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SOL (MSHA) V. BETH ANN COAL CORP.
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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. NORT 79-18-P A/O No. 44-04823-03001
v.	
BETH ANN COAL CORPORATION, RESPONDENT	No. 2 Mine

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
John R. Lark, Secretary-Treasurer, Beth Ann Coal Corporation, Big Rock, Virginia, for Respondent

Before: Judge Cook

A petition for assessment of civil penalty was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a prehearing order was issued. Notices of hearing were issued setting the above-captioned proceeding for hearing on the merits beginning at 2 p.m., June 27, 1979, in Abingdon, Virginia.

At the hearing counsel for the Petitioner appeared, however, no one appeared for the Respondent. During the course of a recess the Administrative Law Judge conducted a telephone conference with counsel for the Petitioner and Mr. Lark, who represented the Respondent. Both parties then conferred and reached a settlement agreement. Thereafter, at the hearing, counsel for MSHA informed the Judge that a motion requesting approval of settlement would be filed. On July 6, 1979, MSHA filed a motion requesting approval of settlement wherein it requested that the Respondent be granted 90 days from the date of approval in which to pay the agreedupon settlement figure. A complete transcript of the hearing was filed on September 13, 1979.

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.

An agreed settlement has been reached between the parties in the amount of $590. The assessment for the alleged violations was $682.

The alleged violations and the settlement are identified as follows:

Citation No.	Date	30 CFR Standard	Assessment	Settlement
323139	04/26/78	75.313	$ 84	$ 84
323140	04/26/78	75.523	122	87
323141	04/26/78	75.516-2	60	25
323142	04/26/78	75.703	90	90
323143	04/26/78	75.604	90	90
323144	04/26/78	75.1107	122	100
322390	05/25/78	75.604	114	114

As grounds for the proposed settlement, MSHA states, in part, as follows:

> 1. As shown by the Inspection Report (Appendix A), the No. 2 Mine was operated by the Beth Ann Coal Corporation near Big Rock in Buchanon County, Virginia. The mine had a daily production of approximately 200 tons of marketable coal, one production shift, one employee on the surface and six employees underground. The front side of the Proposed Assessment (Appendix B) prepared by the MSHA's Office of Assessments shows MSHA records had the corporation producing 50,878 tons of coal in 1978, of which the mine produced a total of 12,500 tons of coal that year. The mine and operator should be classified as small for purposes of assessing a civil penalty.
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> 2. During the telephone conversation on June 28, 1979, Mr. Lark explained * * * that the coal in the ground is owned or leased by one United Coal Company (formerly Wellmore Coal Company), and the Beth Ann Coal Corporation had contracted with United Coal Company to mine the coal at a rate of so much money a ton. The Beth Ann Coal Corporation is presently insolvent and has no cash flow. The only means of obtaining money to pay the corporation debtors is to have United Coal Corporation or one of its

lessees operate the mine and reimburse Beth Ann for its equipment. However, the anticipated equipment sale has been delayed because there have been unforeseen delays in preparing the mine so it can again produce coal. Based substantially on the foregoing information, the Office of the Solicitor agreed to reduce the civil penalties to the amounts indicated above because larger penalties could adversely affect the ability of the operator to remain in business. * * *

3. The Office of Assessments reports there is no history in that office of prior paid violations concerning this mine.

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5. Citation No. 323139 issued citing 30 CFR 75.313 because the methane monitor was inoperable on a cutting machine.

Gravity: Both former inspector Roby R. Fuller and present inspector Larry F. Clevinger appeared in the courtroom and were interviewed by the undersigned attorney concerning the issues posed by this proceeding. Both inspectors agree that the mine has no history of liberating methane. See also the issuing inspector's statement, Appendix C, concerning this violation. Consequently, the gravity by reason of the inoperable methane detector would be that some mines not known to liberate methane have had methane ignitions. Both inspectors agree that the chance of methane building to the 5% to 15% explosive range in this Eagle coal seam is unlikely. The violation is nonserious.

Negligence: Appendix C (the inspector's statement) shows the condition had been recorded in the book of weekly examinations so the Respondent had information that the violation existed and continued to mine coal. The violation is intentional or the same as gross negligence.

Abatement: The condition was abated within the time provided by the inspector which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of $84.00 (appendix B), and because the violation is intentional the Office of the Solicitor would be unwilling to reduce the amount of the penalty.

6. Citation No. 323140 issued citing 30 CFR 75.523 because the panic bar on the roof bolt machine was inoperable.

Gravity: A panic bar has saved lives. Nevertheless, an emergency of some sort must occur before the panic bar switch is needed. Furthermore, a roof bolting machine does not travel fast or have much mobility. In fact, some roof bolting machine models are not equipped with brakes because such vehicles travel at such low speed. The need for a panic bar is less on a roof bolter than on a shuttle car or other faster, more mobile equipment. The violation is serious since death or injury is possible as a result of the condition. See the Inspector's statement concerning this violation, Appendix D.

Negligence: The Inspector's statement, Appendix D, notes that the roof bolt machine operator has some supervisory responsibilities. However, the operator of the machine may not have had occasion to depress the panic bar and he still would then not know it was not operable.

Abatement: The condition was abated within the time provided by the Inspector which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of $122.00 (appendix B), which the Office of the Solicitor has agreed to reduce to $87.00 because the negligence is not well established and because of the financial condition of the operator.

7. Citation No. 323141 issued citing 30 CFR 75.516-2 because the telephone wire was not hung on insulated hangers in two places.

Gravity: The two inspectors are both electrical inspectors and both agreed that a telephone wire never has over 24 volts and usually has only six to nine volts. Thus, although the mine is very wet there is no shock hazard because of the low current. Since the mine does not liberate methane there is only a remote danger from that source by reason of the wire on the mine floor. The violation is nonserious.

Negligence: Inspector Roby cannot remember whether an insulated hanger had been provided for the wire and the wire had been knocked off or whether there never had been a hook provided for the wire. Both inspectors agree that the wire could have been knocked down suddenly without being observed.

Although the negligence would be gross negligence if no hanger had been provided, MSHA cannot prove that there was any negligence involved in the violation.

Abatement: The violation was corrected within the time provided which demonstrates a normal degree of good faith.

Penalty: The Office of Assessment proposed a civil penalty of $60.00. The inspector's statement, Appendix E, concerning this violation merely stated that the mine operator, Buford Hackney (a former MSHA inspector also), supervises some of the work--apparently the presumption would be that if Mr. Hackney saw the wire after it fell there would be an intentional violation. However, at a hearing MSHA could not prove negligence since we do not know if hooks were provided or when or what caused the wire to fall. Thus, the Office of the Solicitor (considering the financial problems of the operator, the nonserious nature of the violation, and the inability to prove negligence) will settle for a civil penalty of $25.00.

8. Citation No. 323142 issued citing 30 CFR 75.703 because the roof bolting machine was no longer frame grounded since the wire had broken.

Gravity: For there to be an electric shock some component in the roof bolting machine must first malfunction because the frame ground wire is a backup protection. However, as noted in the inspector's statement, Apendix F, there is a possibility that a miner could receive a shock as a result of this condition--especially since the mine is wet.

Negligence: The condition would not be discovered until the weekly electrical examination was made. Abatement: The condition was abated when the inspector next returned, so the condition was abated with a normal degree of good faith.

Penalty: The Office of Assessments proposed a civil penalty of $90.00 (appendix B). The Office of the Solicitor considers the proposed civil penalty to be reasonable, and recommends that it be approved.

9. Citation No. 323143 issued citing 30 CFR 75.604 because one or more permanent splicings on the trailing cable to the cutting machine were not insulated until moisture was excluded.

Gravity: As noted in the inspector's statement, Appendix G, the mine is wet so moisture could have entered the openings and caused an arc, resulting in an electric shock or burn.

Negligence: Although Appendix G notes that the mine operator is foreman of the mine also, there is no showing that he or anyone knew or should have known of the condition. The cable must be examined at the beginning of the shift, but the break may have occurred after that examination.

Abatement: The violation had been abated when the inspector returned, so a normal degree of good faith was demonstrated.

Penalty: The Office of Assessments proposed a civil penalty of $90.00 (Appendix B), and the Office of the Solicitor deems the proposed civil penalty reasonable and recommends that it be approved.

10. Citation No. 323144 issued citing 30 CFR 75.1107 because the cutting machine was not provided with fire resistant hydraulic fluid, nor did it have the fire suppression device which can be used as an alternative requirement.

Gravity: The Inspector's statement, Appendix H, shows the Inspector had no opinion about gravity or negligence. The reason being that the mine is so wet that fire in the cutting machine is remote.

Negligence: The person installing the hydraulic fluid may not have noticed the color which is the means of identifying fire retardant fluid, so the violation is the result of a normal degree of negligence, and not gross negligence as deemed by the Office of Assessments.

Penalty: As shown by Appendix B, the Office of Assessments recommended a civil penalty of $122.00. The Office of the Solicitor will agree to settle for a civil penalty of $100.00 because no gross negligence can be proven.

11. Citation No. 322390 issued citing 30 CFR 75.604 because Inspector Clevinger observed three permanent splices in the trailing cable to a roof bolting machine which had not been effectively insulated against water. Gravity: The mine is wet so an arc could have occurred or a shock or burn resulted to a miner. See the inspector's statement, Appendix I.

Negligence: The Mine Operator was in the mine that shift so he should have seen smoke rising from each of the three breaks in the cable. The violation was intentional.

Abatement: The condition was abated within the time provided which demonstrates a normal degree of good faith.

Penalty: The Office of Assessments recommended a civil penalty of $114.00 and the Office of the Solicitor would not be willing to reduce this proposed civil penalty in view of the intentional nature of the violation.

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.

In view of the fact that the transcript in this case was not received until more than 30 days after it normally should have been received, it appears that payment of the penalty within 60 days after the date of this decision will comply with the settlement agreement.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 60 days of the date of this decision, pay the agreed-upon penalty of $590 assessed in this proceeding.

John F. Cook
Administrative Law Judge