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SOL (MSHA) V. FARRELL-COOPER MINING  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

PETITIONER

Civil Penalty Proceeding

Docket No. CENT 79-70

A.O. No. 34-00976-03005

v.

Red Oak Mine

FARRELL-COPPER MINING COMPANY,  
RESPONDENT

DECISION

Appearances: David S. Jones, Attorney, U.S. Department of Labor,  
Dallas, Texas, for the petitioner Genevieve Farrell  
Yoes, Esquire, Forth Smith, Arkansas, for the  
respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on April 23, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking assessment of civil penalties for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The alleged violations were served on the respondent in three section 104(a) citations issued by MSHA inspector Donalee Boatright on October 18, 1978.

Respondent filed a timely answer to the petitioner's proposals, asserted several factual and legal defenses, and by notice of hearing issued on February 4, 1980, the case was docketed for hearing in Fort Smith, Arkansas, on April 15, 1980. Subsequently, by telephone call to my office at approximately 4 p.m., Friday, April 11, 1980, counsel for the petitioner advised me for the first time that the case had been settled and that he mailed a letter to that effect to the Commission on Wednesday, April 9, 1980. I advised counsel that the letter had not been received and that I considered his telephone call as untimely, and that the petitioner should enter an appearance at the hearing or run the risk of my dismissing the docket. Counsel was further informed that another case scheduled for hearing at

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2 p.m. on April 15, was being handled by his office and that the attorney representing MSHA in that proceeding could present any settlement proposals with respect to this matter on the record when the docket was called for trial.

The parties appeared at the hearing, and after a brief prehearing conference concerning the proposed settlement, including a discussion with counsel regarding the timely filing of proposed settlements, the parties were afforded an opportunity to present their settlement proposals on the record.

#### Discussion

The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
393052	10/18/78	77.1605(k)	\$ 140	\$ 90
393053	10/18/78	77.1110	90	66
393054	10/18/78	77.1605(k)	140	90
			\$ 370	\$246

In support of the proposed settlement, the parties filed a joint settlement agreement executed on April 14, 1980, and petitioner asserts therein that it has reconsidered and reviewed the statutory factors concerning the size of the respondent, its previous history of violations, the gravity of the violations in issue here, respondent's negligence, and its good faith compliance. Petitioner also filed copies of the citations, the "inspector's statements" concerning each citation, and information concerning respondent's prior history of violations, its size, the abatement, and the gravity presented as to each citation (Exhs. P-1(a) through P-1(k)).

Citation Nos. 393052 and 393054 both allege violations of the provisions of 30 C.F.R. 77.1605(k), which requires that berms or guards be provided on the outer banks of elevated roadways. The information contained in Exhibit P-1(j) with regard to Citation No. 393052 reflects that the roadway in question was not a regularly traveled roadway, that due to the height of the drop-off there was very little chance of injury, and that the berm was provided in the shortest possible time. With regard to Citation No. 393054, the information provided reflects that the "roadway" in question had not been established since the scrapers were removing topsoil and as soon as it was removed a berm was provided.

In addition to the foregoing, the parties conceded that the proposed settlement takes into consideration the fact that the berm citations issued by the inspector allege that berms were not provided on the inner banks of the roadways in question, and that this defense was raised by the respondent in its initial answer to the petitioner's proposals for assessment of civil

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penalties for these citations (Tr. 15). Petitioner's counsel also asserted that respondent rapidly abated the conditions cited.

With regard to Citation No. 393053, the inspector's citation reflects that it was issued because the fire extinguisher on a piece of equipment was discharged and not maintained in an operable condition. However, the record (Exh. P-1(j)), reflects that a new one was provided immediately and that there was no gross negligence (Tr. 14).

The parties agree that the respondent is a medium-sized coal mine operator, and its prior history of violations during the 2-year period preceding the issuance of the citations in question here consists of 38 citations (Tr. 16-18; Exh. P-1(i)).

#### Conclusion

After careful consideration of the arguments presented by the parties in support of the proposed settlement, including review of the information contained in the exhibits and pleadings, I conclude and find that the proposed settlement disposition of this case should be approved.

#### ORDER

Pursuant to Commission Rule 29 C.F.R. 2700.30, the settlement is APPROVED, and respondent is ORDERED to pay civil penalties in the amount of \$246 within thirty (30) days of the date of this decision and order in satisfaction of the aforementioned citations. Upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras  
Administrative Law Judge