

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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19 JUN 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA), : Docket No. CENT 79-32
 Petitioner : A.O. No. 14-00236-03003V
 v. :
 : No. 25 Strip
 CLEMENS COAL COMPANY, :
 Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Robert J. Lesnick, Attorney, U.S. Department of Labor,
 Kansas City, Missouri, for the petitioner;
 Jesse M. Lee, Pittsburg, Kansas, for the respondent.

Before: Judge Koutras ,

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent through the filing of a proposal for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards promulgated Pursuant to the Act.

Respondent filed a timely answer and requested a hearing. The matter was scheduled for hearing in Wichita, Kansas, April 23, 1980, along with several other dockets heard that week. When this docket was called, the parties advised me that they proposed a settlement pursuant to 29 C.F.R. § 2700.30, and they were permitted to present their arguments in support of the proposed settlement disposition on the record. A bench decision was rendered, and the decision is herein reduced to writing and served on the Parties. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Assesement</u>	<u>Settlement</u>
390730	10/10/78	77.205(a)	\$1,800	\$1,100
390731	10/10/78	77.400(a)	900	250
			\$2,700	\$1,350

Discussion

The conditions or practices cited by the inspector in this proceeding are as follows:

Citation No. 390730, 10/10/78, 30 C.F.R. 77.205(a). "A safe means of access was not maintained to the lower **walkway** to the bottom conveyor on the north side of the tippie in that the **floor** of the travelway (expanded metal) was loose and would not support any weight."

Citation No. 390731, 10/10/78, 30 C.F.R. 77.400(a). "The fan inlets to the blades on the 36 in. fan in the bathhouse was not guarded to keep person from contacting exposed moving parts."

In support of the settlement disposition of this matter, petitioner made the following arguments and presented information concerning the six statutory criteria set forth in section 110(i) of the Act.

Size of Business

Petitioner asserted that at the time of the citations were issued, respondent's strip mining operations at the mine in question were **small**, and that annual production was 87,257 tons of coal. Petitioner also indicated that the mine is no longer in operation. Respondent confirmed this fact and indicated that during the **relevant** times in question, 40 miners were employed at the mine and one mine superintendent was in charge of the operation.

Prior History of Violations

Petitioner asserted that the respondent has an exceptional good safety record and prior history of violations and that it operated some 74,000 man-hours of production with no lost-time accidents.

Effect of Civil Penalties on Respondent's Ability to Remain in Business

Although the mine in question is no longer operational, respondent is still in the coal-mining business, and the parties agreed that the civil penalties assessed in this matter will not adversely affect its ability to remain in business.

Good Faith Compliance

Petitioner asserted that respondent exhibited exceptional good faith in achieving rapid compliance and **correcting** the conditions cited.

Negligence

With regard to Citation No. 390731, concerning the unguarded fan, petitioner argued that the condition resulted from ordinary negligence and that the lack of a guard should have been known to the respondent.

With regard to Citation No. 390730, petitioner asserted that the alleged hazardous condition of the walkway was first brought to the attention of mine management by the mine safety committee. Respondent's safety director looked into the matter, and after inspecting the walkway, concluded that it was safe and not hazardous. This difference of opinion as to the alleged hazardous condition was subsequently resolved when MSHA inspector Lester Coleman issued the citation after an inspection of the walkway. In these circumstances, petitioner's counsel advanced the argument that the citation resulted from gross negligence. I advised the parties that absent any further testimony or evidence indicating deliberate or reckless disregard for safety on the part of the respondent, I could not conclude that the fact that the asserted hazardous condition was brought to the attention of mine management by the mine safety committee per se constitutes gross negligence. Since reasonable men may differ on the gravity of any violation, absent further facts, I can only conclude that this citation resulted from ordinary negligence.

Gravity

With regard to the gravity of the walkway citation, petitioner asserted that the condition cited was serious. Although two employees were initially thought to be exposed to the hazard presented, in fact, only one employee a day would be using the walkway and would be exposed to a possible falling hazard of some 10 feet from the walkway. I find the violation was serious.

With regard to the gravity of the fan citation, petitioner asserted that the fan in question was located some 5 feet off the floor and was recessed into the wall. Further, the fan was actually only in use once a month when one or two employees had occasion to use the bathhouse where the fan was located in one corner of the building. Petitioner also indicated that the factor of gravity was overevaluated by MSHA when the initial proposed assessment was computed. I find the violation was nonserious.

In addition to the foregoing arguments in support of the proposed settlement, petitioner's counsel stated he has consulted with Inspector Coleman, who was present in the courtroom, and that the inspector was in accord with counsel's analysis of the circumstances surrounding the citations, including the arguments advanced by counsel with regard to the statutory criteria set forth in section 110(i) of the Act. Respondent's representative also expressed agreement with the proposed settlement.

Conclusion

After careful consideration of the arguments presented in support of the proposed settlement, and taking into account my findings and conclusions made in this matter, I conclude that the proposed settlement is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, petitioner's motion is granted and the settlement is approved.

ORDER

Respondent is ordered to pay civil penalties in the amount of \$1,350 in satisfaction of the two citations in question within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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