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CANTERBURY COAL v. SOL (MSHA)
SOL (MSHA) v. CANTERBURY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CANTERBURY COAL COMPANY, APPLICANT	Applications for Review
v.	Docket No. PITT 78-127 Order No. 1AM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PITT 78-128 Order No. 1DEM
UNITED MINE WORKERS OF AMERICA, RESPONDENT	David No. 5 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. PITT 78-301-P A/O No. 36-00813-02012V
v.	Docket No. PITT 78-302-P
CANTERBURY COAL COMPANY, RESPONDENT	A/O No. 36-00813-02014 David No. 5 Mine

DECISION APPROVING SETTLEMENT

The Secretary of Labor has filed a motion for an order approving the case disposition and settlement agreement in the above-captioned proceedings.

On July 30, 1981, Petitioner filed its motion for an order approving settlements, scheduling time for payment, and dismissing applications for review. The settlement agreements were entered into between counsel for Canterbury Coal Company (Canterbury) and MSHA on June 4, 1981, as follows:

> 104(c)(1) Notice of Violation No. 1 DEM/AM (7-65), issued on September 23, 1977, citing 30 CFR 75.200. The proposed penalty is $800.00 and the proposed settlement is $500.00. PITT 78-301-P
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> 104(c)(1) Order of Withdrawal No. 1 DEM (7-78), issued on December 2, 1977, citing 30 CFR 75.200. The proposed penalty is $1,500.00 and the proposed settlement is $500.00. PITT 78-302-P

MSHA also moved that a time be set by the Administrative Law Judge upon approval of the settlements for payment of the total amount of $1,000.00. The parties have also agreed that the above-captioned applications for review be dismissed as part of the settlement. Respondent United Mine Workers of America did not object to this disposition.

The reasons given by MSHA for the Motion are in substance as follows:

1. Size: The Order of Assessment, dated January 10, 1978 (PITT 78-301-P), indicated that the Mining Enforcement and Safety Administration (MESA) records on that day showed that the David No. 5 Mine and Canterbury Coal Company both produced 486,584 tons of coal in the year preceding January 10, 1978. The Order of Assessment, dated February 23, 1978 (PITT 78-302-P) indicated that MESA records show the mine produced the same (486,584) tonnage for the year preceding the latter date but the parent company, Aquitaine Incorporated, produced 1,132,587 tons annually for the year. A narrative statement concerning the above-mentioned order of withdrawal was attached to the motion and the Assessor's finding therein was the annual company production was 1,132,587 tons during 1976. The mine is of upper middle range size for assessment purposes. The Company is of lower middle range size.

2. Prior History: A certified computer printout showing only paid violations assessed against Respondent indicates that there were 161 violations of all standards during that period for that mine.

3. NOTICE OF VIOLATION NO. 1 DEM/AM (7-65): If a hearing were to be held, two Federal Inspectors would testify that each of them saw the substandard mine roof described in the notice of violation. The inspectors observed four locations where the mine roof in the same area has fallen between the roof bolts, indicating that the mine strata had shifted and was less stable than at the time the roof was bolted (Tr. 224). The area had pot holes or cavities indicating that additional support was required (Tr. 250). Safety Precaution No. 1 of the approved roof control

plan required additional roof supports where conditions indicated a need (Tr. 231). In the notice of violation the Inspectors cited that part of the plan as not being complied

with. Safety Precaution No. 12 of the plan identifies additional supports (Tr. 234) to be longer roof bolts, posts, cribs, or crossbars (Tr. 230). The existence of the cutter in the area is further evidence that the mine roof was deteriorating. Whether anyone observed the roof condition before the Inspectors saw it or not, a violation of 30 CFR 75.200 occurred because the Mine Operator should have known of the condition (Tr. 217) if adequate examinations in a working place had been made (Tr. 221-222). The Office of the Solicitor recognizes that Respondent's witnesses, at a hearing, would not agree with all of the foregoing summarization of MSHA's position, but the Office of the Solicitor's position is that a violation occurred and can be proven.

a. Gravity: In the Inspector's Statement, the Inspector stated he was of the opinion that there would be a hazard to one miner. The Inspector was of the opinion that the condition was not serious when he observed it because no one was in the area (Tr. 259), but it is a travel area (Tr. 260). The Office of the Solicitor respectfully suggests that the violation was serious in that death or serious injury to someone could reasonably be expected as a result of the condition.

b. Negligence: The Inspector observed coal dust on the rock dust on a rock where the cutter had opened. This caused the Inspector to believe that the cutter occurred before the coal was mined in this area two shifts previously (Tr. 191-197, 249). The Mine Operator would have witnesses testify that the preshift examiner did not see the cutter and the type of ventilation system used leaves almost no coal dust. The parties agree that a cutter can occur anytime without warning. Accordingly, the Office of the Solicitor will agree that the violation was not the result of an unwarrantable failure in view of the conflicting testimony and the unimportance of this issue since the unwarrantable chain was long ago broken by a clean inspection. This was a travel area (Tr. 259) and the roof should have been examined before the adverse conditions became so prevalent. The section foreman told the Inspector he saw the cavities in the mine roof, but did not consider the roof such as to need additional roof supports (Tr. 263). The Office of the Solicitor suggests that ordinary negligence is shown and has taken such into consideration in arriving at the $500.00 proposed settlement.

c. Good Faith: The Inspector's Statement shows that the Mine Operator assigned extra persons to correct the condition. Although the Inspector had to allow more time than was originally determined needed, a normal degree of good faith is demonstrated. The area was "dangered off" until the condition was abated, and attention given to the problem until abatement was obtained (Tr. 278). The Mine Operator demonstrated good faith.

d. Prior Violations: On page one of the certified computer printout mentioned in paragraph 2 above, it is shown that there were 17 paid 30 CFR 75.200 violations which occurred in this mine prior to September 23, 1977 (the date the notice of violation

issued).

e. The narrative statement prepared by MESA's Office of Assessments shows that the Assessor elected to waive the formula provided at 30 CFR Part 100.3 and, instead, found special facts by which he suggested a proposed penalty of $800.000 for the violation. At the time the proposed assessment was made, the Office of Assessments had a policy that unwarrantable violations would be routinely assessed specially. This policy was discontinued because excessive proposed penalties sometimes resulted.

f. The Office of the Solicitor has proposed a settlement of $500.00 instead of the proposed penalty of $800.00 primarily because the degree of negligence was less than that found by the Assessor.

4. ORDER OF WITHDRAWAL NO. 1 DEM (7-78): At a hearing the Federal Inspector would testify that the Mine Operator had failed to follow the required sequence for pillar removal and had mined the fender of a pillar so the fender no longer provided the required protection. The roof support was not provided as required by the roof control plan in that breaker posts had not been installed after the pillar had been mined through, there were only two breaker posts on the right side, and the roadway was wider than the allowed 14 feet but no timbers had been set to narrow it. Canterbury witnesses would argue that the area described by the Inspector in the order of withdrawal was an abandoned area. Thus, the proceeding would revolve around the question of whether the area was active or abandoned, with Inspector Dalton and the Canterbury witnesses both adamant as to their respective positions.

a. Gravity: In the Inspector's Statement, he states that, in his opinion, a hazard was posed to up to four miners who could be disabled (but he would not expect a fatal accident). If Canterbury is correct in its assertion that the area had been abandoned, no hazard was posed. The violation of the roof control plan was serious, but no miner should have been in abandoned area. MSHA does not accept the argument that the area was not active, and suggests the violation was serious, but not as serious as found by the Assessor.

b. Negligence: The Office of the Solicitor will agree that the violation was not unwarrantable in view of the uncertainty as to whether the area was active or abandoned. If abandoned there would still be a question as to whether, when active, it had been mined according to the roof control plan, or whether the timbers and breaker posts had been removed. Canterbury would urge that the plan does not require the sequence the Inspector states is required. Mr. Dalton, however, is a roof expert of many years experience and certainly can read a roof control plan. The Office of the Solicitor suggests that the violation was the result of ordinary negligence.

c. Good Faith: As the Inspector noted in his statement, there was no time provided for abatement since an order of withdrawal issued. The order of withdrawal was terminated in

less than two hours after issuance. Good faith was demonstrated since there were several problems to be resolved.

d. Prior Violations: The certified computer printout lists 18 prior paid 30 CFR 75.200 violations. The September 23rd violation previously discussed would bring the total to 19 prior violations of 30 CFR 75.200.

e. The narrative statement prepared by MESA's Office of Assessments shows that the Assessor elected to waive the formula provided at 30 CFR 100.3 and made special findings pursuant to the policy then in effect which is mentioned in paragraph 2-e above.

f. The Office of the Solicitor deems the proposed penalty of $1,500.00 to be excessive considering the conflicting testimony which might reduce the gravity and negligence, and the fact that credit was not allowed for the rapid abatement. The parties have agreed upon a proposed settlement of $500.00 and the Office of the Solicitor deems it reasonable.

5. The Office of the Solicitor asserts that a civil penalty of $500.00 for each of the two violations would be reasonable and the best interest of the public would be served by the approval of the same.

6. Thirty days after approval is a reasonable time to allow in which to pay the $1,000.00.

Based on the information furnished and an independent review and evaluation of the circumstances, I find the settlement proposed is in accord with the provisions of the Act.

ORDER

The settlement negotiated by the parties in the above-captioned proceedings is APPROVED.

The above-captioned Applications for Review are hereby DISMISSED.

Respondent is ORDERED to pay(FOOTNOTE.2) the amount of $1,000 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

Sections 110(i) and (k) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C.   801-960, provide:

"(i) The Commission shall have the authority to assess all civil penalties provided in this Act. In assessing all civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged,

whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the Court."

~FOOTNOTE_TWO
Section 110(j) of the Act provides as follows:

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."