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SOL (MSHA) V. PEERLESS EAGLE COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. HOPE 78-511-P
A/O No. 46-01616-02018V

v.

No. 2-A Mine

PEERLESS EAGLE COAL CO.,
RESPONDENT

DECISION AND ORDER APPROVING SETTLEMENT

Appearances: John H. O'Donnell, Trial Attorney, Office of the
Solicitor, Department of Labor, Arlington, Virginia,
for petitioner;
Donald Lambert, Esq., Charleston, West Virginia, for
respondent.

Before: Judge Koutras

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on June 13, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for three alleged violations of 30 CFR 75.200, namely a \$3,600 civil penalty assessment for 104(c)(2) Order No. 7-0008 (1 JDD), January 26, 1977, a \$4,000 civil penalty assessment for Order No. 7-0011 (2 JDD), January 26, 1977, and a \$5,000 civil penalty assessment for Order No. 7-0013 (3 JDD), January 26, 1977. Petitioner has filed a motion pursuant to Commission Rule 29 CFR 2700.27(d), seeking approval of a proposed settlement, whereby respondent has agreed to payment of a civil penalty in the amount of \$1,800 for Order No. 7-0008 (1 JDD), \$2,000 for Order No. 7-0011 (2 JDD), and \$2,500 for Order No. 7-0013 (3 JDD).

In support of its motion for approval of the proposed settlement, petitioner has submitted proposed findings and conclusions with respect to the statutory criteria to be considered in the assessment of civil penalties for the violations. Counsel for petitioner has further stated that he has discussed in depth the Office of Assessment's Narrative Statement with Federal coal mine inspector John D. Dotson and the inspector does not agree with the facts set forth by the Office of Assessments.

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Gravity, Negligence and Good Faith

Order of Withdrawal No. 1 JDD (7-8) (Order No. 7-0008)

The subject order alleged that the roof support plan was not being followed on the 4th East Section to a point approximately 150 feet out by the belt fender in that a boom hole had been shot out in the mine roof and the roof bolts were installed 5-1/2 to 6 feet apart, whereas the roof support plan required that they be set on 4-foot centers lengthwise and crosswise. Petitioner asserts that the mining height in the No. 2-A Mine is low so areas must sometimes be dug out of the roof into the rock so certain machinery or activities can have enough height to be performed--these holes into the rock are called "boom holes". To make a boom hole, of course, the existing roof bolts in that area must be removed and then should be replaced in the boom rock hole. The roof bolts had been replaced in the boom hole a greater distance apart than allowed by the roof control plan (Govt. Exh. No. P-3). According to petitioner, Inspector Dotson would deny that the area had been mined wider than allowed as stated in the Narrative Statement of the Office of Assessments (Govt. Exh. No. P-9). The violation was not having the roof bolts in the boom hole close enough together. Inspector Dotson is of the opinion that no miner was endangered although any of 14 miners could be injured or killed in the unlikely event the boom hole roof did fall.

Petitioner maintains that the mine operator knew the requirements of its roof control plan and the violation is the result of ordinary negligence. The condition was abated in 3 hours which demonstrated a normal degree of good faith. Order of Withdrawal No. 2 JDD (7-11) (Order No. 7-0011)

The above order again alleged that the roof control plan was not being followed in the 4th East Section in that a boom hole had been dug out of the mine roof to allow enough height and the roof bolts had either not been reinstalled or were installed too far apart. There were no excessive widths mined in a roadway as stated in the Office of Assessment's Narrative Statement.

Petitioner maintains that Inspector Dotson is of the opinion that two workers were exposed to probable risk by reason of the condition. Since respondent knows the requirements of its roof control plan, ordinary negligence was demonstrated.

With respect to a showing of good faith on the part of respondent, the condition was abated in less than 3 hours, which demonstrates a normal degree of good faith.

Order of Withdrawal No. 3 JDD (7-13) (Order No. 7-0013)

The above order alleged that the roof control plan was not being followed in the No. 2 Entry in the 4th East Section in that the roof bolts were spaced further apart than the plan called for. But again, petitioner asserts that there were no excessive widths in the roadway as mentioned in the Narrative Statement of the Office of Assessments. However, the roof was drummy. According to petitioner, the condition is the result of ordinary negligence for the same reasons stated in discussing the above two orders of withdrawal. Petitioner further submits that the condition was abated the following day which demonstrates a normal degree of good faith.

Size of Business

Petitioner asserts that there is a limited present market for the quality of coal produced by the No. 2-A Mine, but the respondent can still pay any reasonable amount that may be assessed for each of the three violations under consideration, without an adverse effect on its business.

Previous History

Petitioner has submitted a computer printout concerning respondent's prior history of violations for the period January 1, 1970, to January 26, 1977. During this 7-year period, there have been eight prior 30 CFR 75.200 violations, and a total of 280 prior violations of all types. I cannot conclude that this constitutes a significant prior history of violations.

ORDER

After careful consideration of the detailed analysis submitted by the petitioner in support of its motion, particularly with respect to the question of gravity, good faith compliance, and respondent's size and history of prior violations, I conclude that petitioner's proposed civil penalty assessment is reasonable in the circumstances presented. Accordingly, the settlement is approved, and respondent IS ORDERED to pay for violations of 30 CFR 75.200 a civil penalty in the amount of \$1,800 for Order No. 7-0008 (1 JDD), January 26, 1977,

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\$2,000 for Order No. 7-0011 (2 JDD), January 26, 1977, and \$2,500 for Order No. 7-0013 (3 JDD), January 26, 1977, within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge