

CCASE:  
SOL (MSHA) V. LEECHBURG MINING  
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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

Civil Penalty Proceeding

Docket No. PITT 78-419-P  
A/O No. 36-00818-02012V

v.

Foster No. 65 Mine

LEECHBURG MINING COMPANY,  
RESPONDENT

DECISION APPROVING SETTLEMENT  
AND  
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Michael V. Durkin, Esq., Joseph Walsh, Esq., and  
Anna Wolgast, Esq, Office of the Solicitor, U.S.  
Department of Labor, for Petitioner  
Henry McC. Ingram, Esq., and R. Henry Moore, Esq.,  
Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty,  
Pittsburgh, Pennsylvania, for Respondent

Before: Judge Cook

On July 31, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against Leechburg Mining Company (Leechburg). This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977). An answer was filed on August 18, 1978. A prehearing order was issued.

Subsequent thereto, various notices of hearing were issued. When the hearing convened on December 5, 1978, in Pittsburgh, Pennsylvania, MSHA proposed the receipt into evidence of certain documents in order to establish its prima facie case in the absence of the issuing MSHA inspector. Leechburg interposed objections, both to the receipt of the documents into evidence and to a continuance, on various grounds. Instead, Leechburg moved for dismissal of the proceeding with prejudice. As grounds therefor, Leechburg cited MSHA's failure to comply with Leechburg's prehearing interrogatories, requests for admissions and requests for production of documents. The motion was denied, upon the premise that MSHA would comply with the requests for admissions and for production of documents within 15 days and on December 6, 1978, the hearing was continued until February 15, 1979.

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On February 15, 1979, MSHA filed a motion for approval of settlement. An order was issued on February 16, 1979, cancelling the hearing and continuing the proceeding indefinitely pending consideration of the request for approval of settlement.

An order was issued on March 6, 1979, denying the motion for approval of settlement. Subsequent thereto, MSHA filed a second motion wherein it requested both approval of a settlement and dismissal of the proceeding.

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 settlement 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.

MSHA's motion sets forth the following justifications for the proposed settlement:

Comes now the Mine Safety and Health Administration (MSHA), by and through its undersigned attorney, and moves the Administrative Law Judge (Judge) to approve the settlement to which the parties have agreed, as expressed in this second motion, and to dismiss the Petition for Assessment of Civil Penalty.

The alleged violation in this case and the settlement are identified as follows:

Number:	Date:	30 CFR:	Assessment	Settlement
7-0029	9/09/77	75.1403	\$1,650	\$ 250

1. On or about February 15, 1979, the original motion to approve settlement was filed. On March 6, 1979, the Judge issued a decision disapproving the proposed settlement. Since then the parties have reviewed the entire matter in light of the Judge's disapproval. They believe that their proposed settlement is an appropriate disposition of the case. Therefore, this second motion proposes a settlement of the one alleged violation in the case for \$250, i.e., the same amount proposed in the original motion.

2. In the original motion, due to a typographical error, for which MSHA apologizes, the amount of the proposed assessment was stated as \$650 instead of the correct \$1650. However, during the negotiations which resulted in the proposed settlement, the Office of the Solicitor

was aware of the correct proposed assessment. It was determined that the proposed assessment was much too high and the proper penalty was agreed to be \$250.

3. After correcting the proposed assessment, MSHA now adopts the original motion and its attachments in support of this motion to approve settlement. (A copy of that motion is attached). In addition, brief comments on the six criteria will be included here.

4. Gravity was sufficiently covered in the original motion.

5. Negligence was sufficiently covered in the original motion.

6. The Respondent is a small to medium size operator as the tonnage figures in the original motion indicate.

7. The Respondent demonstrated good faith in achieving abatement after notification of the alleged violation.

8. Attached hereto and made a part hereof is a computer printout from MSHA's Office of Assessments. It reflects that in the two years immediately preceding the subject alleged violation, Respondent paid penalties for 107 violations. Two of the penalties were for violations of the mandatory standard here in question - one in 1975 and one in 1976. The penalties paid for these were \$58 and \$78, respectively.

9. Payment of the agreed penalty will have no effect on Respondent's ability to continue in business. The parties have agreed that the Judge should take official notice of the financial information introduced before him in Leechburg Mining Co., PITT 78-420 (decision pending), for a somewhat detailed view of Respondent's financial condition. In order to facilitate such consideration, attached hereto and made a part hereof are pages 15 through 34 of the transcript of that proceeding and two exhibits from that proceeding, the Respondent's Financial Statement and 1977 Federal tax return.

It is the parties belief and conviction that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

Those portions of the February 15, 1979, motion, incorporated by reference into the above-quoted passage, state the following:

\* \* \* \* \*

2. In support of said settlement MSHA submits the order of assessment including the narrative findings of the assessment office, the order of withdrawal, the order of termination, and the inspector's statements, and the notice of safeguard.

3. As set forth in the narrative findings of the assessment office, the annual company production is 69,761 tons. The annual production for the Foster #65 Mine is the same.

4. As set forth in the narrative findings of the assessment office, the history of violation includes 111 violations during the 24-months prior to the violation at issue.

5. The order of withdrawal was issued on September 9, 1977. The condition or practice cited in the order reads as follows. "The clearance face along the track haulage road was obstructed with loose rock, mud, steel rails, and cement blocks at various locations beginning at the 4 right section and extending outby to the quarter mains overcast, a distance of approximately 3200 feet. The clearance space measured from one to 16 inches from the furthestest ÖsicÊ projection of the normal traffic at these locations. Issued in reference to notice to provide safe guard No. 1 WDW issued 2-18-72.

6. The notice to provide safeguard reads as follows:  
"The clearance space and shelter holes along all track haulage entry at this mine shall be cleared of loose rock and other loose materials, crosscuts used as shelter holes shall be cleared of loose rock and other loose materials for a depth of at least 15 feet." In its narrative findings the assessment office concluded that the violation resulted from the operator's negligence. The daily examination should have revealed this condition. The testimony of the inspector would support this conclusion. In its narrative findings, the office of assessment did not make an express finding of gravity. In a discussion with the inspector, the inspector stated that the entry was not used regularly. The entry was used only by one supply car each day, and by the examiner who made the daily inspection. The inspector stated that approximately five percent of the 3200 feet contained obstructions. He stated that there were perhaps four or five cement blocks in the entire area. He said that there were three or four rails in this area. He said that most of the obstructions consisted of loose rock fallen from the roof. This rock resulted from sloughing. The sloughing debris measured from eight to ten inches in depth. These obstructions

presented a tripping hazard to anyone walking in the area. He stated that there was no other hazard presented by the violation.

In accordance with the wishes of the parties, official notice is hereby taken of the financial information introduced in Leechburg Mining Company, Docket No. PITT 78-420-P (June 27, 1979). 5 U.S.C. 556(e) (1976). In that decision, the evidence adduced by Leechburg as to the company's financial condition was analyzed as follows:

The Respondent is subject to a maximum aggregate penalty assessment of \$60,000 for the six subject violations. The Respondent, through the testimony of company president Harold Dunmire, contends that a \$60,000 penalty would jeopardize the Respondent's survival, considering the Respondent's other financial obligations (Tr. 435-36). The Respondent anticipates difficulty in raising \$60,000 within 30 days because the company's current financial posture renders doubtful the provision of the requisite monies by a lending institution (Tr. 445-46).

In addition to the testimony of company president Harold Dunmire, the Respondent offered a copy of the Respondent's tax return for the year ending June 30, 1978, and financial statements for the year ending June 30, 1978, in support of its position. The Respondent did not call an expert witness to assist in interpreting the tax return and the financial statements. Bearing in mind the limitations imposed by the lack of expert testimony, the following picture of the Respondent's financial condition was established by the evidence.

Leechburg Mining Company is owned by a small group of shareholders and is not part of a larger business entity (Tr. 437, 440). Eighty-two percent of the company's stock is held by the Mellon Bank on behalf of the Hick's estate (Tr. 438). The Bank administers the trust for the estate (Tr. 439). The beneficial interest in the trust is held by Lewis and Harry Hicks, the heirs of the Hick's estate (Tr. 438-39). The company has approximately 80 employees (Tr. 432). It operates only one mine, the Foster No. 65 Mine (Tr. 440). The mine has two sections operating (Tr. 432). The company's coal production was lower during the year ending June 30, 1978 than during the year ending June 30, 1977, because of the United Mine Worker's strike in 1978 (Tr. 432-33). The company produces approximately 900 to 1,000 tons of coal per day (Tr. 441). It is sold to Penelec at a price of \$26.60 per ton, F.O.B. (Tr. 433, 441). The

contract with Penelec expires on April 22, 1979. The company anticipates receiving a reduced price per ton after April 22 because the current prevailing market rate for coal is \$22 to \$25 per ton (Tr. 441).

The company has large obligations based on a settlement agreement with the Pennsylvania Department of Environmental Resources for reclamation of 130 acres of refuse area (Tr. 434). This reclamation is proceeding at the present time (Tr. 434). It costs \$20,000 to \$25,000 per month, and is projected to cost \$1.3 million upon completion in 1981 (Tr. 435, 441-3, Exh. OX-13). According to Mr. Dunmire, the company lacks sufficient assets to fund this liability and must pay for it on a day-to-day, month-to-month basis out of net operating revenues (Tr. 434-35).

At a recent board of directors meeting, one director proposed closing the company, primarily in consideration of the obligations to the Pennsylvania Department of Environmental Resources (Tr. 436). It was decided at that time to continue in business as long as sufficient revenue could be generated (Tr. 436).

#### Leechburg's U.S. Corporation Income Tax

Return for the year ending June 30, 1978, shows a \$257,236 loss for tax purposes (Exh. OX-15). The \$257,236 loss was computed as follows:

Gross Income	
Gross receipts or Gross Sales	\$3,883,699
Less: Cost of Goods Sold	3,534,850
Gross Profit	348,849
Interest	55,735
Gross Rents	5,810
Gross Royalties	5,082
Other Income	4,086
Total Income	419,562
Deductions	
Compensation to Officers	79,605
Salaries & wages (not deducted elsewhere)	9,901
Rents	690
Taxes	157,349
Interest	2,785
Depreciation	241,857
Depletion	662
Pension, Profit Sharing, etc. plans	73,107
Other Deductions	110,842
Total Deductions	676,798
Taxable Income	(257,236)

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Tax

Refunded

25,714

The financial statement for the year ending June 30, 1978 (Exh. OX-13), reveals the following information:

Balance Sheet

Assets	June 30, 1978	June 30, 1977
Total current assets	1,760,592	2,002,797
Mortgage Receivable	10,932	12,777
Annuity Contract	72,000	72,000
Fixed Asset-At Cost	1,948,592	1,762,846
	3,792,116	3,850,420

Liabilities

Total current Liabilities	649,903	446,694
Deferred Compensation	72,000	72,000
Committments and Contingencies (note c)	--	--
Stockholders Equity		

Capital stock par value \$5 per share- 20,000 shares authorized & issued	100,000	100,000
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Capital contributed in excess of par value	38,675	38,675
Retained Earnings	2,931,538	3,193,051
	3,070,213	3,331,726
	3,792,116	3,850,420

Statement of Earnings  
and Retained Earnings

	1978	1977
Revenues	3,954,413	5,484,939
Costs and Expenses	4,217,634	4,790,494
(Loss) earnings before income taxes	(263,221)	694,445
Income Taxes	(1,708)	88,243
(Loss) Earnings for Year	(261,513)	606,202
Retained earnings-beginning of year	3,193,051	2,686,849
Cash dividends paid	--	(100,000)
Retained earnings-end of year	2,931,538	3,193,051
(Loss) Earnings per share	(\$13.08)	\$30.31

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Statement of Changes in  
Financial Position

	1978	1977
Working capital at beginning of year	1,556,103	971,440
Working capital at end of year	1,110,689	1,556,103
(Decrease) Increase in working capital	(445,414)	584,663
Cost of Operations (Years ended June 30)	1978 3,737,349	1977 4,335,249

Fixed Assets & Accumulated Depletion & Depreciation

	Balance July 1, 1977	Additions	Deductions	Balance June 30, 1978
Fixed Assets	4,659,000	433,546	24,263	5,068,283
Accumulated Depletion & Depreciation	2,896,154	246,365	22,828	3,119,691

The land reclamation expenses are not covered in the financial statements (Tr. 443). Reclamation expenses currently run between \$20,000 to \$25,000 per month (Tr. 435). This translates into yearly expenses ranging between \$240,000 and \$300,000.

The financial statement (Exh. OX-13) reveals assets valued at \$3,792,116 for the year ending June 30, 1978, a \$58,308 decline from the \$3,850,420 figure for the year ending June 30, 1977. Total current liabilities increased from \$446,694 to \$649,903 during the same time period, while retained earnings declined from \$3,331,726 to \$3,070,213 (Exh. OX-13).

Revenues declined from \$5,484,939 in the year ending June 30, 1977 to \$3,954,413 in the year ending June 30, 1978 (Exh. OX-13), while costs and expenses failed to decline at the same rate (Exh. OX-13). This resulted in a \$261,513 loss for the year ending June 30, 1978, as opposed to the \$606,202 profit for the year ending June 30, 1977. It is impossible to determine, on the basis of the information supplied, whether the loss experienced in the year ending June 30, 1978, is attributable to such

unforeseen and nonrecurring activities as the 1978 United Mine Workers' strike (Tr. 432-3), or whether it indicates long term financial problems. The Respondent offered no evidence, other than the deleterious effects of the strike, which would have explained the decline in revenues reflected in the financial statements, a decline responsible for the loss experienced during the year ending June 30, 1978. It appears, however, that Respondent's financial posture, when viewed in light of total assets and retained earnings, is sufficiently secure to withstand the assessment of moderately appropriate civil penalties.

PITT 78-420-P at pp. 35-39.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED. IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$250 assessed in this proceeding.

John F. Cook  
Administrative Law Judge