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SOL (MSHA) V. OAK MINING
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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.

OAK MINING COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 82-5
A.O. No. 46-04160-03014 V

Marilyn No. 1 Mine

DECISION

Appearances: Aaron Smith, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Robert V. Berthold, Jr., Esquire, Hoyer, Sergent & Berthold, Charleston, West Virginia, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with three alleged violations of certain mandatory safety standards found in Section 75, Title 30, Code of Federal Regulations.

Respondent filed a timely answer to the proposals, admitted that the mine is subject to the provisions of the Act, and in defense of the violations stated that the conditions cited were abated within a reasonable time, did not constitute an immediate threat to the health and safety of miners, and did not constitute a continued pattern of conduct. Further, respondent submitted that the initial proposed penalty assessment amounts for the violations are inappropriate considering the size of the mine, the size of respondent's company, and the number of previously assessed violations.

By notice of hearing, as subsequently amended, the case was docketed for hearing on April 28, 1982, in Charleston, West Virginia. Prior to the Commencement of the hearing, respondent's counsel of record withdrew from the case and also advised that the respondent had filed a Petition for reorganization under Chapter II of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of West Virginia at Charleston, West Virginia.

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By motion filed April 1, 1982, respondent's bankruptcy counsel filed a motion for a stay of the scheduled hearing on the ground that Section 362 of the U.S. Bankruptcy Code automatically stays the pending adjudicative proceeding before this Commission. The motion for stay was denied by me on April 9, 1982, and my reasons for the denial are detailed in the order which is a part of the record. The hearing was convened as scheduled and the parties appeared and participated fully therein.

At the request of the parties, an informal prehearing conference was held in Charleston on the evening of April 27, 1982, for the purpose of discussing the issues to be tried, the status of respondent's bankruptcy petition, and a possible settlement of the case. The parties advised me that they had reached a proposed settlement of the case and they were afforded an opportunity to present their arguments in support of the settlement on the record at the hearing.

Discussion

Citation No. 904194, issued on June 8, 1981, is a Section 104(d)(2) Order of withdrawal, cites a violation of 30 CFR 75.303, and the condition or practice cited is as follows:

There were no evidence that a preshift examination had been made before miners entered the 002 Section, in that initials, date or time could be found at or near the face areas.

Citation No. 904293, issued on June 19, 1981, is a Section 104(d)(2) Order of Withdrawal cites a violation of 30 CFR 75.400, and the cited condition or practice is as follows:

Loose coal and coal dust, in depths from 1 to 18 inches, was allowed to accumulate on the mine floor and coal ribs in the following entries in the No. 1 (001) section: From the face of No. 1 entry outby 60 feet the face of No. 2 entry outby 50 feet, the face of the No. 3 entry outby 74 feet, the hold of No. 4 entry outby 98 feet, the face of No. 5 entry outby 85 feet and the face of No. 6 entry outby for 59 feet.

Citation No. 904294, issued on June 19, 1981, Section 104(d)(2) Order of Withdrawal, cites a violation of 30 CFR 75.316, and the cited condition or practice is as follows:

Permanent stoppings were not maintained up to and including the third connecting crosscut in the No. 1 (001) section in that permanent stoppings were terminated 4 crosscuts outby the faces of the No. 2 and 3 (intake) faces and No. 4 and 5 (Return) face.

Stipulations

The parties stipulated that the respondent owned and operated the subject mine, that the mine is subject to the Act, that the citations were duly served on respondent's agents at the times and dates stated therein, and that I have jurisdiction to hear and decide the matter.

Respondent's bankruptcy petition

As noted in my April 9, 1982, Order denying respondent's motion for stay, Section 362 of the Bankruptcy Code, 11 U.S.C. 362, contains exceptions to the automatic stay provisions of the law, and one of those exceptions reads as follows:

- (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay - * * *
- (4) Under subsections (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power;
- (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power;

N.L.R.B. v. Evans Plumbing Company, 639 F.2d 291 (5th Cir. 1981), contains a detailed discussion of the section 362 bankruptcy code stay exception, particularly in cases involving a Federal agency's exercise of regulatory powers, including the enforcement of safety regulations. See also: In re Tauscher, et al., E.D. Wisc. Bankruptcy Court, 24 WH cases 1310, holding that administrative proceedings involving the assessment of civil penalties for child labor violations of the Fair Labor Standards Act are excepted from the automatic stay provisions of section 362 of the Bankruptcy code.

In an April 6, 1982, decision concerning a discrimination complaint filed by the Secretary pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, MSHA, et al. v. Leon's Coal Company, et al., Docket No. CENT 80-339-D, Judge Melick ruled that enforcement proceedings before this Commission brought by MSHA pursuant to the Act come within the aforementioned statutory exception to the automatic stay provisions of the Bankruptcy Code. Citing several applicable court decisions in addition to those cited above, Judge Melick further held that in spite of the pending bankruptcy proceeding in the case before him, this Commission retained jurisdiction to proceed with hearings in pending cases and to issue decisions and orders.

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I am in total agreement with the Leon Coal Company decision and adopt Judge Melick's rulings regarding the Commission's jurisdiction to proceed with the final adjudication of cases involving coal mining companies who are parties in proceedings before the Commission or its administrative Law Judges as my finding and conclusion on this issue. I also reaffirm my previous ruling and order denying respondent's motion for a stay of this adjudicative proceeding.

Petitioner's counsel presented full and complete arguments in support of the proposed settlement disposition of this case, including information concerning the six criteria found in section 110(i) of the Act.

Fact of violations

Respondent does not dispute the fact of violations and presented no defense to the citations. Under the circumstances the citations in question are AFFIRMED.

Size of business and the effect of the civil penalty assessments on the respondent's ability to remain in business.

The parties agreed that the respondent is a moderate-to-medium sized coal mine operator that all of the mines owned and operated by the parent company, Coal Management Services Incorporated, had an annual production of 1,088,959 tons of coal, and that the subject mine had an annual production of 272,321 tons.

The parties stipulated that the initial proposed civil penalty assessments for the three citations in question would have an adverse impact on the respondent's ability to continue in business, particularly in light of the pending bankruptcy proceedings. Although the mine is not presently in operation, respondent's counsel indicated that respondent is attempting to resolve its financial affairs and will attempt to reopen the mine sometime in the future. Counsel also asserted that the approval of the proposed settlement will contribute to the respondent's efforts to remain solvent and get back into the coal mining business.

History of prior citations

The parties stipulated that for the 24-month period prior to the issuance of the citations in question the respondent paid civil penalty assessments for a total of 37 violations.

Gravity

Petitioner argued that all the citations were moderately serious. The failure to conduct the required preshift examination (citation 904194), exposed miners to potential hazards. The failure to clean-up the cited coal accumulations (904293), presented a fire hazard. The failure to maintain the permanent stoppings could have affected the mine ventilation

system.

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Negligence

The parties agreed that the citations resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence as to each of the citations. Although recognizing that the citations were "unwarrantable failure" orders, petitioner's counsel agreed that there is no evidence of any gross negligence by the respondent in this case.

Good faith compliance

Petitioner stated that citation no. 904194 was abated within 20 minutes after it was issued, and that the conditions cited in the remaining citations were promptly corrected by the respondent and that the inspector terminated the citations upon his next visit to the mine.

The parties proposed that a civil penalty assessment for the three citations in question in the total amount of \$1,000 is reasonable and in the public interest, particularly in light of the pending bankruptcy proceedings.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the petitioner's motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 20 C.F.R. 2700.30, petitioner's motion is GRANTED and the settlement is APPROVED.

The agreed upon penalty assessment of \$1,000 is allocated as follows:

Citation No.	Date	30 CFR Section	Assessment
904194	6/8/81	75.303	\$300
904293	6/19/81	75.400	\$400
904294	6/19/81	75.316	\$300

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge