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SOL (MSHA) V. PEABODY COAL
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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. KENT 80-103 A.O. No. 15-03161-03041
v.	Star UG Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION AND ORDER

The parties move for approval of a settlement of a violation of the Federal Mine Safety Code requirement that "ample warning shall be given before shots are fired." This requirement is incorporated by reference in section 313(c) of the Act, 30 C.F.R. 75.1303, by the permissibility standards relating to the use of explosives in underground mines found in 30 C.F.R. 15.19(e). The specific provision of the Mine Safety Code applicable is section 5b. 16.(FOOTNOTE 1)

A penalty of $7,000 was initially proposed for a violation that involved a failure to post warning flares that resulted in serious injuries to a scoop operator and endangered his helper. The violation was committed by a certified shot firer who admitted the flares should have been posted. He also admitted that if the flares had been properly set the accident would not have occurred. Despite the reckless nature of the firer's misconduct and its almost fatal consequences for his fellow workers,

MSHA, in accord with its policy of nonenforcement against the workforce, and especially rank-and-file miners such as the shot firer, declined prosecution under section 110(c). In view of this, and the culprit's obvious remorse and contrition, Peabody states no disciplinary action will be taken. So once again the enforcement proceeding has focused solely on the collection of a substantial fine from the corporate treasury, $6,250, while the real culprit goes free on the plea that "he has suffered enough."

Let me make my position clear. I firmly believe that Peabody should pay a substantial fine and I would disapprove this settlement if I thought a larger fine or even the maximum provided by law, $10,000, would persuade Peabody to institute a disciplinary policy, including suspensions without pay or discharges, for knowing violations of the mandatory safety standards that gravely endanger the lives of fellow miners. Fairness, however, dictates that I recognize the reality of the constraints imposed by the collective bargaining agreement on management's freedom to discipline the workforce for violations of the Mine Safety Law. Despite its slogan of "Safety or Else" the Union, I am reliably informed, is unalterably opposed to acceptance of responsibility for enforcement or compliance with the Mine Safety Law either as an organization or by its members. Compare, Bryant v. United Mine Workers, 467 F.2d 1 (6th Cir. 1972), cert. denied, 410 U.S. 930 (1973) with Dunbar v. United Steelworkers, 602 P.2d 21 (S. Ct. Idaho 1979), cert. denied _____ U.S. _____ (1980). Consequently, until MSHA, the Union and management reach a consensus on enforcement of the law against the rank-and-file workforce I cannot conscientiously deny a settlement such as that proposed in this case. See, New River Company, 2 FMSHRC _____ (September 9, 1980). This does not mean that I will not continue to take into account the encouragement to disciplinary action that results from the imposition of substantial fines on corporate operators who fail to insure abatement by appropriate disciplinary action.

The premises considered, and based on an independent evaluation and de novo review of the circumstances, including the parties' prehearing submissions and the representations and disclosure made during the course of the lengthy telecon settlement conference of September 5, 1980, I find the settlement proposed, $6,250, is, insofar as the corporate operator is concerned, in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the settlement agreed upon, $6,250, on or before Friday, October 17, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE_ONE

1 This is published as an appendix to Part 15 of Title 30 of the C.F.R. The record and the parties disclosures established that "ample warning" embraces and is understood by the industry to include both visual and verbal warnings. Counsel for the operator is to be commended for his diligence and candor in discovering MSHA's instructions to the industry with respect to the interpretation and coverage of the term "ample warning".

The circuity of the reference to the requirement is unfortunate. It is suggested that MSHA undertake to cross reference the various provisions in its next publication of the C.F.R. and to include in the inspection manual a copy of the relevant MSHA instructions.