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SOL (MSHA) V. RICHARD & SONS
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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

v.

RICHARD A. DOUGLASS & SONS,
RESPONDENT

Civil Penalty Proceeding

Docket No. YORK 81-23-M
A/O No. 17-00493-05001 EJ6

Beckler Pit & Mill

DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department
of Labor, Boston, Massachusetts, for the Petitioner
David W. Austin, Esq., Rumford, Maine, for the Respondent

Before: Judge Cook

I. Procedural Background

On January 16, 1981, the Mine Safety and Health Administration (Petitioner) filed a proposal for assessment of civil penalties in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The proposal alleges 11 violations of provisions of the Code of Federal Regulations. On February 4, 1981, an answer was filed by Richard A. Douglass & Sons (Respondent). A hearing was held on September 24, 1981, in Augusta, Maine, with representatives of both parties present and participating.

II. Proposed Settlement

During the course of the hearing, both parties proposed a settlement. The amount of the original proposed assessment is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
00200203	07/01/80	56.14-1	\$ 52
00200204	07/01/80	56.14-1	52
00200205	07/01/80	56.14-3	44
00200206	07/01/80	56.14-1	44

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00200207	07/01/80	56.14-1	52
00200208	07/01/80	56.9-7	34
00200209	07/01/80	56.9-7	34
00200210	07/01/80	56.14-1	52
00200211	07/01/80	56.14-1	34
00200212	07/01/80	56.14-1	34
00200213	07/01/80	56.14-1	34

Total proposed assessment: \$466

The proposed settlement is identified as follows:

Vacate Order Nos.	00200204	- \$52
	00200207	52
	00200210	52

Amount proposed to be paid in settlement - \$300.

In support of the proposed settlement, the parties stated as follows at the hearing:

JUDGE COOK: What is the status now? There have been many stages, apparently, that this settlement discussion has been going through, but what is your present status?

MR. BASKIN: Well, counsel for the Respondent contacted me--I believe it was the day before yesterday--your Honor, and said that his client was willing to settle the case for a lower amount of money, and we reached an agreement between ourselves of \$300, and the original penalty assessment is \$466. We would like to submit our \$300 settlement for the Court's consideration. It is certainly the Secretary's belief that settlement at this lower amount is consistent with the purposes of the Act and there is every reason why it ought to be approved. I can get more specific, if the Court desires, your Honor.

JUDGE COOK: Well, now, could you specify particularly as to each of these charges what particular amount you had agreed upon.

MR. BASKIN: We haven't agreed on specific amounts, your Honor. What I would like to do, your Honor, is point out something to you, if I could. I think this is one of the justifications for settlement, although

Mr. Douglass--the fact that Mr. Douglass is a small operator and doesn't have a great deal of cash flow is also a definite factor in this case.

I would like to point out to the Court that we have Citations in this case whose numbers are all 2000, 002, 0020, and then they go three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, so I am going to just refer to the last two digit numbers for convenience, your Honor.

JUDGE COOK: Yes.

MR. BASKIN: We have Citations No. 4 and 11, your Honor, that both pertain to an area on the one and a half inch film conveyor. Now, 4 and 11, 4 pertains to the unguarded tail pulley, and 11 pertains to unguarded return idlers, and in the way the small crushing unit works, these areas are very close together, from 2 to 4 feet. It is what you would say, it is in the same place. There was lack of guarding in the same place, but two unguarded pinchpoints.

The point is that we have an area that is pretty much the same. The same thing is true with Citations 7 and 12, your Honor; they have one unguarded tail pulley on a conveyor under a screen, a crushing screen, and you have the same unguarded idlers in that area. Again, it is very close together.

With Citations 10 and 13, your Honor, you have an unguarded tail pulley on a return conveyor. You have an unguarded return idler on the same return conveyor. I would like to make the Court aware of an MSHA memorandum that was dated October 3, 1979, and it is from Thomas Shepard [sic], who [was] then the Administrator for metal and nonmetal mine safety and health; the subject was Citations and orders citing multiple violations.

The third paragraph of that he says that where there is multiple violations, the same standard we are talking about, here 29 CFR [56.14-1], standards which were observed in violation involving the same piece of equipment or the same area of the mine should, and I emphasize the should and it is a discretionary thing, but we are willing to put it into effect in this case, should be treated as one violation and one citation should be issued.

What I am saying here is that we got six citations that could easily be treated as three citations. We would be very happy to amend the Complaint that way. Now, I want to point out to the Court, for instance, that for Citation 4, we have a \$52 assessment. Citation 11

we have \$34. For Citation 7, we have \$52. assessment, and for Citation 12, \$34. For Citation 10, \$52. For Citation 2, \$52. For Citation 13, \$34. In each case we would combine the Citations, we would modify it, and wipe out the \$52 citation. So we wipe out the 3 \$52 citations with a reduction in the penalty of \$156 down to \$310. Then quite frankly, to round it off, take into consideration Mr. Douglass not to great financial strength, we simply want to cut down the other \$10 to the \$300, which his counsel has agreed to pay. We think that the reasons for modifying the citations are, one, that we have the discretion to do it; secondly, the man is just not super wealthy, like Peabody Coal Co. So, I would appreciate it if the Court would consider the agreement in that context. I would like to state that we have agreed, counsel and I have agreed, that he pay in installments. There is a \$300 penalty to be paid in \$100 every month for three months. This company shouldn't have to pay \$300 in one month. I don't know, but it would put a dent in his personal finances. There is no reason to make it all at once.

JUDGE COOK: Now, Mr. Austin, what is your position on this?

MR. AUSTIN: Thank you. My position is the same as my colleagues. It is something that we have agreed to after discussing it, and we were in hopes of reaching an agreement and presentation to the Court, and I would concur with what he recommends.

JUDGE COOK: Very well. Now, before we conclude it then, Mr. Baskin, how did you want to handle the matter that you suggested of making some motion concerning three of the charges? How did you want to handle that?

MR. BASKIN: Well, to put it in perspective, I would move, your Honor, that Citation No. 4 be vacated and that Citation No. 11 be modified to refer to lack of guarding not only at the return idler, but at the tail pulley on the one and a half in conveyor belt. With respect to Citation Nos. 7 and 12, I would move for vacating on Citation No. 7 and modification of Citation No. 12 to state there was lack of guarding not only at the return idler but also at the tail pulley on the conveyor belt under the washing screen. With respect to Citations No. 10 and 13, we would move that Citation No. 10 be vacated and that Citation No. 13 be modified to refer to lack of guarding not only at the return idler but at the tail pulley on the return conveyor.

In each case, the penalties attached to the vacated citation would be wiped out, cancelled, if you will, and the \$34 penalty for the remaining citations be retained.

JUDGE COOK: Very well, now, what is your position as to that motion, Mr. Austin?

MR. AUSTIN: I would also concur in that, your Honor.

JUDGE COOK: Very well. Then I will grant that motion.

MR. BASKIN: Thank you, your Honor, I appreciate that.

JUDGE COOK: And I will approve the settlement then at the \$300 figure as agreed to by both parties.

MR. BASKIN: Do you want anything in writing, your Honor, or just on the record?

JUDGE COOK: This is adequate. If you did want to do anything else in writing, that is your privilege but is on the record here, and the transcript, of course, will be the basis upon which I will later issue a decision approving the settlement, and, of course, the motion to vacate those citations.

MR. BASKIN: Thank you. Will your order include, please, and order the Respondent to pay the penalty in \$100 installments over three months for a total of \$300. Send it to the Mine Safety & Health Administration, Attn. [Madison McCulloch] Director of the Office of Assessments, MSHA, 4015 [Wilson] Blvd., Arlington, VA [22203.] That should be paid on November, December and January first, if your Honor, please.

JUDGE COOK: Very well. I will also include that order in mine.

(Tr. 3-8).

The reasons given above by counsel for the Petitioner for the proposed settlement have been reviewed in conjunction with the information submitted as to the statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

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IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay one-third of the agreed-upon penalty of \$300 assessed in this proceeding, and that it thereafter pay one-third of such penalty within 60 days of the date of this decision and the remaining one-third of such penalty within 90 days of the date of this decision. Such payment is to be forwarded to Madison McCulloch, Director of the Office of Assessments, Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, Virginia 22203.

John F. Cook
Administrative Law Judge