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SOL (MSHA) V. SEWELL 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

v.

SEWELL COAL COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. HOPE 79-72-P
A.C. No. 46-01477-03003

Docket No. HOPE 79-73-P
A.C. No. 46-01477-03004

Docket No. HOPE 79-74-P
A.C. No. 46-01477-03005

Docket No. HOPE 79-114-P
A.C. No. 46-01477-03006V

Docket No. HOPE 79-115-P
A.C. No. 46-01477-03008

Docket No. HOPE 79-147-P
A.C. No. 46-01477-03010

Docket No. HOPE 79-148-P
A.C. No. 46-01477-03012

Docket No. HOPE 79-149-P
A.C. No. 46-01477-03016

Sewell No. 4 Mine

DECISION AND ORDER APPROVING
SETTLEMENT OF CIVIL PENALTY PROCEEDINGS

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Michels.

These proceedings were brought pursuant to section 110(a) of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
820(a). The petitions for assessment of civil penalties were
filed by the

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Mine Safety and Health Administration on October 17, 1978, November 9, 1978, and December 13, 1978. Thereafter, answers were filed by the Respondent. A hearing was held on October 9, 1979, in Charleston, West Virginia, at which both parties were represented by counsel.

Evidence was received on Citation No. 44827 (June 19, 1978), which is docketed in HOPE 79-149-P (Tr. 4-92). After the conclusion of the taking of evidence on this citation, the parties advised the court that they had agreed to a settlement of all the citations in all of the dockets, including the citation upon which evidence had been taken (Tr. 92). The settlement, it was stated, computed out to 75 percent of the proposed assessment (Tr. 92).

Upon questioning from the bench, the parties placed the following general representations on the record as to the justification for the settlement:

MR. KRAMER: Well, Your Honor, one of the areas, of course, as you are aware, I think, it's approximately thirteen violations in this case that involves sanding devices and many of those are assessed -- they're just common citations assessed at as much as eight hundred dollars. And being realistic about it I wouldn't expect Your Honor to assess anything approaching that high an assessment on those particular citations.

I would expect violations to range more in the four to five hundred dollar range. So I would expect Your Honor to reduce those.

JUDGE MICHELS: In other words, you believe as to that group which constitutes eleven of the twenty-two citations that the assessment may have been excessive?

MR. KRAMER: Yes, I do, Your Honor.

JUDGE MICHELS: All right. Do you have any other reasons?

MR. KRAMER: There are some other individual violations which I believe fall in the same category, mostly which in my view are slightly overassessed.

I believe with respect to the three withdrawal orders, those assessments are reasonable. I believe there were three withdrawal orders assessed for a total of a little over seven thousand dollars. I felt from the facts in those cases that those were pretty fair assessments and so those I would not propose to reduce very significantly.

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JUDGE MICHELS: Is this HOPE 79-114-P with citations 046376, 043421, and 043461?

MR. KRAMER: That's correct, Your Honor.

JUDGE MICHELS: You would not reduce those significantly?

MR. KRAMER: That's correct. And I think that is primarily my feelings on the cases, Your Honor.

JUDGE MICHELS: Do you have anything to add to that,

Mr. Callahan?

MR. CALLAHAN: Your Honor, not other than my general feeling that a good number of these citations were overassessed. There are some factual difficulties that might arise during trial, if we were to try the cases involving sanding devices. I believe, however, there is enough question on both parts that we can reasonably settle these cases without going into those facts per se, and that a settlement would certainly be proper in this instance.

(Tr. 95-97).

Thereupon, a decision was issued from the bench approving the proposed settlement, subject to the submission by Petitioner of more detailed information on the amounts allocated for the individual citations and the reasonableness of the proposed disposition.

JUDGE MICHELS: Thank you very much, gentlemen.

The sum of it is then, for the dockets, for all of the dockets which I previously identified for the record, and all of the citations therein, the parties have agreed to settle for seventy-five percent of the assessments made by the Office of Assessment.

As Mr. Kramer has explained, certain of these citations dealing with sanding devices may have been, and it's his view were, overassessed and would not bear in all probability an assessment of that amount after a hearing.

Furthermore, as I understand, Mr. Kramer would not reduce significantly at least those citations which deal with the float coal and loose dust which are in HOPE 79-114-P.

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Furthermore, Mr. Kramer will in due course submit a final proposed settlement in which he will allocate or proposes to allocate among all of the citations the amount agreed upon in settlement * * * [and] as to each of the individual citations, he will there further express his view as to why the settlement is fair and reasonable.

Considering all of those circumstances, it is my view that the settlement proposed for all of these citations, including that citation which has been heard here today, would be fair and reasonable.

I do not believe that it would be an undue lowering or lessening of the penalties.

Accordingly, I will accept the agreement, or the settlement, that the parties have entered into.

(Tr. 97-98).

On October 24, 1979, counsel for Petitioner submitted its motion which allocates the total settlement in the following manner which is hereby incorporated as part of the agreement:

CITATION NO.	STANDARD	ASSESSMENT	SETTLEMENT
HOPE 79-72-P			
43415	75.1403	\$ 420	\$ 100
43416	75.1403	590	200
43418	75.316	395	100
HOPE 79-73-P			
43436	75.1403	530	400
43437	75.1403	530	400
43438	75.1403	530	400
43439	75.1725(a)	530	200
43443	75.1403	530	300
43446	75.200	590	590
HOPE 79-74-P			
43455	75.323	240	100
43470	75.200	470	470
HOPE 79-114-P			
46376	75.400	3,000	3,000
43421	75.400	1,000	1,000
43461	75.400	3,000	3,000

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CITATION NO.	STANDARD	ASSESSMENT	SETTLEMENT
HOPE 79-115-P			
44009	75.302-1	\$ 420	\$ 100
HOPE 79-147-P			
44055	75.1403	395	395
HOPE 79-148-P			
44443	75.1403	590	400
44457	75.1403	800	400
44458	75.1403	800	300
44459	75.1403	800	300
HOPE 79-149-P			
44827	75.1103-1	920	655
		\$17,080	\$12,810

In its motion, Petitioner made the following statements with reference to the settlement:

Citation 43415 was reduced since the left inby sanding device and the two outby sanding devices were still operational. Thus sand could be delivered to the two left wheels while traveling inby and sand could be delivered to all 4 wheels while traveling outby. Consequently, the degree of gravity is small.

Citation 43416 was reduced since it was the emergency brake which was inoperative due to low brake fluid. The main system was operational and the gravity was therefore small.

Citation 43418 was reduced since this citation was based upon the fact that 2 of the water sprays had been intentionally plugged with wood -- apparently to increase the water pressure to the other sprays. The inspector inferred, therefore, that the spray system could not have been adequately checked and, if necessary, serviced at the beginning of each shift and after each cut of coal is mined as required by the methane and dust control plan. Thus, MSHA would not be able to directly establish negligence on the part of the Respondent other than for the 2 sprays intentionally plugged.

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Citation Nos. 43436, 43437 and 43438 were reduced since the gravity of the violations does not appear to be as high as that assigned by the assessment office.

Citation 43439 was reduced, since it was the emergency brake which was inoperative and the main braking system was operational. Thus the gravity was reduced.

Citation 43443 was reduced, since only 2 of the 4 sanding devices were inoperative and the inspector did not remember which they were. Thus there may have been an operational sander for each direction of travel reducing the gravity.

Citation 43455 was reduced because there is some question of whether the condition described by the inspector constitutes a violation of 75.323.

Citation 44009 was reduced because there is some question of whether the condition described by the inspector constitutes a violation of 74.302-1.

Citation Nos. 44443, 44457, 44458 and 44459 were reduced, since they appear to have been over assessed by the assessment office and only 2 of the 4 sanding devices were defective for 44458 and 44459.

Citation No. 44827 was reduced, since the testimony at the hearing seemed to indicate that the Respondent did make some effort to abate the violation within the time given. Thus there was not a total lack of good faith abatement on their part.

Other than Citation No. 44827, the Respondent demonstrated a good faith abatement effect. Other considerations are that the Respondent is a large operation and has a previous history of violations. MSHA believes that this settlement fairly reflects the six criteria and that the penalties are adequate to promote future compliance.

Respondent orally advised the court that it does not object to the allocations or the supporting statements made by counsel for MSHA.

After considering the above, I hereby AFFIRM my approval of the settlements for these dockets.

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ORDER

IT IS ORDERED that Respondent pay total penalties of \$12,810 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge