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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 Proceedings Docket No. SE 82-12 A.O. No. 01-00758-03104 V
v.	
	Mine No. 3
JIM WALTER RESOURCES, INC., RESPONDENT	Docket No. SE 82-13 A.O. No. 01-01247-03081 V
	Mine No. 4

DECISION

Appearances: George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the petitioner Robert W. Pollard, Attorney, Birmingham, Alabama, and Gerald Reynolds, Attorney, Tampa, Florida, for the respondent

Before: Judge Koutras

Statement of the Case

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on November 27, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing civil penalty assessments for two alleged violations of mandatory safety standards 30 CFR 75.316 and 75.1704.

Respondent filed timely answers to the petitioner's proposals, denied that the alleged violations occurred, interposed several legal and factual defenses, and requested a hearing. Subsequently, by notice of hearing issued by me on February 26, 1982, the parties were advised that both cases would be heard in Birmingham, Alabama, on May 4, 1982. By an amended notice issued on April 13, 1982, the parties were informed of the specific hearing location in Birmingham.

Although all of the notices of hearings issued in these proceedings directed the parties to inform me of any proposed settlements arrived at by the parties in writing no later then ten calendar days in advance of the commencement of the hearings, petitioner's counsel, the Associate Regional Solicitor, telephoned my office on Friday, April 29, 1982, to advise me that the parties had reached a settlement in both dockets.

I directed both parties by telephone calls placed on the afternoon of April 29, 1982, to appear at the hearings as previously noted. I further advised them that since the initial notices of hearings were served on the parties more than sixty (60) days in advance of the scheduled hearing date, petitioner's "last-minute" telephone call was totally unacceptable, untimely, and contrary to the specific prehearing notice requirement that settlement proposals he communicated to me in writing no more than 10 days in advance of the scheduled hearings.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of a civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 CFR 27001.1 et seq.

Discussion

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The hearing in this case was convened pursuant to notice and the parties appeared. Petitioner's counsel presented a motion for approval of a proposed settlement for the citation in question. In addition to the matters presented in the written motion, the parties were afforded a full opportunity to present oral arguments in support of the proposed settlement disposition of the case. In addition, statements were presented by MSHA Inspector L. G. Ingram who issued citation, as well as by the representative of miners (Bobby Johnson) who acted as the union walkaround representative at the time of the issuance of the citation.

The 104(d)(1) Citation No. 0756313, June 19, 1981, cites 30 CFR 75.316, and states as follows:

> The ventilation plan was not being followed in 2 entry on section 10 in that the roof bolting was being performed with out the temporary wing curtain for blowing was not installed and the curtain line was approximately 17 feet from the deepest penetration. Wing curtain is required when bolting.

Fact of violation

The respondent does not dispute the fact that the conditions or practices cited by the inspector constituted a violation of cited mandatory safety standard 30 CFR 75.316. The failure to insure the installation of the missing temporary wing ventilation curtain was a violation of the operator's approved ventilation plan, and the respondent conceded that this was in fact the case. The citation is AFFIRMED.

Good faith compliance

The record reflects that the cited condition was immediately abated within minutes after the missing wing curtain was installed, and the inspector confirmed this fact.

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

The parties were in agreement that the No. 3 mine employed approximately 679 miners at the time the citation issued, and that the mine's annual coal production was approximately 500,000 to 800,000 tons. Respondent does not contend that the penalty assessed in this case will adversely affect its ability to remain in business.

History of prior of violations

Petitioner asserted that the respondent has a moderate history of prior assessed violations, but failed to produce a computer print-out detailing this history. However, the inspector stated that while he had cited previous ventilation violations at the mine, he could not recall any prior citations for failure to install temporary ventilation wing curtains.

Gravity

The information presented during the hearing reflects that the No. 3 mine is a gassy mine and that methane is ever-present and liberally emitted. In addition, the inspector indicated that methane ignitions

had occurred in the mine, particularly during the mining cycle. In this case, the citation issued during the roof bolting operation, and the parties agreed that methane ignitions during roof bolting were very rare.

Although the inspector did not know how long the missing curtain condition existed, he agreed that he observed the condition at the beginning of the shift and that it was not likely that it existed for any long duration. Since the missing curtain affected the ventilation system, the inspector believed that the condition cited was serious, and the parties agreed that this was the case.

Negligence

In it's motion in support of a reduction of the proposed civil penalty assessment of $2,750, petitioner stated that the initial assessment made by MSHA's Office of Assessments was $750, and the rationale for this assessment amount is detailed in the "Narrative Findings for a Special Assessment", which is a part of the record in this case. Subsequently, when the respondent requested a conference, MSHA's assessment representative at that conference increased the penalty assessment to $2,750 and he did so on the basis of information that two higher level mine management personnel were at the location of the missing ventilation curtain and had been there for several minutes before the mine foreman and inspector arrived on the scene. The conference officer obviously concluded that the condition cited was known by top-level management for an extended period of time, and their failure to correct the condition before the inspector arrived at the scene resulted in a drastic increase in the original assessment.

Petitioner asserted that the mine foreman arrived at the scene a minute or so in advance of the inspector but that the other top-level management personnel were directing their attention to an operating problem and were not aware of the wing curtain violation. Thus, petitioner maintained that the possible actual knowledge of the missing wing curtain by respondent's management was not present for more than about a minute before the inspector arrived and required correction.

Respondent's counsel agreed with the arguments advanced by the petitioner with regard to the circumstances noted and insisted that such management knowledge, if any, was at most momentary and was not sufficient for the foreman to react before the inspector arrived on the scene. Given the full facts and circumstances now known to the parties, respondent maintained the increased assessment was totally arbitrary.

In view of the foregoing arguments, the parties proposed a civil penalty assessment in the amount of $350 as an agreed upon settlement disposition for the citation.

Conclusion

After careful consideration of the arguments and information presented by the parties in support of their proposed settlement disposition of this matter, and particularly with regard to the question of negligence, I agree that a reduction in the increased assessment is justified. However, in view of the seriousness of the citation, the proposed penalty of $350 is rejected. Further, taking into account the almost instant abatement of the condition, the parties were advised that I would approve a civil penalty assessment of $500 for the citation, and they agreed. Accordingly, pursuant to Commission Rule 30, 29 CFR 2700.30, I conclude and find a settlement in the amount of $500 is reasonable and in the public interest, and the motion is GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $500 is staisfaction of Citation No. 0756313, June 19, 1981, 30 CFR 75.316, within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is DISMISSED.

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The 104(d)(1) Citation No. 0752151, July 28, 1981, cites 30 CFR 75.1704, and states as follows:

> The operator did not maintain the designated 10-men service cage in the prod. shaft properly -- in that such device (Nord Berg Hoist/Lakeshore Designed) would not run. Further, the approved back-up North coal skip did not have the embark-debark means available for persons. The main service hoisting facility (Nordberg/Lakeshore cage) was unavailable as material (flat car on trip) had cage tied up.

In this case the parties proposed a settlement in the amount of $295 for the citation in question. The initial "special assessment" made in this case was in the amount of $2,000. The assessment was further reduced to $1250 at the assessment conference stage, and this is the amount which was proposed by the petitioner at the time that it filed its civil penalty proposal on November 27, 1981.

In support of the proposed settlement reduction for the citation in question the petitioner asserted that the facts as now known to him justifies a reduction. Counsel stated that the citation was issued after the inspector found that the 10-man service case located in the production shaft would not operate on a manual mode, but could be used automatically. Since this equipment was a designated main escapeway, the inspector was not concerned that it was not totally operable, but that two additional hoists designated as back-ups could not be used.

In preparation for the hearing, petitioner's counsel asserted that additional facts were brought to his attention concerning the two back-up escape hoists. The service hoist had a piece of equipment stored on it which could have been easily removed to facilitate the transportation of men in an emergency. The second hoist referred to by the inspector in his citation could have been used since a portable walk board for use by the men to enter the hoist was located some distance from this hoist. Thus, petitioner argues that the original assessment was made on the assumption that the two additional hoists were totally unserviceable for use in an emergency, which was in fact not the case.

In addition to the foregoing arguments, petitioner's counsel stated that he has consulted with the assessment officer who "specially assessed" the citation in question and that he was now in agreement that the regular civil penalty process is appropriate in this case. As a matter of fact, counsel asserted that the agreed upon proposed settlement amount of $295 was computed by the same MSHA assessment officer after all of the facts were disclosed and brought to his attention. Counsel also brought to my attention that he discussed the proposed settlement with the inspector who issued the citation, and that the inspector was unavailable for the hearing because he was on sick leave and has filed for disability retirement.

Petitioner's motion also includes information concerning the other statutory criteria found in section 110(i) of the Act. Coupled with the facts and circumstances surrounding the issuance of the citation, the subsequent assessments, and the arguments presented in support of the proposed settlement, I conclude and find that the settlement proposal is reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, the motion to approve settlement is GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $295 in satisfaction of Citation No. 0752151, July 28, 1981, 30 CFR 75.1704, within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge