

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUN 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-420-P
Petitioner : Assessment Control
V. : No. 15-02502-02019
: :
SHAMROCK COAL COMPANY, : No. 18 Mine
Respondent :

DECISION APPROVING SETTLEMENT

Appearances : George Drumming, Jr., Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Neville Smith, Esq., Manchester, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was **convened** on April 22, 1980, in Barbourville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Instead of presenting evidence with respect to the 14 violations alleged in the Petition for Assessment of Civil Penalty, counsel for the parties entered into a settlement agreement under which respondent agreed to pay penalties totaling \$1,203 instead of the total penalties of \$1,805 proposed by the Assessment Office.

Counsel for the parties entered into the following stipulations (**Tr.** 3-4):

(1) Respondent, Shamrock Coal Company, is subject to the jurisdiction of the Act.

(2) Respondent operates a coal mine designated as No. 18 Mine.

(3) The inspector, Mike Detherage, is a duly authorized representative of the Mine Safety and Health Administration and in his official capacity inspected the No. 18 Mine in August and September of 1977.

(4) Respondent was properly issued the citations in question.

(5) Respondent is a large operator.

(6) The history of previous violations is reflected by the computerized history of previous violations and is designated **as** Exhibit P-1. **That** history was considered by the Assessment Office in determining its proposed assessments. The reductions in the proposed assessments under the parties' settlement agreement were made on the basis of the criterion of gravity and do not affect any amount derived under the criterion of history of previous violations.

(7) All of the violations were the result of ordinary negligence.

(8) Respondent demonstrated a normal good faith effort to achieve compliance with respect to all of the violations.

(9) The ability of respondent to continue in business will not be adversely affected by the payment of the negotiated penalty amounts.

The parties' stipulations set forth above show consideration of five of the six criteria in section **110(i)**. The one criterion remaining to be evaluated is that of gravity which will be discussed below **as** each of the violations is individually considered.

Notice No. 2 MDF (7-110)8/22/77§ 75.316

The first one is No. 7-110 alleging a violation of section 75.316. The assessed amount was \$125; the negotiated amount is \$100, and that reduction is based on the fact that only 60 percent of the water sprays were inoperative on the continuous-mining machine. A certain amount of water was still sprayed on the coal so that some of the dust was **alleviated**. Any immediate harm was not great and any injury that might result from the violation would be related to a miner's possible exposure to respirable dust over a period of time sufficient for a miner to contract **pneumoconiosis**. Exposure to respirable dust was not great at the time the notice was written (**Tr.4-5**).

Notice No. 2 MFD (7-112)8/23/77§ 75.302

No. 7-112 alleged a violation of section 75.302. **The** Assessment Office proposed a penalty of \$125 and respondent agreed to pay the full proposed amount of \$125. No methane

was detected in the immediate return in an air sample bottle, but a minute amount of methane was detected at the face with a handheld methane detector. Because of the seriousness attributed by the inspector to the existence of any amount of methane, respondent agreed to pay the full proposed penalty of \$125 (Tr. 5).

Notice No. 5 MFD (7-113) 8/23/77 § 75.514

No. 7-113 alleged a violation of section 75.514. The Assessment Office proposed a penalty of \$140 and respondent agreed to pay a penalty of \$110 because the gravity of the violation was reduced by the fact that the equipment was provided with ground protection, ground monitoring and an instantaneous circuit breaker for any overload or under-current (Tr. 6).

Notice No. 6 MFD (7-114) 8/23/77 § 75.1704-2(d)

No. 7-114 alleged a violation of section 75.1704-2(d). The Assessment Office proposed a penalty of \$98 and respondent agreed to pay the full amount proposed. There was no up-to-date map posted in the section. Although an up-to-date map had been provided in the mine office, there was not one posted in the section as required by the regulations (Tr. 6).

Notice No. 2 MFD (7-116) 8/24/77 § 75.316

No. 7-116 alleged a violation of section 75.316. This notice relates in part to the very first violation alleged in Notice No. 7-110 discussed above. The penalty proposed by the Assessment office for the instant violation was \$170 and respondent has agreed to pay a penalty of \$140. A higher penalty for the instant violation of section 75.316 than was agreed upon for the violation of section 75.316, alleged in Notice No. 7-110, is justified because a greater amount of dust existed on August 24, 1977, when Notice No. 7-116 was written than existed on August 22, 1977, when Notice No. 7-110 was written (Tr. 6-7).

Notice No. 3 MFD (7-117) 8/24/77 § 75.400

No. 7-117 alleged a violation of section 75.400. The gravity here was reduced by the fact that no ignition source was immediately present in the area. The inspector said that if there had been an ignition source, he would have issued a withdrawal order. The inspector did not consider the violation to be as serious as the Assessment Office had when it proposed a penalty of \$120. Respondent has also made note of the fact that the area had been rock dusted. Because the presence of the

rock dust also reduced the explosive possibility associated with the violation, counsel for the Secretary stated that he had agreed to accept respondent's offer of a reduced penalty **of \$90 (Tr. 7).**

Notice No. 4 MFD (7-118)8/24/77§ 75.400

No. 7-118 also alleged a violation of section 75.400. The Assessment Office proposed an amount of \$110 and respondent agreed to pay a penalty of \$90. Counsel for the Secretary agreed to accept respondent's offer as appropriate because, although the accumulation existed in a small area measuring only 3 by 2 feet, the accumulation was observed in a starter box where an ignition source was located in close proximity to the accumulation **(Tr. 8).**

Notice No. 6 MFD (7-120)8/24/77§ 75.603

No. 7-120 alleged a violation of section 75.603. The Assessment Office proposed an amount of \$110 and respondent has agreed to pay a reduced penalty of \$100. Although each wire had been insulated, each wire had not been insulated against moisture to the extent that the other part of the cable had originally been insulated. Nevertheless, the violation was only moderately serious because there was ground protection, ground monitoring and instantaneous **circuit** breakers for overload or undercurrent protection **(Tr. 8-9).**

Notice No. 1 HS (7-123)8/24/77§ 75.316

Notice No. 2 HS (7-124)8/24/77§ 75.316-1

With respect to the two violations alleged in Notice Nos. 7-123 and 7-124, counsel for the Secretary moved to withdraw the Petition for Assessment of Civil Penalty, to the extent that civil penalties are sought for the violations alleged in those notices because the notices were written by an inspector who is no longer available to testify in support of the alleged violations. Since the Secretary's counsel did not think that he could prove that the violations had occurred, his request to withdraw the Petition as to Notice Nos. 7-123 and 7-124 is hereinafter granted **(Tr. 10).**

Notice No. 1 MFD (7-125)9/13/77§ 75.515

No. 7-125 alleged a violation of section 75.515 for which the Assessment Office proposed a penalty of \$145. Respondent has agreed to pay a reduced penalty of \$110.

Although the violation involved high voltage which could have caused a serious shock hazard, there existed ground protection, ground monitoring, and instantaneous circuit breakers for overload and undercurrent protection, Counsel for the Secretary also believed a reduction in the proposed penalty was justified because the procedures which respondent was following had previously been acceptable, but were rendered illegal by an interpretive **MSHA memorandum** written in early 1977. The inspector wrote Notice, No. 7-125 on the basis of that memorandum (Tr. **10-11**).

Notice No. 2 MFD (7-126) 9/13/77 § 75.1710

No. 7-126 alleged a violation of section 75.1710 for which the Assessment Office proposed a penalty of **\$130**. Respondent has agreed to pay a reduced amount of \$100. The circumstances warranting a reduction in the penalty were that a canopy had been removed from a machine while it was located in an area which was so low that no canopy was required. When the section progressed beyond the low area into a height where a canopy was again required, the miners failed to reinstall the canopy. Counsel for the Secretary has agreed to accept respondent's offer of a reduced penalty because the mine roof was sound and did not appear to have exposed the machine operator to a **roof-fall hazard** (Tr. **11-12**).

Notice No. 3 MFD (7-127) 9/13/77 § 77.205(a)

No. 7-127 alleged a violation of section 77.205(a) for which the Assessment Office proposed a penalty of \$170 and for which respondent has agreed to pay a reduced penalty of \$140. Although no miners were stationed near the loose materials on the highwall, the miners did pass by the area when they walked to the place where their cars were parked. Since no miners were exposed to the **highwall** on a continuous basis or at a time when their attention would be directed to work which might make them unaware of any materials that might fall into the travelway, the Secretary's counsel believed that a reduction in the proposed penalty was justified (Tr. **12-13**).

Notice No. 2 MFD (7-130) 9/26/77 § 75.312

The last notice, No. 7-130, alleged a violation of section 75.312 for which the Assessment Office proposed a penalty of \$170. Counsel for the Secretary moved to withdraw the Petition for Assessment of Civil Penalty insofar as it seeks assessment of a penalty for the alleged violation of section 75.312 because he said that section pertains to ventilation of a working place, whereas the area cited in the notice involved active mine workings. Inasmuch as the Secretary's counsel believed that the violation had been improperly cited, his request to withdraw the Petition with respect to the violation cited in Notice No. 7-130 is hereinafter granted (Tr. **13-14**).

I find that counsel for respondent and the Secretary gave satisfactory reasons for approval of the penalties agreed upon in their settlement conference and that the settlement agreement hereinbefore discussed should be accepted.

Summary of Assessments

Based on the parties' settlement agreement, the following civil penalties should be assessed:

Notice No. 2 MFD (7-110) 8/22/77 § 75.316	\$	100.00
Notice No. 2 MFD (7-112) 8/23/77 § 75,302**.....**.....*		125.00
Notice No. 5 MFD (7-113) 8/23/77 § 75.514*.....		110.00
Notice No. 6 MFD (7-114) 8/23/77 § 75.1704-2(d)		98.00
Notice No. 2 MFD (7-116) 8/24/77 § 75.316		140.00
Notice No. 3 MFD (7-117) 8/24/77 § 75.400*.....		90.00
Notice No. 4 MFD (7-118) 8/24/77 § 75.400		90.00
Notice No. 6 MFD (7-120) 8/24/77 § 75.603*		100.00
Notice No. 1 MFD (7-125) 9/13/77 § 75.515		110.00
Notice No. 2 MFD (7-126) 9/13/77 § 75.1710		100.00
Notice No. 3 MFD (7-127) 9/13/77 § 77.205(a)*.....*		140.00
Total Settlement Penalties in Docket No.		
BARB 78-420-P*.....*.....*		\$1,203.00

WHEREFORE, it is ordered:

(A) . The parties' request for approval of settlement is granted and the settlement agreement submitted in this proceeding is approved.

(B) Pursuant to the parties' settlement agreement, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling \$1,203.00 as set forth in the paragraph under "Summary of Assessments" above.

(C) The request by the Secretary's counsel to withdraw the Petition for Assessment of Civil Penalty in Docket No. BARB 78-420-P to the extent that it sought assessment of civil penalties for the violations listed below is granted:

- Notice No. 1 HS (7-123) 8/24/77 § 75.316
- Notice No, 2 HS (7-124) 8/24/77 § 75.316-1
- Notice No, 2 MFD (7-130) 9/26/77 § 75.312

Richard C. Steffey
 Richard C. Steffey
 Administrative Law Judge
 (Phone: 703-756-6225)

Distribution:

George Drumming, Jr., **Esq.**, Office of the Solicitor, U.S. Department
of Labor, **Room** 280, U.S. Courthouse, 801 Broadway, Nashville, TN
37203 (Certified Mail)

Neville Smith, Esq., Attorney for Shamrock Coal Company, P.O. Box 441,
Manchester, KY 40962 (Certified Mail)