

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
(703) 756-6225

15 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 80-30
Petitioner : A.O. No, 44-03525-03014
v. :
BIG TEN CORPORATION, : Mine: No. 2
Respondent :

DECISION AND ORDER APPROVING
PARTIAL SETTLEMENT AND PARTIAL WITHDRAWAL OF PETITION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Gerald L. Gray, Esq., Clintwood, Virginia, for Respondent.

Before: Judge Edwin S. Bernstein

This case originally involved 14 citations issued pursuant to the Federal Mine Safety and Health Act of 1977 (the Act). On April 28, 1980, a Decision and Order Approving Settlement in Docket No. VA 80-29 and Partial Settlement in Docket No. VA 80-30 was issued in which I approved settlement with respect to three of the 14 citations. A hearing concerning the remaining 11 citations was convened on June 24, 1980, in Bristol, Tennessee. At that time, I entertained the following motions and issued the following bench decision:

JUDGE BERNSTEIN: This case originally involved fourteen separate citations. By a previous motion, the parties requested approval of the settlement of citation numbers 682319, 682321, and 682714.

•
By order dated April 28, 1980, I approved the settlement of those citations.

This leaves eleven citations. At a prehearing conference, counsel have advised me that they wish to move for dismissal and vacation of two of the citations and they will move for approval of *a* settlement with regard to one other.

At this time, Ms. Rooney, if you could indicate, for the record, your motion with regard to the two citations you wish to have vacated.

MS. ROONEY: Yes, Your Honor. The Secretary of Labor hereby moves the withdrawal of the petition issued in the instant case with regard to citation numbers 00682727 and 00682728, issued in error.

As reasons for this motion, the Secretary states that the attorney for the Secretary and Respondent's attorney, have discussed the alleged violations and the six statutory criteria stated in Section 110 of the Federal Mine Safety and Health Act of 1977. Pursuant to those discussions, facts were disclosed which warrant a finding that citation numbers 00682727 and 00682728 were issued in error.

The petition, with respect to the aforementioned citations, should be withdrawn for the following reasons: The citations were issued for violation of 30 CFR 77.506. The citations set

forth that the number one and number two battery charging stations were not provided with fuses of the correct capacity to protect against short circuits and overloads. The fuses had been bridged **out**, rendering short circuit and overload protection inoperable.

However, further investigation has revealed that short **circu**it and overload protection was, in fact, provided. The fuses at the power source, **i.e.**, the switch box, was adequate and provided the mandated protection. Thus, the citations as issued cannot be supported by the facts stated therein.

The inspector who issued the citations has been consulted and he agrees that the motion to withdraw the petition would be appropriate with respect to the aforementioned citations.

In view of the foregoing, the Secretary requests that its motion be granted and that citation numbers 00682727 and 00682728 be vacated and the civil penalty petition be withdrawn regarding these two citations.

JUDGE BERNSTEIN: Is there any comment by the Respondent?

MR. GRAY: We don't object to that at all, Your Honor. I think it is highly appropriate.

JUDGE BERNSTEIN: The motion is granted. I want to **compli-**ment counsel on a very thorough presentation of this motion.

Let's move to the citation on which the parties wish me to approve settlement.

MS. ROONEY: The Secretary hereby moves to dismiss this proceeding and for the Administrative Law Judge to approve the negotiated settlement between the parties pursuant to 29 CFR 2700.30(c).

As reasons for the motion, the Secretary states that the attorney for the Secretary and the Respondent's attorney have discussed the alleged violation and the six statutory *criteria* stated in Section 110 of the Federal Mine Safety and Health Act of 1977.

A reduction from the original assessment of one hundred six dollars (\$106.00) is warranted for citation number 00682316, issued for a violation of 30 CFR 77.400. The citation was issued for inadequate guards at the number one belt drive located on the surface.

Guards were on the right side. However, the head roller had a hole at the take-up roller one foot six inches wide and two feet six inches high. On the left side, facing the head roller, the power roller had a hole one foot wide and two feet high.

Further investigation has disclosed that this condition had existed for a number of years and had been found adequate in prior MSHA inspections. This does not indicate that a violation did not exist. However, it does mitigate the operator's knowledge of the condition; hence, the operator's negligence.

Also, the guard was set up so that only if a man or woman got down on his or her hands and knees and crawled through the hole could that person get hurt. Thus, the probability of injury was slightly reduced. The gravity of the injury was appropriately assessed as permanently disabling. The condition was abated within the time fixed.

The operator is a relatively small operator and in the twenty-four months immediately prior to assessment of penalty of the instant case, ~~the~~ operator had received sixty-three violations.

For these reasons, a reduction in penalty from one hundred six dollars (\$106.00) to sixty dollars (\$60.00) is **appropriate**. And the Secretary requests that its motion be granted and the settlement approved.

JUDGE BERNSTEIN: Is there any comment by Respondent?

MR. GRAY: No, s i r .

JUDGE BERNSTEIN: Again, I'd like to indicate my compliments to counsel on a very thorough job of presenting the supplemental motion.

I think this type of motion could be used as an example to other counsel for the Secretary of Labor and I am impressed by not only the format of her motion but the content. I am convinced that the settlement, in the reduced amount, is appropriate and I approve that settlement.

I hereby affirm these bench decisions.

ORDER

Petitioner's motion to approve withdrawal of **the** petition with respect to Citation Nos. 0682727 and 0682728 is GRANTED and those citations are VACATED. Petitioner's motion to approve settlement with respect to Citation No. 0682316 is GRANTED and Respondent is ORDERED to pay \$60 in penalties within 30 days of the date of this Order in satisfaction of that citation. */



Edwin S. Bernstein
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor,
Room 14480, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Gerald L. Gray, P.C., Attorney for Big Ten Corporation, P.O. Box 238,
Clintwood, VA 24228 (Certified Mail)

*/ The remaining eight citations, nos. 0682317, 0682318, 0682320, 0682322, 5682715, 0682716, 0682717, and 0682719 are the subject of a separate Decision issued today.