 12 alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened on August 11, 1981, in Charleston, West Virginia. The petitioner appeared and presented its cases, but the respondent did not and was held in default. Bench decisions were rendered and they are herein reduced to writing in accordance with Commission Rule 65, 29 C.F.R. 2700.65(a).

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the

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operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Discussion

The record in these proceedings reflects that the respondent received actual notice of the scheduled hearings in Charleston. Further, correspondence from the President of V & R Coal Company to the Philadelphia Regional Solicitor's Office advises the solicitor that respondent is no longer in business, has no assets, and that respondent wishes to "withdraw any contest of the above claims". However, as indicated above, the respondent failed to appear at the hearing to present any evidence regarding the status of its mining operations and I conclude that respondent has waived any further right to be heard. I have considered this case de novo and my decisions are rendered on the basis of the evidence and testimony of record as presented by the petitioner.

#### Findings and Conclusions

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#### Fact of violations

MSHA Inspector Melvin C. Harper confirmed that he issued citation 0661931, upon inspection of the mine on June 2, 1980, and that he cited the respondent with a violation of mandatory standard section 75.200 for failure to follow his approved roof control plan in that a cut of coal had been taken out and no temporary roof supports had been installed (exhibit G-1). Mr. Harper identified the applicable roof control plan (exhibit G-2), and testified that drawing No. 1, item 2, page 14 of the plan required the installation of temporary supports and that this was the plan provisions violated by the respondent (Tr. 7-16).

Inspector Harper confirmed that he also issued citation 0661932 on June 2, 1980, charging the respondent with a violation of section 75.200 for a roof control violation. Permanent roof supports were not installed in an area which had been holed through, and this was in violation of drawing No. 2, item 4, page 15 of the applicable roof control plan (exhibits G-2, G-3); (Tr. 17-19).

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I conclude and find that the petitioner has established the fact of violation as to both citations issued in this docket and they are AFFIRMED.

#### Gravity

With regard to citation 0661931, Inspector Harper testified that he believed the violation was serious because the mine has a history of two to six inch draw rock, which is unpredictable, and the likelihood of a roof fall would be greater in this case because he believed the cited roof conditions had been left unattended since the last production shift on May 29. A roof bolter and his helper were exposed to the hazard of a possible roof fall (Tr. 21-22).

Inspector Harper testified that the roof conditions cited in citation 0661932 were also serious because of the area of unsupported roof, which he estimated to be 20 feet wide by forty feet long, and the fact that the draw rock was present. Further, he indicated that the roof was totally unsupported, that is, there was no permanent or temporary support in the area cited and two men were exposed to a possible roof fall (Tr. 23).

I find the two citations issued by the inspector in this case were both very serious violations. They were issued at the approximate same location in the section and exposed miners who were present there to a possibility of a serious roof fall accident.

#### Negligence

Inspector Harper testified that the roof conditions cited in citations 0661931 and 0661932 should have been known to mine management because the area was required to be pre-shifted and on-shifted. His inspection revealed that the cited conditions had been left uncorrected since prior shifts, and he could find no indications that the cited areas had been pre-shifted. As a matter of fact, he indicated that these circumstances prompted him to issue the citations as section 104(d)(2) unwarrantable failure withdrawal orders (Tr. 21-23).

On the basis of the evidence and testimony adduced by the petitioner in this case, I conclude that the citations issued by inspector Harper resulted from the respondent's lack of due care and that the respondent was negligent. While I believe that the level of negligence borders on gross neglect, I am constrained not to make such a finding in this case absent any evidence of a deliberate and reckless omission by respondent's management.

#### Good faith compliance

Compliance was achieved by the issuance of withdrawal orders, and while Inspector Harper testified that the conditions were corrected

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and the roof areas properly supported when he next returned to the mine, I cannot conclude that the respondent is entitled to any special consideration for rapid good faith abatement of the two citations in question.

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Fact of violations

MSHA Inspector Issac H. Jenkins, Jr., testified that he conducted an inspection at the mine on July 24, 1980, and he confirmed that he issued five section 104(a) citations for violations concerning certain mandatory electrical safety standards. He confirmed that he issued citation 0640452 for a violation of section 75.521, citation 0640453 for a violation of section 75.703, citation 0640454 for a violation of section 75.900, and citations 0640455 and 0640456 for violations of section 75.503 (exhibits G-1 through G-5; Tr. 7-33).

Inspector Jenkins testified as to the conditions which prompted him to issue the aforementioned five citations. The first citation was issued after he found that grounding conductors for the surface lightning arresters were not separated from the underground power cable grounding conductor, the second for failure to properly completely ground a battery case located on a scoop battery charger to the frame of the charger, and the third one was issued for failing to provide an adequate ground phase protection for the section feeder breaker power cable in that a test conducted by him on the circuit revealed a faulty relay switch which failed to open and de-energize the system. As for the remaining two citations, he testified that they were permissibility violations for a shuttle car which had an excessive opening between the cover plate and starter enclosure, and a Galis roof bolter which had a damaged light fixture which was not securely fastened to the machine (Tr. 7-33).

Based on the testimony and evidence adduced by the petitioner with respect to the aforementioned citations, I conclude and find that the conditions and practices described by Inspector Jenkins on the face of each of the citations which he issued constituted violations of the cited mandatory standards, and that his testimony establishes the fact of violations as to each of the citations and they are all AFFIRMED.

Good faith compliance

Inspector Jenkins testified that all of the citations which he issued were abated in good faith by the respondent, and I adopt this conclusion by the inspector as my finding as to each of the citations in question.

Negligence

With regard to citation 0640452 concerning the inadequately grounded lightning arresters, Inspector Jenkins testified that he doubted the

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respondent knew of the condition cited because the respondent did not make the initial electrical installation at the mine, that the condition would only be visible to the trained eye, and there is no requirement for a daily pre-shift of the system. As for the remaining citations, Inspector Jenkins believed that the respondent should have been aware of the conditions cited through weekly or other inspections which should have disclosed the conditions cited.

Considering the testimony of Inspector Jenkins, I find that citation 0640452 did not result from the respondent's negligence, but that citations 0640453 through 0640456 resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence as to these four citations.

#### Gravity

I conclude and find that all of the citations issued by Inspector Jenkins were serious. Although he testified that the mine is not gassy and that the equipment he observed was in otherwise good condition, he did indicate that failure to properly ground the lightning arresters could have affected the underground mining equipment since the main power dable ground system was tied to the same arresters and could have resulted in energizing the machine frames. Failure to properly ground the battery frame and the defective relay switch could have resulted in shock hazards, and the permissibility citations could have developed into more serious hazardous conditions due to the continued use of the cited equipment.

MSHA Inspector Tony Romeo testified that he conducted an inspection of the mine on August 6, 1980, and he confirmed that he issued citation 0659330 for a violation of section 75.1715 for failure by the respondent to follow the mine check in and out system; citation 9659328 for a violation of section 75.303 after finding no record of a pre-shift date or initials by two belt conveyors; and citation 0659329 for a violation of section 77.410 after finding a payloader being operated on the mine surface area without an operable reverse signal alarm (Exhibits G-6 through G-8; Tr. 38-56).

Inspector Romeo confirmed that he issued citation 0659334, citing a violation of section 75.400 after finding an accumulation of dry, loose coal and coal dust on the mine floor in the number one entry. He measured the accumulations and they measured up to 12 inches deep, 18 inches wide, over an area of some 70 feet long. He observed no float coal, and the accumulations which he did observe appeared black in color and he saw no evidence of any rock dusting. He took several samples from the floor in accordance with his usual approved procedures, and submitted them for laboratory analysis to support the citation for a violation of section 75.403 for failure to adequately rock dust (exhibits G-9 through G-11; Tr. 48-57).

In view of the foregoing testimony and evidence adduced by the petitioner in support of the citations issued by Inspector

Romeo, I conclude and find that the respondent violated the mandatory safety standards cited and the citations in question are AFFIRMED.

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Good faith compliance

Inspector Romeo stated that each of the citations he issued were timely abated in good faith, and I adopt this testimony as my finding on this issue.

Negligence

I conclude and find that each of the citations issued by Inspector Romeo resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence as to each of the citations.

Gravity

Inspector Romeo testified that the failure to follow the mine check-in-and-out system was not serious in this case because the mine was small, and only three of the six men on the one section did not check in. I concur in the inspector's conclusions and find that citation 0659330 was non-serious.

With regard to the failure to record the results of the conveyor belt pre-shift examination, Inspector Romeo stated that he did not know whether the examination had in fact been made, but the failure to make a record of such an examination by dating and signing the book could possibly result in someone not being apprised of possible hazardous conditions which may exist in the cited area. I find that this citation is serious.

With regard to the inoperative back-up alarm on the payloader, Mr. Romeo testified that he observed no one in the proximity of the machine and he indicated that the truck driver who came to the area to load his truck would in fact alight from the truck and operate the payloader himself. Thus, he would be the only person in the area, and in these circumstances, I cannot conclude that the citation was serious. I conclude that it was not.

With regard to the accumulations and rock dust citations, I find that they were both serious. Although Inspector Romeo testified that he observed no equipment operating on the day he issued the citations, he did see evidence that equipment and machines had operated in the area where he found the accumulations of coal and coal dust, and considering the extent of those accumulations as well as the results of the rock dust samples which reflects percentages far below the acceptable standards, I conclude that the citations were serious. Mining was taking place in the cited areas, and in the event of a fire, the accumulations as found by the inspector would certainly add to the hazard.

Size of business and the effect of the assessed penalties on the respondent's ability to remain in business.

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The testimony of the inspectors reflects that the respondent no longer operates the mine in question and that MSHA considers it to be in a temporary abandoned status. All of the equipment has apparently been removed from the mine and production has ceased. Further, by failing to appear at the hearing, I have no way of confirming respondent's present financial condition and the effect of the assessed penalties on the respondent. Under the circumstances, I conclude that the penalties will not otherwise adversely affect his operation since he is apparently no longer in business.

As for the size of the operation, the record establishes that at the time of the citations the respondent leased the mine from Itmann Coal Company, but operated it as respondent's sole mining venture under a separate mine identification number. At the time of its operation, the mine operated on one production shift, with mine employment of approximately 24 employees, and daily coal production at 300 tons. Under the circumstances, for purposes of any civil penalty assessments, I conclude and find that the respondent's mining operations were small.

#### History of prior violations

Petitioner has submitted a computer print-out which reflects that during the period June 2, 1978 to June 1, 1980, respondent has paid \$2,196 for a total of 37 assessed violations issued during this time. The paid assessments include one prior citation for a violation of section 75.200, five prior citations for violations of section 75.503, and one each for sections 75.400 and 75.403. Considering the totality of all prior paid assessed citations, I cannot conclude that respondent's prior history of violations is such as to warrant any additional increases over the assessments which I have levied in these cases.

#### Penalty Assessments

On the basis of the foregoing findings and conclusions, I conclude that the following penalties are reasonable and appropriate for the citations which have been affirmed in these cases:

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Citation No.	Date	30 CFR Section	Assessment
0661931	6/2/80	75.200	\$ 750
0661932	6/3/80	75.200	750
			\$1500

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Citation No.	Date	30 CFR Section	Assessment
0640452	7/24/80	75.521	\$ 44.00

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0640453	7/24/80	75.703	\$ 72.00
0640454	7/24/80	75.900	72.00
0640455	7/24/80	75.503	78.00
0640456	7/24/80	75.503	78.00
0659330	8/6/80	75.1715	15.00
0659328	8/6/80	75.503	38.00
0659329	8/6/80	77.410	25.00
0659334	8/6/80	75.400	60.00
0659335	8/6/80	75.403	28.00

\$ 510.00

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling \$2,010 within thirty (30) days of the date of these decisions and order, and upon receipt by MSHA, these cases are DISMISSED.

George A. Koutras  
Administrative Law Judge