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SOL (MSHA) v. BIG 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 80-255 Assessment Control No. 15-11233-03007 V
v.	
BIG HILL COAL COMPANY, RESPONDENT	No. 5 Mine

DECISION APPROVING SETTLEMENT

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Charles E. Lowe, Esq., Lowe, Lowe & Stamper, Pikeville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened on December 10, 1980, in Pikeville, Kentucky, counsel for the parties moved that a settlement agreement reached by the parties be approved. Counsel for the parties thereafter discussed the six assessment criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977 in support of their settlement agreement under which respondent has agreed to pay a penalty of $275 instead of the penalty of $500 proposed by the Assessment Office.

It was stipulated by the parties that respondent is subject to the provisions of the Act and that I have jurisdiction to approve the settlement(Tr. 3).

As to the criterion of the size of respondent's business, counsel for the parties stated that respondent has three coal mines which produce about 175,000 tons annually. The No. 5 Mine involved in this proceeding produced 7,000 tons over a 6-month period and employed 11 miners. (Tr. 4;7). On the basis of those facts, I find that respondent operates a small coal business.

With respect to the criterion of whether payment of penalties would cause respondent to discontinue in business, it was stipulated that payment of the settlement penalty of $275 will not adversely affect respondent's ability to continue in business (Tr. 5).

Counsel for MSHA stated that during the 24 months preceding the citing of the single violation involved in this proceeding, respondent had been cited for 72 prior alleged violations (Tr. 5). Those previous violations did not include a prior violation of 30 C.F.R. 75.306 which is involved in this proceeding. It has been my practice to increase a penalty under the criterion of history of previous violations only when a respondent's history

of previous violations shows that respondent has been previously cited for the same violation which is before me in a given case. Therefore, I find that the parties' failure to indicate any specific amount as being assessable under the criterion of history of previous violations is acceptable.

As to the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance, the order shows that it was issued at 9:30 a.m. on July 18, 1978, and was terminated by 2:30 p.m. on the same day. The order, of course, did not provide any time within which the alleged violation was required to be abated, but the abatement was sufficiently rapid to warrant a finding that respondent demonstrated a normal good faith effort to achieve compliance. Penalties are usually increased or decreased under the criterion of good faith compliance only when there is a lack of good faith compliance or an extraordinary effort to achieve rapid compliance, respectively. Since there was normal compliance with respect to the violation alleged in this proceeding, the settlement penalty need not contain any amount expressly assessable under the criterion of good faith abatement.

The remaining two criteria of negligence and gravity will hereinafter be specifically evaluated in connection with consideration of the condition or practice described in the inspector's order. Order No. 70479, here involved, was issued on July 18, 1978, under section 105(d)(1) of the Act citing respondent for a violation of 30 C.F.R. 75.306 because a proper record of the weekly ventilation examinations was not being kept. The withdrawal order was issued under the unwarrantable failure provisions (section 104(d)(1)) of the Act when the inspector was told that no anemometer or other type of measuring device for measuring air velocity was kept at the mine. The Assessment Office waived the penalty formula provided for under 29 C.F.R. 100.3, and proposed a penalty of $500 based on narrative findings of fact. A copy of the Assessment Office's findings is in the official file and those findings indicate that the criterion of negligence was extensively relied upon by the Assessment Office. Those findings indicate that the Assessment Office considered the violation to have been the result of a high degree of negligence because management is alleged to have known that the ventilation examinations were not being made and the Assessment Office believed the report made to the inspector to the effect that management had failed to provide the mine foreman with an anemometer or other instrument for measuring air velocity in the mine.

At the hearing, counsel for respondent explained that the alleged violation was not being contested because respondent's owner was ill and could not attend the hearing (Tr. 7). If respondent's owner had appeared at the hearing, he would have testified that an anemometer had been made available and that respondent's management assumed that the mine foreman was making ventilation examinations. Additionally, respondent's counsel stated that the mine foreman who was responsible for making the ventilation examinations had been discharged for failure to

perform all of his obligations as a mine foreman (Tr. 6).

If a hearing had been held, it is likely that respondent's owner would have been able to show that his degree of negligence was much less than the

degree of negligence assumed by the Assessment Office when it wrote its narrative findings.

The Assessment Office found that the violation was serious because failure to make the required examinations would have kept the miners from knowing that the air velocity was sufficient to prevent possible accumulations of methane and to carry away respirable dust. The inspector's order and the findings of the Assessment Office are silent about whether respondent had installed brattice curtains to within 10 feet of the face at the time the order was written. Existence of curtains would have been likely to provide adequate ventilation. Therefore, the violation may or may not have been serious, but the Assessment Office is correct in finding that respondent's mine foreman would not have known for certain that the proper volume of air was being supplied at the last open crosscut and working face apart from his making the proper examinations with an anemometer.

I find that the settlement penalty of $275 should be approved because the parties have shown that the degree of negligence was probably less than it was thought to be by the Assessment Office, the degree of seriousness is not known for certain, and a small operator is involved. Those criteria support a finding that a penalty of $275 is reasonable in the circumstances.

WHEREFORE, for the reasons given above, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay a penalty of $275.00 for the violation of section 75.306 alleged in Order No. 70479 issued July 18, 1978, under section 104(d)(1) of the Act.

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