FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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4 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding : Docket No. WEVA 79-393 : A.O. No. 46-03805-03048V
v.	: Martinka No. 1
SOUTHERN OHIO COAL CO., Respondent	: :

DECISION AND ORDER

The parties move for approval of a settlement of the two violations charged at approximately 80% of the amount initially assessed.

Based on an independent evaluation and de novo review of the information submitted in support of the motion, I find the penalty proposed for the ventilation violation ($1100) is excessive in view of circumstances which show the condition was attributable to the negligence of a shuttle car operator who failed to report the hole in the line curtain and to the roof bolters' disregard for compliance with the Mine Safety Law. It continues to be my.position that rank-and-file miners who deliberately.endanger themselves and their fellow workers by knowing disregard for compliance with the mandatory safety standards should be the subject of the civil and criminal sanctions provided for under section 110(c) of the Act. Gregoire Coals Inc., 2 FMSHRC 1444 (June 16, 1980).

Citing its fear that enforcement of the law against rank-and-file miners would "encourage anarchy among the workforce" the Office of the Solicitor has turned a blind eye to the failure if not the refusal of the miners to insist on safe operating conditions. It is argued that for MSHA to apply the sanctions of the law to the workforce would interfere with the operators' authority to manage the mines, including their authority to insist, if they choose, on an unsafe operation so long as they are willing to assume liability for payment of

penalties assessed for the violations that inevitably result from the push for production. Compare, Whitt et al. v. Itmann Coal, Co., 2 F'MSHRC ___, (August 4, 1980). MSHA's hands-off the workforce enforcement policy is another aspect of the "live and let live" relationship between MSHA, the Unions, and the operators that has emasculated the criminal sanction and debilitated the civil sanction. It is somewhat heartening to learn that the Department of Justice may not share the solicitor's myopic view of the reach of the civil and criminal -sanctions. In an indictment recently returned by a Grand Jury in the Western District of Virginia, one Donnie Duncan, a continuous miner operator for the United Castle Coal Company, was charged with "having willfully taken coal more than 40 feet beyond the last line of roof support, jeopardizing his fellow workers' lives." According to published reports this is the first time the criminal sanctions have been applied to a rank-and-file miner.

In addition to the foregoing considerations, I also find the ventilation violation created no recognizable hazard of a fire or explosion and was rapidly abated. I conclude therefore that the penalty warranted for this violation is $400.00.

My review of the circumstances surrounding the accumulation violation leads me to conclude it was under-assessed by the same amount the ventilation violation was over-assessed. My reasons are that this was a knowing violation attributable to the operator's failure to provide a miner to cleanup the accumulation. The excuse of absenteeism is unacceptable in mitigation of noncompliance since an operator who cannot operate safely should shut down until a workforce sufficient to permit a safe operation becomes available. I also find this violation created a probable and recognizable hazard of a fire that could result in burn injuries or fatalities from smoke inhalation. I conclude therefore that the amount of the penalty warranted for this violation should be increased from $400 to $1100.

My reevaluation and reassessment of the relative gravity and culpability of the operator for these two violations results in no increase or decrease in the total penalty agreed upon for settlement of these violations. For this reason, I conclude the motion to approve settlement is acceptable with respect to the total amount involved, but disagree as to how it should be allocated.

Accordingly, it is ORDERED that subject to the reallocation of the amounts proposed as hereinabove indicated the motion to approve settlement be, and hereby is, GRANTED.

It is FURTHER ORDERED that the operator pay the amount of the total penalty agreed upon, $1500, on or before Friday, August 22, 1980 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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