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SOL (MSHA) V. DRY LAKE 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. BARB 78-617-P Assessment Control No. 15-00600-02009F
v.	
DRY LAKE COAL COMPANY, INC., RESPONDENT	No. 4 Mine

DECISION APPROVING SETTLEMENT

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, Department of Labor, for Petitioner
William R. Forester, Esq., Forester & Forester, Harlan, Kentucky, for Respondent

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on September 11, 1979, the parties asked that I approve a settlement agreement under which respondent had agreed to pay a civil penalty of $5,000 instead of the penalty of $10,000 proposed by the Assessment Office. The Assessment Office had waived the formula provided for in 30 CFR 100.3 and had made findings of fact based on a fatality report. Counsel for both parties stated that if a hearing were to be held, most of the facts stated in the fatality report would be contested by respondent's witnesses.

Counsel for MSHA noted that he had been unable to get exact data to serve as a basis for findings with respect to the criteria of the size of respondent's business and respondent's history of previous violations. It appears that difficulties as to the data needed for findings regarding those criteria resulted from the fact that information stored in the computer had become mixed with respect to whether the alleged violations occurred at the No. 4 Mine involved in this proceeding or at other mines which respondent had previously operated (Tr. 6-7). Also the data available to MSHA did not remove doubt as to whether respondent is a small company operated by one individual or part of other interests controlled by several individuals (Tr. 7-8). In the absence of definite information, it was agreed that respondent should be found to operate a small business which produced about 200 tons of coal per day (Tr. 8). The lack of specific facts also results in a finding that respondent has no significant history of previous violations which would warrant any increase in any penalty that might be assessed in this proceeding.

Finally, it was agreed that since respondent pulled out of the area of the roof fall, the criterion of whether respondent made a good faith effort to achieve rapid compliance was inapplicable to any penalty which might be assessed (Tr. 8).

There is nothing in the record to show that payment of the settlement penalty of $5,000 will cause respondent to discontinue in business. In the absence of any information to the contrary, I find that the payment of the settlement penalty will not cause respondent to discontinue in business.

The foregoing discussion shows that any penalty which might be assessed would have to be based entirely upon the two criteria of negligence and gravity. As to the criterion of negligence, the Assessment Office found that the roof fall which killed one miner and injured another was the result of considerable negligence. Counsel for respondent challenged any finding of gross negligence (Tr. 24) by arguing that his witnesses would testify that a check of the roof shortly before the roof fall occurred indicated that the roof was in good condition (Tr. 18). Also respondent's counsel stated that the inspectors who wrote the fatality report did not see the actual entry in which the roof fall occurred and that the fatality report was the result of interviewing other persons who had been in the area of the roof fall. Counsel for respondent stated that the fatality report's claims that insufficient timbers had been set in the area of the roof fall would be challenged because the roof fall had knocked down the timbers which had been erected before the roof fall and he also said that it was difficult to obtain timbers to help support the roof while they were trying to remove the injured miners. Timbers were taken from some entries where they had previously been set and used in the entry where the roof fall had occurred. In such circumstances, it was contended that no one knew whether an adequate number of timbers had been set before the roof fall occurred (Tr. 22).

Respondent's attorney also stated that the fatality report's claim that the miners did not have an understanding of the roof-control plan would be contested. It was pointed out that respondent keeps a copy of the roof-control plan on the bulletin board at all times and that the miners know the provisions in the roof-control plan. Additionally, they were using a Wilcox continuous-mining machine and most of the miners were experienced in that type of mining and understood the provisions of the plan (Tr. 18-19).

There would be no way that anyone could deny that the roof fall was extremely serious because one miner was killed and another injured as a result of the roof fall (Exh. 2; Tr. 28). Respondent claimed that the main reason that the roof fell was that it was not known before the roof fell that respondent's No. 4 Mine was directly under an abandoned mine which had pillars directly above the site of the roof fall in respondent's mine. Respondent claims that the roof in its mine took weight suddenly

and unexpectedly and that the mine foreman could not have anticipated the roof fall which occurred (Tr. 27).

Counsel for MSHA stated that the inspectors would testify in support of the facts as they were stated in the fatality report, but he said that they would be unable to support their measurements and data concerning the number of timbers in the mine and width of the entries because a flood had occurred after the fatality report had been written and the flood had inundated the MSHA files where the inspectors' notes were kept and the notes had been dstroyed. Therefore, if a hearing had been held, the inspectors would not have had available in the hearing room any written data to support their testimony other than the facts in the fatality report whose accuracy had been challenged by respondent's prospective witnesses (Tr. 5).

The foregoing discussion of the evidence which would have been submitted if a full hearing had been held indicates that any findings as to gravity and negligence would not be so firm as to justify the assessment of a maximum civil penalty of $10,000 where a small mine is involved. Consequently, I find that respondent's agreement to pay a civil penalty of $5,000 is reasonable in the circumstances and should be approved.

WHEREFORE, it is ordered:

(A) The parties' request that I approve a settlement under which respondent would pay a civil penalty of $5,000 is granted and the settlement proposal is approved.

(B) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay a civil penalty of $5,000 for the violation of Section 75.200 cited in Order No. 1 KF (7-20) dated February 9, 1977.

Richard C. Steffey
Administrative Law Judge