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SOL (MSHA) V. DAVIS COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceedings<br><br>Docket No. WEVA 79-358<br>A.O. No. 46-02208-0318V |
| v. | Docket No. WEVA 79-359<br>A.O. No. 46-02208-03019 |
| DAVIS COAL COMPANY,<br>RESPONDENT | Marie No. 1 Mine |

DECISION AND ORDER APPROVING SETTLEMENT

In response to the order to furnish additional information concerning the motions to approve settlement, the Regional Solicitor has declined to furnish "a current evaluation of this operator's ability to comply with the Mine Safety Law considering its financial difficulties." The Regional Solicitor claims that in reviewing a proposed settlement the advisability of a reduction in proposed penalties because of adverse business impact need not take into account or be balanced against the affirmative interest in perpetuating only safe mining operations. (FOOTNOTE 1) The logical extension of this position seems to be that mine safety is a consideration secondary to mine productivity and that the enforcement policy in effect is "all the safety consistent with production" and not "all the production consistent with safety."

These echoes of a production-oriented enforcement policy I thought were authoritatively rejected with the transfer of enforcement responsibility from the Interior Department to the Labor Department. I believe, therefore, that the view expressed by the Regional Solicitor, namely that "evaluation of an operator's financial ability to comply with the mine safety and health regulations is not" to be considered in evaluating a settlement where the principal justification

for the reduction is adverse business impact, represents a profound misreading of the legislative intent.

Congress has declared that "the first priority" of all concerned with mine safety is protection of the health and safety of the miner. Certainly an interpretation of that intent that puts safety at risk in the interest of continued productivity runs counter to the fundamental declaration of policy contained in the Act as well as the Secretary's explicit mandate to evaluate an operator's past performance and history of compliance to ensure that mining operations do not constitute a "continuing hazard to the health or safety of miners." 30 U.S.C. 814(c)(1), 818(a)(2); S. Rep. 95-181, 95th Cong., 1st Sess., at 32-33, 38-39 (1977).

As the Senate Committee Report that accompanied the 1977 Act notes: "* * * the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Id. at 41. How a penalty can deter future violations and ensure voluntary compliance if the operator does not have the financial resources to effect compliance is not explained. Nor is the public interest in encouraging a mining operation without the financial resources to comply with mine safety laws. Just as the purpose of the law is not to raise revenue so also its purpose is not to perpetuate unsafe or even marginally safe mining operations. In my judgment, the failure to make the evaluation called for is a violation of the Secretary's obligation to ensure a working environment substantially free of the hazards proscribed by the Act.

Under no circumstances, in my judgment, can the imposition of a token or unwarrantably low penalty be justified by the claim that the adverse business impact criteria precludes a realistic evaluation of the ongoing mine operation from the standpoint of ability to comply and to devote necessary resources to promote mine safety. Such an evaluation of an operation in serious financial difficulties is not beyond the competence and expertise of MSHA. The history and pattern of prior conduct and violations is highly predictive of the likelihood of future compliance. Simple observation should provide the basis for determining whether, for example, an operator has on hand the necessary materials to ensure compliance with its roof control plan. Consequently, I think it unfortunate that the Regional Solicitor has declined to furnish the evaluation requested.

Nevertheless, I am satisfied, at least for the present, that with the waters stirred, with the matter under review by the Commission, and with the possibility that MSHA may be held liable for the negligent execution of its duty to

prevent the continuation of mining conditions that constitute an ongoing hazard to miners, the surveillance of the Marie No. 1 Mine will be intensified. Compare, Raymer v. U.S., 455 F.Supp. 165 (W.D. Ky. 1978).

As previously noted, the overall reduction proposed in these cases is only $1250.00 or one-third of the amount initially assessed. It is unlikely, therefore, that it will be determinative of whether the operator sinks or swims. Furthermore, I am impressed with the operator's representations as to the efforts he will make to achieve future compliance.

Based on my independent evaluation and de novo review of the violations, the matters set forth in mitigation, including the fact that the hole-through occurred while the operator was acting under an MSHA approved plan, the operator's straitened financial circumstances, and the Pikeville National Bank loan to cover immediate operating expenses, I conclude the settlement proposed is acceptable.

Accordingly, it is ORDERED that the Secretary's motions to approve settlement be, and hereby are, GRANTED. It is further ORDERED that the operator pay the settlement agreed upon, $2,325.00 on or before Friday, February 7, 1980, and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE 1

While the Act requires that adverse business impact be "considered", it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing only those mining operations that promote mine safety.