FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 81-49 Assessment Control No. 15-11566-3007 F
V.	:	No. 3 Mine
V AND M MINING COMPANY OF PAINTSVILLE, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; G. C. Perry III, Esq., Paintsville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated March 12, 1981, a hearing in the above-entitled proceeding was held in Prestonsburg, Kentucky, on May 5, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the hearing was convened, counsel for the parties stated that they had entered into a settlement agreement under which respondent had agreed to pay a penalty of $2,000 for the single violation of 30 C.F.R. § 75.200 alleged in this proceeding, instead of the penalty of $4,000 proposed by the Assessment Office.

Section 110(i) of the Act gives six assessment criteria which are required to be used in determining the size of civil penalties. The parties had been able to stipulate as to all of the six criteria except the question of whether the operator was negligent with respect to the occcurrence of the violation. Therefore, counsel for the parties asked that they be permitted to present evidence solely on the criterion of negligence. The testimony of three different MSHA inspectors was introduced. After testimony had been received by three different inspectors, the parties reopened their settlement discussions and agreed that a settlement penalty of $2,000 was not supported by the record. Consequently, the final settlement agreement was that respondent would pay a penalty of $1,000.

The parties stipulated that respondent is subject to the provisions of the Act, that I have jurisdiction to decide the issues, that respondent is the operator of the No. 3 Mine which produces 137,000 tons of coal annually and employs about 21 miners, that a miner named Elijah Jude was fatally injured in a roof fall which occurred in respondent's No. 3 Mine on February 25, 1980, that the inspector who issued the withdrawal order and citation involved

in this case is a duly authorized representative of the Secretary of Labor, that respondent has violated section 75.200 on three-prior occasions during the24 months preceding the occurrence of the violation at issue in this proceeding, that respondent demonstrated a good-faith effort to achieve compliance after the citation and order were written, and that the violation was serious in view of the fact that it caused the death of one miner (Tr. 4-5).

Inspector John S. South wrote Citation and Order No. 707822 which is the subject of the Proposal for Assessment of Civil Penalty . He testified that he is responsible for investigating accidents and that he was asked to investigate the cause of a roof 'fall which occcurred at respondent's mine on February 25, 1980 (Tr. 10). The roof fall consisted of a single piece of sandstone which measured 53 feet in length, 23 feet in width, and from 15 to 20 feet in thickness (Exh. 10). The roof fell without warning while the continuous-mining machine was cutting coal. The operator of the continuous-mining machine ran in one direction and escaped the fall, but the victim ran in another direction and was caught beneath the massive rock (Exh. 10, p. 4). The rock was so heavy that it could not be moved with two 300-ton jacks and two 50-ton jacks (Tr. 32; 36). The body of the miner who was killed had to be removed by chipping away the rock and digging into the floor of the mine. A period of 15 hours was required to recover his body (Tr. 32-33). Three inspectors assisted-in the removal of the miner's body and each of them testified that they had never seen a roof fall which was made up of a single rock as large as the one here encountered. .

The inspector who wrote the order stated that respondent had violated the first safety-precaution in its roof-control plan which provides that if hazardous conditions are encountered, the operator is to install roof supports in addition to the standard 30-inch bolts required by the roof-control plan (Tr. 12; Exh. 9). The inspector explained that, in this instance, the additional support would normally consist of installing straps along with roof bolts. The inspector agreed, however, that even if the operator had been using straps in this instance, they would have had no effect whatsoever on holding the roof because the piece that fell was from 15 to 20 feet thick and no roof bolt would have been able to anchor above a rock that size. The inspector agreed that there is no known technology which could have prevented a roof fall of the size that occurred in respondent's mine (Tr. 14-15).

Another aspect of the roof fall which tended to exonerate respondent from any negligence was the fact that, although a hill seam existed in the huge piece of sandstone that fell, the inspector was unsure that the hill seam could have been observed on both sides of the entry prior to the fall (Tr. 17). Another inspector was positive that the hill seam could not have been detected before the roof fall occurred. He testified that if he had been mining in the same entry involved in the accident, he would have been 'proceeding in the same way respondent was producing coal. It was his belief that the roof fall could not have been prevented by 'any known technology (Tr. 25). Another factor which contributed to the roof fall was the fact that a strip mine on the surface had been shooting coal directly above respondent's mine and that work could have loosened the roof of respondent's mine (Tr. 20).

After three different inspectors had presented testimony indicating that they did not believe respondent could have foreseen the fact that the roof fall would occur and that they were unaware of any roof-control methods which could have prevented the fall, the parties agreed that the settlement penalty should be reduced from the $2,000 first discussed (Tr. 5) to the amount of $1,000 agreed upon at the end of the hearing (Tr. 37).

The preponderance of the evidence which I have discussed above shows that respondent could not have detected any hill seams prior to the accident. If so, respondent would have had no reason to install the additional support which is required by its roof-control plan when hazardous conditions are encountered. When it is considered that a small operator is involved, one may be inclined to wonder if a settlement amount of $1,000 was fair to respondent.

I believe that a penalty of $1,000 is appropriate if one considers all the implications which can be derived from the total record. Since the hearing opened with a statement by counsel that the case had been settled, I did not go into all the conditions described in Citation and Order No. 707822 which I would normally have pursued with the inspectors. For example, no testimony was received as to allegations in the citation and order to the effect that respondent had been driving some entries and crosscuts at widths greater than were permitted by the roof-control plan. Also it was alleged that respondent had performed some work 25 feet inby permanent roof support (Exh. 4). Moreover, respondent has been cited for three prior violations of its roof-control plan (Exh. 1). I am not finding that the allegations discussed in this paragraph were proven because no testimony was received with respect to them and respondent had no reason to address them since the witnesses were presented as to a single aspect of the settlement agreement. I am referring to these matters solely to show that in a fully contested proceeding, it is very likely that the evidence would have supported findings as to the six criteria which would have warranted assessment of a penalty as large as the penalty of $1,000 agreed upon by the parties.

I find that the evidence-presented by the parties did fully justify a reduction of the penalty of $4,000 proposed by the Assessment Office to the settlement amount of $1,000.

WHEREFORE, 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 shall, within 30 days from the date of this decision, pay a penalty of $1,000 for the violation of section 75.200 alleged in Citation and Order No. 707822 dated February 27, 1980.

Richard C. Steffey

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

Distribution:

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