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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 Proceedings Docket No. PITT 78-368-P A/O No. 36-00906-02016 V
v.	Docket No. PITT 78-369-P A/O No. 36-00906-02017 V
GATEWAY COAL COMPANY, RESPONDENT	Gateway Mine

DECISION

Appearances: David F. Barbour, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner MSHA;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against Gateway Coal Company, the respondent.

At the outset of the hearing, operator's counsel challenged MSHA's assessment procedures. I held that the hearing before me is de novo in all aspects, and that MSHA's assessment procedures are not involved stating in this respect as follows (Tr. 16-17):

> I hold I have no jurisdiction to review the Secretary of Labor's assessment procedures. There is no point in taking evidence regarding the assessment procedures because it does not lie within my jurisdiction to do anything about it.
>
> The hearing before the Administrative Law Judges of the Commission in penalty cases are entirely de novo. The proposed assessments not only are not binding upon me, but I wholly reject any notion that they have an influence potential, or actual, upon the ultimate determination I make in any given instance.

I determine the existence of a violation in a hearing such as this based solely upon the record, documentary and testimonial, which is made before me. Where I conclude a penalty exists, I determine the amount of penalty in accordance with the statutory criteria, based, once again, solely upon the record made before me.

> I note that section 2700.24 requires that the petition for civil penalties include the proposed penalties. This, obviously, has to do with the settlement process concerning which, as both counsel well know, Congress expressed serious concern.
>
> This concern found expression particularly with respect to the reduction of original assessments. But this, again, dealt only with the settlement process. Once we come to a hearing on the merits, as we are doing here, the entire matter is de novo; and I am not influenced by anything except the record that is made before me in this room.
>
> It makes no difference in this penalty proceeding whether the alleged violation was cited in an order of withdrawal, or in a notice of violation. The issue before me is not whether a notice, instead of an order, should have been issued; or whether, in particular, the issuance of an unwarrantable order was justified.
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> The Act very specifically sets forth the type and nature of hearing to be held in penalty cases. I do not believe the Administrative Law Judges have been given the authority to oversee the Secretary's assessment procedures; especially where, as here, those procedures have no effect whatsoever on the fulfillment and discharge of my responsibilities.

Item 7-0121

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator regarding this item. At the conclusion of the taking of evidence, the parties presented oral argument (Tr. 78-88). A decision was then rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation as follows (Tr. 88-91):

> Based upon the testimony which I have heard this morning, I find the violation existed. I accept the inspector's description of the cited condition as consisting of loose coal, coal dust, and float coal dust ten feet wide, 50 feet long, and up to six inches in depth with most of the depth consisting of float coal dust.

The inspector's testimony regarding the condition is the most detailed and, therefore, the most persuasive evidence on the point. I also accept the inspector's opinion that this condition existed for more than eight hours.

> I conclude that the operator should have been aware of these accumulations, and that it did not take the necessary steps to clean them up. I further accept the inspector's view that the materials in question should have been cleaned up before the midnight shift ended and that because they were not so cleaned up, the operator permitted them to exist within the purview of section 75.400. For all these reasons, therefore, I find a violation.
>
> With respect to gravity, the inspector on direct testimony referred to danger from explosion, fire, and dust among other things. However, on cross-examination, the inspector stood by his contemporaneous written statement to the effect that it was improbable that any of these hazards would occur. He specifically referred to the good condition of the rest of the section, which was rock dusted, the good condition of the roof, and the presence of water hose. In this connection, I also note the limited extent of the accumulation. Therefore, while the violation is serious because it presents a danger to the safety of the miners, it is not as serious as it would first appear. In light of the foregoing, I conclude the violation is of ordinary gravity.
>
> Based upon the facts already set forth, I find the operator was negligent because it should have been aware of the accumulations, and should have cleaned them up at least on the prior midnight shift.
>
> I take into account the history of prior violations shown on the printout. However, in the absence of the definitive information regarding statistics for violations of section 75.400, I cannot accept the Solicitor's ballpark representation that the operator's violations of that mandatory standard amounting to approximately 56, is excessive when compared with the record of other operators. However, as operator's counsel himself pointed out, there were 18 violations of section 75.400 in 1977. I take all the foregoing into account in considering the operator's prior history as well as the fact that its record apparently improved with respect to 75.400 in 1978.

In accordance with the stipulations agreed to by the parties, I find the operator is large in size. In accordance with the stipulations agreed to by the parties, I find this violation was abated in good faith. In accordance with the stipulations of the parties, I find that the assessment of any penalty will not affect the operator's ability to continue to do business.

> In light of all foregoing factors, the penalty of $400 is hereby assessed.

Item 7-0117

The Solicitor moved to withdraw this item without prejudice because the inspector could not testify due to a serious illness. The motion, which was granted from the bench, is hereby affirmed (Tr. 10).

Item 7-0128

The parties recommended a settlement of $400 for this violation of section 75.400. The Solicitor advised that the accumulations in this instance were comparable to those in Item 7-0121 concerning which a hearing had been held, and that in this instance also, the inspector would testify that the occurrence of any danger was improbable. Accordingly, the recommended settlement of $400 was approved from the bench and is hereby affirmed (Tr. 92-94).

Item 7-0131

The parties recommended a settlement of $400 for this violation of section 75.400. Once again, the Solicitor advised that although this violation was composed of three separate accumulations, it was comparable in nature and extent to those already considered. Accordingly, the recommended settlement of $400 was approved from the bench and is hereby affirmed (Tr. 94-95).

Item 7-0133

The parties recommended a settlement of $2,500 for this violation of 75.400 which involved 4,400 feet of loose coal, coal dust, and float coal dust. According to the Solicitor, the violation was visually obvious and very serious, although in mitigation of gravity, the Solicitor stated there were no roof or electrical defects. I approved the recommended settlement from the bench on the ground that $2,500 was a substantial penalty which would effectuate the purposes of the Act. The approval of the settlement is hereby affirmed (Tr. 97-99).

Item 7-0110

The parties recommended a settlement of $300 for this item, which was a violation of 75.1107-1(b), because eight sprays on the continuous miner were not working. The Solicitor pointed out that gravity was mitigated because 12 other sprays on the machine had not been cited, and there were no electrical defects or accumulations of grease or oil on the machine. Accordingly, the recommended settlement was approved from the bench and is hereby affirmed (Tr. 95-97).

Item 7-0111

The parties recommended a settlement of $500 for this violation of 75.601 which involved the use of a jumper cable without short-circuit protection for one hundred feet. In mitigation of the penalty amount, the Solicitor pointed out that the operator had shown an improving safety record with respect to this mandatory standard. I found the violation serious and stated that were it not for the operator's improving safety record, a higher penalty would have been imposed. However, in view of all the circumstances, the recommended settlement was accepted from the bench and is hereby affirmed (Tr. 99-101).

ORDER

I note that the originally assessed amounts were $4,000 for each of the accumulations violations. These amounts are excessive, especially with respect to violations where the inspector himself admitted the occurrence of any danger was unlikely. The originally assessed amounts of $1,500 for the other violations also were too great in light of the circumstances. I state, as I have before, that the imposition of such large amounts unwarranted by the facts does not serve any valid program purpose.

The operator is ORDERED to pay $4,500 within 30 days.

Paul Merlin
Assistant Chief Administrative Law Judge