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

11 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding
	: Docket No. VA 79-78
	: Assessment Control No. 44-02253-03007
v.	:
	: Seaboard No. 1 Mine
JEWELL RIDGE COAL CORPORATION, Respondent	:

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Donald R. Johnson, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Abingdon, Virginia, on May 2, 1980, pursuant to a notice of hearing issued February 29, 1980, the parties asked that I approve a Settlement agreement which the parties had reached with respect to a violation of 30 C.F.R. § 75.1722. I stated at the hearing that I would approve the parties' settlement agreement when I acted upon the other matters raised by the Petition for Assessment of Civil Penalty filed in Docket No. VA 79-78, namely, the question of whether respondent had violated section 103(f) of the Federal Mine Safety and Health Act of 1977 as alleged by Citation No. 693846 dated March 19, 1979.

The issue raised by Citation No. 693846 is whether respondent is required to pay a miners' representative if he accompanies an inspector who is conducting a regular inspection on the same day that a coal company pays another miners' representative who walks around with an inspector who is conducting a "spot" inspection. In Magma Copper Co., 1 FMSHRC 1948 (1979), the Commission held that two or more miners' representatives have to be paid if on the same day at the same mine they accompany different inspectors who have split into groups to conduct a regular inspection. The Commission's decision in the Magma Copper case has been appealed by Magma Copper to the Ninth Circuit Court of Appeals. After the notice of hearing had been served on the parties to this proceeding, I received from the Secretary's counsel

a motion requesting that the hearing be stayed insofar as it pertains to 'the question of payment of compensation for miners' representatives who walk around with inspectors. By order issued April 1, 1980, I stayed the hearing with respect to the issue of payment of compensation of the miners' representative, but provided that the hearing would be convened with respect to the alleged violation of section 75.1722. When the hearing was subsequently convened on May 2, 1980, counsel for the parties orally asked that I approve a settlement-agreement which had been reached by the parties just prior to the convening of the hearing.

After I became aware that the Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motion for stay granted by my order issued April 1, 1980, I issued a further order on July 10, 1980, dissolving the stay and requiring the parties to state whether the issue with respect to payment of compensation for the miners' representative could be disposed of on the basis of stipulations so as to avoid a second convening of a hearing in this proceeding.

In response to my order of July 10, 1980, counsel for the Secretary filed on August 14, 1980, a letter in which he set forth some proposed stipulations of facts and requested that respondent's counsel advise me as to whether respondent agreed with the proposed stipulations. Counsel for respondent filed on August 20, 1980, some stipulations of facts which do not disagree with the stipulations set forth in the letter filed by the Secretary's counsel. Therefore, the Issue of whether respondent violated section 103(f), as alleged in Citation No. 693846, can be decided on the basis of the parties' stipulations of facts.

The stipulation of facts shows that respondent paid a miners' representative for walking around with an inspector on March 13, 1979, while that inspector was making an electrical, or "spot", inspection at the Seaboard No. 1 Mine, but declined to pay a miners' representative who walked around on March 13, 1979, with an inspector who was conducting a regular inspection at the same-mine. The Commission held in The Helen Mining Co., 1 F'MSHRC 1796 (1979), that an operator has to pay a miners' representative only when he walks around with an inspector who is engaged in conducting a regular inspection. In the Magma Copper case, supra, the Commission held that an operator has to pay two or more miners' representatives If they walk around at the same mine on the same day with different inspectors who are traveling separately while making a regular inspection. Applying the Commission's holdings in the Helen Mining and Magma Copper cases to the facts in this proceeding requires that respondent compensate the miners' representative who walked around with the inspector who was conducting the regular inspection on March 13, 1979. The fact that respondent had also on March 13, 1979, paid a miners' representative who accompanied an inspector who was making a "spot" inspection is immaterial to respondent's obligation to pay compensation to the miners' representative who accompanied the inspector Who was making the regular inspection. Therefore, I find tdat Citation No. 694653 dated March 19, 1979, properly alleged a violation of section 103(f).

Raving found that a violation of section 103(f) occurred, it is necessary that I now consider the six criteria set forth in section 110(i) of the Act for the purpose of assessing a civil penalty for that violation. The Proposed Assessment in the official file in this proceeding shows that respondent produces 6,355,484 tons of coal on an annual basis. It was also stipulated at the hearing that respondent is owned by the Pittston Company. On the basis of the aforementioned facts, I find that respondent is a large operator. Respondent introduced no evidence at the hearing to show that payment of penalties would affect its ability to continue in business. Therefore, I find that payment of penalties will not have an adverse effect on respondent's ability to continue in business (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974)).

I find that respondent was not negligent in declining to pay compensation to more than one miners' representative at the same mine on the same day because section 103(f) was reasonably subject to the interpretation given to it by respondent prior to the issuance of the Commission's decisions discussed above. I find that the violation was nonserious because respondent did not interfere with the right of a miners' representative to accompany more than one inspector at the same mine on the same day. Respondent declined to compensate the second miners' representative until a withdrawal order was issued, but, since respondent's refusal to pay prior to the issuance of the order was based on a reasonable legal interpretation of section 103(f), I believe that no increase in a civil penalty would be warranted under the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance. The Secretary's counsel submitted some data prior to the hearing which show that respondent has not previously violated section 103(f). On the basis of the aforesaid findings with respect to the six criteria, I conclude that respondent should be assessed a civil penalty of $25 for the violation of section 103(f) alleged in Citation No. 693846. As the court stated in Bituminous Coal Operators' Assn. v. Ray Marshall, 82 FRD 350 (D.D.C. 1979), at page 354, "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety."

Settlement Agreements

Despite the fact that I stated in footnote 1 of my order issued July 10, 1980, dissolving the stay in this proceeding, that the parties had moved at the hearing convened on May 2, 1980, that I approve a settlement agreement reached by the parties with respect to the violation of section 75.1722 alleged in this proceeding, I received on August 26, 1980, a written motion for approval of settlement pertaining to that same alleged violation of section 75.1722. I have chosen to approve the first settlement agreement because it was entered into on May 2, 1980, whereas the written motion for approval of settlement was not filed until August 26, 1980. 1/

1/ The parties twice settled the issues with respect to the alleged violation of section 75.1722 because the attorneys representing the parties at the hearing convened on May 2, 1980, were different from those who represented the parties in connection with the filing of the motion for stay.

Citation No. 694653 was issued on Feburary 13, 1979, under section 104(a) of the Act alleging a violation of section 75.1722. That section requires the guarding of fan inlets and other moving machine parts. Citation No. 694653 alleged that respondent had violated section 75.1722 because the guard at the main fan inlet had fallen and had not been replaced. The Assessment Office found that the violation was the result of ordinary negligence, that it was serious, that a good faith effort to achieve compliance had been made, and that a penalty of $122 should be imposed. Respondent has agreed to pay a reduced penalty of $100. The Assessment Office based its proposed penalty of $122 on finding8 justifying a total of 34 penalty points under 30 C.F.R. § 100.3.

Under section 100.3, an operator is entitled to a reduction of up to 10 penalty points for demonstrating a rapid good faith effort to achieve compliance. The inspector's statement evaluating negligence and gravity shows that respondent corrected the alleged violation within one-third of the time allowed by the Inspector. In such circumstances, respondent would be entitled to a reduction of 3 penalty points instead of having been given 0 penalty points a8 found by the Assessment Office. A reduction in penalty points to 31 would result in a penalty of $98 under section 100.3. Additionally, at the hearing convened on May 2, 1980, counsel for the Secretary stated that there was reason to believe that the guard had fallen down only a short time before it was observed to be inadequate by the inspector. Counsel for the Secretary indicated that he believed there was a low degree of negligence which would warrant some reduction in the proposed penalty.

On the basis of the discussion above, I find that the parties' settlement agreement presented to me on May 2, 1980, should be approved. Since the first motion for approval of settlement rendered moot the second motion for approval of settlement of the same alleged violation, I shall deny the motion for approval of settlement filed on August 26, 1980.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement made at the hearing convened on May 2, 1980, is granted and the settlement agreement is approved.

(B) Within 30 days from the date of this decision, respondent shall pay civil penalties totaling $125.00 which are allocated to the respective violation: as follows:

Citation No. 694653 2/13/79 § 75.1722 . . (Settled) $100.00
Citation No. 693846 3/19/79 §103(f) . . . (Contested) . . . 25.00
Total Contested and Settled Penalties in
This Proceeding $125.00

(C) The motion for approval of settlement filed August 26, 1980, is denied as moot because a previous motion for approval of settlement had already been made at a hearing convened in this proceeding on May 2, 1980.

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

Distribution:

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