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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. DENV 79-88-P  
A.O. No. 42-00089-03004

v.

Southern Utah Fuel Mine

COASTAL STATES ENERGY CO.,  
RESPONDENT

DECISION AND ORDER APPROVING SETTLEMENT

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on November 29, 1978, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with an alleged violation of the provisions of 30 CFR 77.1301(c), cited in Citation No. 245262 on April 5, 1978, for which petitioner seeks a civil penalty assessment in the amount of \$305.00. Respondent filed an answer denying the fact of violation and contending that the proposed assessment was excessive. Respondent requested a hearing on the petition, and by notice of hearing issued April 13, 1979, the matter was docketed for hearing in Salt Lake City, Utah, July 20, 1979. Subsequently, on June 21, 1979, petitioner's counsel, James H. Barkley, telephonically advised my office that the parties had reached a tentative settlement of the matter, and as a result of that call the hearing was subsequently cancelled for the purpose of permitting the parties an opportunity to file the proposed settlement for my review and possible approval pursuant to Commission Rule 29 CFR 2700.27(d), now 29 CFR 2700.30. In addition, Counsel Barkley was afforded an opportunity at the same time to enter his appearance in the matter, and this was done on July 2, 1979.

On July 6, 1979, the parties filed a joint motion and stipulation for approval of a proposed settlement whereby respondent agrees to pay a civil penalty in the amount of \$157.50 for citation 245262. In support of the motion, the parties assert that the proposed settlement takes into account the following statutory factors set out in Section 110(i) of the Act:

History - In the previous 24 months respondent was inspected a total of 280 days and has received 224 assessed violations.

Size - Respondent operates a coal mine which mines approximately 5,000 tons of coal daily and employees [sic] approximately 146 employees.

Ability to continue in business - Payment of the proposed penalty will not impair the respondent's ability to continue in business.

Good faith, negligence and gravity - See the inspector's statement Exhibit A attached hereto, which reflects the testimony of the inspector if he were to testify. Additionally, the inspector would testify that the condition was corrected within the time specified for abatement.

Such amended proposed penalty also takes into account the uncertainties of litigation.

#### Discussion

Commission Rule 2700.30, 29 CFR 2700.30, concerns the manner in which proposed settlements are to be adjudicated, and the rule states in pertinent part:

(b) Contents of settlement. A proposal that the Commission approve a penalty settlement shall include the following information for each violation involved: (1) the amount of the penalty proposed by the Office of Assessments of the Mine Safety and Health Administration; (2) the amount of the penalty proposed by the parties to be approved; and (3) facts in support of the appropriateness of the penalty proposed by the parties.

(c) Order approving settlement. Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration, and discussion thereof, shall be given to the six statutory criteria set forth in section 110(i) of the Act. Such order shall become the final decision of the Commission 40 days after approval unless the Commission has directed that such approval be reviewed. (Emphasis added.)

After full review and consideration of the arguments advanced by the parties in support of their proposed settlement, including the pleadings filed in this case, I conclude and find that the motion should be granted and that the settlement should be approved. The condition cited indicates that a surface metal detonator magazine

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was not constructed in accordance with the requirements of section 77.1301(c) in that several nails and bolts were exposed on the inside of the ungrounded detonator magazine in question and that screens were not provided over the ventilation openings. Among other things, subsection (c) requires that magazines other than box type be grounded and provided with screens. Abatement was achieved through the construction of a new detonator storage magazine. Although not specifically and fully articulated by the parties as part of their arguments in support of the proposed settlement, I take particular note of the fact that respondent's answer to the petition raises a viable defense to the alleged violation in that respondent asserts that mandatory standard 77.1301(c) set forth certain requirements for "magazines other than box type", whereas the explosives magazine described in the citation was a box type magazine. I assume that this defense advanced by the respondent is the basis for the "uncertainties of litigation" statement made by the parties as an additional reason for the proposed settlement. Coupled with the fact that the petitioner believes the condition cited was abated in good faith, I cannot conclude that the proposed settlement does not comport with the intent and purposes of the Act. Accordingly, pursuant to 29 CFR 2700.30, settlement is approved.

#### Order

Respondent is ordered to pay a civil penalty in the amount of \$157.50 in satisfaction of citation 245262 within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge