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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 Proceeding Docket No. WEVA 82-110
v.	A. C. No. 46-01369-03038
AMHERST COAL COMPANY, RESPONDENT	MacGregor Cleaning Plant

DECISION AND ORDER OF DISMISSAL

Counsel for the Secretary of Labor filed on June 24, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent has agreed to pay reduced penalties totaling $180 instead of the penalties totaling $1,260 as proposed by the Assessment Office.

The motion for approval of settlement gives the following reason for reducing the penalties proposed by the Assessment Office (p. 2):

> The underlying citations in this action are based on nine separate violations of 30 CFR 71.208(a), each of which was originally assessed a penalty of $140. The cited standard requires that each operator take a valid respirable dust sample from each designated work position on a bimonthly basis. In this action, subsequent to the filing of the civil penalty petition, respondent presented evidence showing that it had, in fact, taken the required respirable dust samples and submitted them to MSHA within the established timeframe. Copies of the dust data cards indicating that the samples were taken at each of the nine designated work positions are attached hereto as Exhibit A. However, due to the transposition of two numbers in block No. 10 of each dust data card, respondent was not given credit for having taken and submitted the sampling results to MSHA. Under the circumstances, the parties agree that respondent's negligence was significantly less than originally assessed and that a considerable reduction in penalty is warranted.

Each of the nine citations involved in this proceeding alleges that the operator violated section 71.208(a) by failing to submit a required respirable dust sample for a certain occupation in a designated work area for the bimonthly sampling cycle of June-July 1981. Seven of the nine citations designate the area involved as the "001-0" section and two of them designate the area involved as the "002-0" section. The seven citations in the "001-0" section cite seven different occupational codes and the two citations for

the "002-0" section designate two different occupational codes. Each citation is based on an "Advisory of Non-Compliance" sent out by MSHA's computer.

Each of the Dust Data Cards furnished by respondent in support of its claim that it did not violate section 71.208(a) shows that respondent did, in fact, submit a respirable dust sample for each of the occupational codes involved for the bimonthly sampling cycle of June-July 1981. The only mistake which respondent made was that respondent wrote in Block No. 10 of the card the numbers "010-0" for the seven samples submitted for section "001-0" and wrote the numbers "020-0" for the two samples submitted for section "002-0". Naturally, when data for respondent's samples were entered in MSHA's computer, the computer gave respondent no credit for seven samples submitted for section 001-0 because respondent's samples had an erroneous designation of section 010-0. Likewise, MSHA's computer did not give respondent credit for two samples for section 002-0 because respondent had erroneously designated the samples for section 020-0.

Section 71.208(a) provides as follows:

> (a) Each operator shall take one valid respirable dust sample from each designated work position during each bimonthly period beginning with the bimonthly period of February 1, 1981. The bimonthly periods are * * * June 1-July 31 * * *.

The evidence submitted with the motion for approval of settlement shows without question that respondent did "take one valid respirable dust sample from each designated work position during" the bimonthly period here involved of June 1 to July 31. Section 71.208(a) does not provide that respondent shall make no mistakes in filling out his dust data card. The requirements of the regulations were fulfilled when respondent took the required respirable dust samples for the designated working positions and submitted them within the June-July 1981 time period.

Computers perform the functions which they have been programmed to carry out. When mistakes are made by the human beings who feed facts into a computer, those mistakes are not corrected by the computer. When an operator proves, however, that he took the samples, but made a clerical error in submitting them to MSHA, the mistake should be corrected so that the operator may be given credit for the having taken the samples and having submitted them within the time period required by section 71.208(a).

In Co-Op Mining Co., 2 FMSHRC 3475 (1980), the Commission reversed an administrative law judge's decision which had accepted a settlement agreement in circumstances almost identical to those which exist in this proceeding. In the Co-Op case, a respondent had submitted a respirable dust sample for an employee who did work for it but had not submitted a sample for a person who MSHA mistakenly thought worked for respondent. The

Commission said that no violation of section 70.250(b) had occurred in that case. The Commission

observed that the deterrent effect of paying penalties would not be advanced by having a penalty paid for a violation which had not occurred. I believe that the Commission's holding in the Co-Op case is controlling in the factual circumstances which exist in this proceeding. A respondent should not have to pay penalties for a clerical error. In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed a judge's decision in which he had held that an inspector's clerical mistake of writing section 104(c)(1), instead of section 104(c)(2), on four different unwarrantable-failure orders should not be considered as a reason for invalidating the orders since the inspector's mistake did not in any way prejudice respondent.

The purposes of the respirable-dust standards were not thwarted in any way by the fact that respondent inadvertently transposed two numbers when submitting nine respirable-dust samples. The provisions of section 71.208(a) were complied with when respondent took the required samples and submitted them within the required time period. Therefore, I find that no violations of section 71.208(a) occurred, that the citations should be vacated, and that the motion for approval of settlement should be denied.

WHEREFORE, it is ordered:

(A) Citation Nos. 9915322 through 9915330 dated August 13, 1981, were issued in error and are hereby vacated.

(B) The Petition for Assessment of Civil Penalty filed January 7, 1982, in Docket No. WEVA 82-110 is dismissed.

(C) The motion for approval of settlement filed on June 24, 1982, in Docket No. WEVA 82-110 is denied.

(D) The hearing now scheduled to be held on August 3, 1982, in this proceeding is canceled.

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