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SOL (MSHA) V. DAVIS COAL CO.
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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. WEVA 79-25
A/O No. 46-02208-03005

v.

Marie No. 1 Mine

DAVIS COAL COMPANY,
RESPONDENT

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Paul E. Pinson, Esq., Williamson, West 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. Subsequent thereto, Petitioner filed a motion requesting approval of settlement and for 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.

An agreed settlement has been reached between the parties in the amount of \$326.30. The assessment for the alleged violations was \$3,263.

The alleged violations and the settlement are identified as follows:

Citation No.	30 CFR		Assessment	Settlement
	Date	Standard		
7-0044	7/18/77	70.508	\$180	\$18.00
23226	4/21/78	77.1107	240	24.00
9910140	7/19/78	70.508	106	10.60
9910248	8/28/78	70.212	84	8.40
26321	10/5/78	75.200	470	47.00
26028	10/12/78	75.603	160	16.00
26252	10/25/78	77.410	150	15.00
26253	10/25/78	77.400(c)	210	21.00
26254	10/25/78	77.202	130	13.00
26255	10/25/78	77.504	84	8.40
26256	10/25/78	77.505	98	9.80
26257	10/25/78	77.410	170	17.00
26258	10/25/78	77.701	150	15.00
26259	10/25/78	77.506	150	15.00
26260	10/25/78	77.505	98	9.80
26881	10/25/78	77.502	84	8.40
26882	10/25/78	77.800-2	106	10.60
26884	10/25/78	77.410	395	39.50
26885	10/25/78	77.1109(c)(1)	84	8.40
26886	10/25/78	77.1104	114	11.40

The Petitioner makes the following representations as relates to the statutory criteria of negligence, gravity and good faith:

Citation No.	30 CFR		Negligence	Good Faith
	Standard	Gravity		
7-0044	70.508	nonserious	ordinary	normal
23226	77.1107	serious	ordinary	normal
9910140	70.508	serious	ordinary	normal
9910248	70.212	serious	ordinary	normal
26321	75.200	serious	ordinary	normal
26028	75.603	serious	ordinary	normal
26252	77.410	serious	ordinary	normal
26253	77.400	serious	ordinary	normal
26254	77.202	serious	ordinary	normal
26255	77.504	serious	ordinary	normal
26256	77.505	serious	ordinary	normal
26258	77.701	serious	ordinary	normal
26259	77.506	serious	ordinary	normal
26260	77.505	serious	ordinary	normal
26881	77.502	nonserious	ordinary	normal
26882	77.800-2	serious	ordinary	normal
26884	77.410	serious	ordinary	normal
26885	77.110-01[sic]	serious	ordinary	normal
26886	77.1104	serious	ordinary	normal

As relates to Citation No. 26257, information submitted by the Petitioner reveals that the alleged violation was caused by ordinary negligence, that it was of moderate gravity, and that the Respondent demonstrated good faith in attempting rapid abatement.

Information submitted by the Petitioner also reveals that the Respondent's size is rated at 111,516 tons of coal per year. The Respondent's history of previous violations is rated at five assessed violation points for each citation, and eleven inspection day points as relates to all citations except Nos. 7-0044 and 9910140, which are rated at twelve inspection day points each.

The Petitioner advances the following justifications in support of the proposed settlement:

* * * * *

3. A reduction from the original assessment is warranted in view of the detriment on the operator's ability to continue in business which would result from payment of a greater penalty amount. Respondent's financial condition is precarious. From 1972 through 1975, Davis suffered losses which it was able to carry forward to 1976. By doing this it was able to reduce the amount of tax payable on its 1976 profit of \$190,008 (see Exhibit A). That, however, was the last profit made by Davis.

In 1977 Davis was closed for approximately eight months due to floods and strikes. It lost \$332,548 (see Exhibit B). In 1978 Davis was closed for six months due to strikes at the Norfolk and Western Railroad and by the United Mine Workers of America. The Respondent's unofficial corporate balance sheet, dated September 30, 1978, shows an operating loss of \$848,860.57, (See Exhibit C, page 3). The balance sheet dated May 31, 1979, shows an operating loss, in the first five months of the year of \$271,903.04 (See Exhibit D).

Davis has been able to stay in business only through the recent acquisition of a long term loan from Pikeville National Bank and Trust. It has used the money from the loan to pay its immediate obligations and thus, prevent default on the loans for its mining equipment. Davis is now operating solely on borrowed capital. Additional liabilities in the form of the proposed civil penalties will have an adverse effect on Davis's ability to meet its short term obligations and operating expenses and thus to stay in business.

Respondent is currently in the process of applying to FHA (through Pikeville National Bank and Trust Company of Pikeville, Kentucky,) for a loan with which to pay its current obligations. The owners of Davis are pledging to the government as collateral for this loan all the corporate stock in Davis and in its sister corporation, Burning Springs, Collieries Company, Inc., as well as all equipment and interest in real estate held by both corporation [sic]. As Davis' financial condition approaches bankruptcy at this time, this loan is necessary to the continued existence of the mining operation.

The Board of Mine Operations Appeals discussed the penalty criteria of the Coal Act which were identical to that of the Mine Act and concluded as follows:

. . . the intent of Congress was to give the Secretary great latitude in the assessment of monetary penalties so as to permit him to weigh the equities and render justice on a case-by-case basis . . . We believe Congress intended a balanced consideration of all statutory factors, including the size of the mine and the ability to [remain] in business to permit assessments which would be equitable and just in all situations . . . Robert G. Lawson Coal Company, 1 IBMA 115, 118 (1972).

Thus, penalties set under the Act may be tailored to the financial circumstances of each violator. This is not to say that financial difficulties automatically require major reduction in proposed penalties. All of the statutory criteria must be considered. Should a violation pose grave risks of clear and reckless negligence, reduction based upon financial hardship would be difficult to justify. However, the Secretary believes that the circumstances under which Davis found itself were dire enough to warrant the proposed settlement and the record revealed no extraordinary culpability or gravity of the violations which would have precluded the operator from receiving full consideration of his financial difficulties.

All citations involved in this matter except 7-0044 were issued under Section 104(a) of the Act. No. 7-0044 is a 104(b) Notice issued under the 1969 Act. Copies of the inspector's statements and the proposed assessment are attached hereto.

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The Secretary contends that the proposed settlement amount of \$326.30 is sufficient under the circumstances to induce not only compliance with the Act, but also to allow Davis to continue mining. The proposed settlement properly balances the public interest which underlies the mandatory penalty provisions, the penalty criteria, and the settlement approval provisions of the Mine Act.

In view of the reasons given above by counsel for the Petitioner 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 \$326.30 assessed in this proceeding.

John F. Cook
Administrative Law Judge