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SOL (MSHA) V. THE NEW RIVER
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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. WEVA 80-308
A.O. No. 46-01297-02026 V

v.

Siltix Mine

THE NEW RIVER COMPANY,
RESPONDENT

DECISION AND ORDER

The parties move for approval of a settlement of a willful violation of the prohibition against by-passing the ground fault protection on the circuit breaker feeding the high voltage circuit to the belt feeder on the 023 section of the Siltix Mine. Counsel for the parties advise that the perpetrator has never been identified. It further appears that at the time of the violation, June 14, 1979, no concerted effort was made either by MSHA or the operator to determine, by the use of appropriate investigative techniques, the culpable individual or individuals. (FOOTNOTE 1) For these reasons, I conclude an investigation at this late date to determine the identity of the individual or individuals chargeable with this act of reckless indifference to the safety would be unproductive.

~2561

I wish to take this occasion to once again emphasize that in my view individual miners of whatever rank who deliberately endanger fellow workers by knowing and willful disregard for compliance with the mandatory safety standards should be the subject of a civil or criminal investigation and, where appropriate, prosecution under section 110(c) of the Act. See, Secretary v. Southern Ohio Coal Co., 2 FMSHRC _____ (August 4, 1980) and cases cited.

Sooner or later, Congress or the Secretary must face up to the present glaring deficiencies in the Secretary's enforcement scheme. Unless and until MSHA, management, and the unions join forces to ensure that noncompliance by any miner will result in a severe monetary or other penalty voluntary compliance will remain an illusion and miners and their families will continue to suffer untimely deaths and disabling injuries.

In my opinion, MSHA's policy of nonenforcement against the workforce, and particularly the rank-and-file, undermines effective compliance and serves only to (1) engender a cynical disregard for the law, (2) discourage voluntary compliance and (3) create an atmosphere in which miners are induced to cut corners on safety in the interest of increased production. Management's claim that immunizing the workforce is the price paid for industrial peace and productivity has a hollow ring when in case after case it appears immunity is purchased at the expense of safety. (FOOTNOTE 2) When the flaws in the present enforcement scheme are

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frankly confronted, it is a small wonder that MSHA seems to have all the clout of a moth hitting a summer screen.

Turning to the instant motion, an independent evaluation and de novo review of the circumstances persuades me that given the prevailing enforcement policy the one-third reduction in the penalty proposed for the corporate operator, from \$3,000 to \$2,000, is fully justified. The time may come, however, when I may feel compelled to deny such a settlement because MSHA and the operator were remiss in their duty to produce the culprit or culprits and implead them as third-party respondents. See, Secretary v. Morton Salt v. Frontier-Kemper Contractors, CENT 80-59-M, 2 FMSHRC, August 8, 1980. But that is a matter for another day.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$2,000, on or before Friday, September 19, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE_ONE

1 The inspector's statement furnished an investigatory lead that was never followed. Under his remarks on negligence the inspector stated:

"The person who did this has a thorough knowledge of the electrical circuit and knew exactly where to place the bridge in order to render the ground fault relay inoperative.

This occurs often at this mine due to the fact that the maintenance foremen find it easier and quicker to bridge or block a circuit out than to repair it."

~FOOTNOTE_TWO

2 While compliance with the Mine Safety Law has increased the cost of labor and reduced productivity, it has also sharply reduced the number of mine disasters. The principal reason for the reduction in productivity, however, is the fact that increased costs of production have not been offset by breakthroughs in mining technology. The last major innovation in the underground mines, the continuous miner, was introduced twenty years ago. The World Coal Study notes the industry has been slow to adopt the longwall, shortwall and other techniques that greatly increase the percentage of recovery.

MSHA and the industry can take pride and comfort in the fact that the disaster rate is down. But the sad fact that the miners and their families must live with is the tragedy rate. This is the rate of individual deaths and seriously disabling injuries, which is sharply up. This rate, in my judgment, will only be tolled when every miner of whatever rank is held publicly accountable for compliance with the Mine Safety Law. Much more effective enforcement at less cost can be achieved by imposing

personal accountability on the miners. Penalties rightly criticized as ineffective, if not paltry, when imposed on the corporate entity should be supplemented and reinforced by imposition on culpable individuals. There the corrective impact in terms of deterrent and encouragement to voluntary compliance is much greater. Close scrutiny of the present regulatory apparatus reveals that reliance on corporate accountability results in ineffective overregulation at a cost greater than the benefits conferred.

There is no inherent conflict between safety and productivity. As the President's Commission on Coal noted:

* * * conversations with industry, labor, and Government regulatory officials and surveys undertaken by the Commission staff suggest that the safest underground mines--apart from any advantage owing to favorable geological conditions and assuming full compliance with the safety law--are those in which the commitment of top management to safety is strong and well known, efforts to achieve good labor-management relations and open communication are practiced, regular equipment maintenance is performed, and training of miners in safe practices is stressed.