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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ISLAND CREEK COAL COMPANY, PETITIONER v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT UNITED MINE WORKERS OF AMERICA, RESPONDENT	Contest of Citation Docket No. VA 79-74-R Citation No. 694946 June 4, 1979 Virginia Pocahontas No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. ISLAND CREEK COAL COMPANY, RESPONDENT	Civil Penalty Proceeding Docket No. VA 80-9 A. C. No. 44-02134-03011 Virginia Pocahontas No. 4 Mine

DECISION ON REMAND AND APPROVING SETTLEMENT

A decision was originally issued in this consolidated proceeding granting the notice of contest, vacating Citation No. 694946, and dismissing the petition for assessment of civil penalty, 2 FMSHRC 2583 (1980). The original decision was based on the Commission's decisions in The Helen Mining Co., 1 FMSHRC 1796 (1979), and Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), in which the Commission had held that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection.

The Commission issued an order on May 20, 1982, remanding the cases to me for further proceedings consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F. 2d 615 (1982), in which the court reversed the Commission's rulings in the Helen Mining and Kentland-Elkhorn cases and held that operators are required to pay miners for accompanying inspectors who are making "spot" inspections. I issued a procedural order on May 27, 1982, requesting that counsel for the parties advise me as to whether they wished to present any additional evidence or make additional arguments before a decision on remand was issued.

Counsel for the Secretary of Labor filed on July 9, 1982, a response to the aforesaid procedural order requesting that Citation No. 694946 and the petition for assessment of civil penalty be reinstated, and moving that a settlement agreement be approved under which the operator has agreed to pay a reduced penalty of $15, instead of the penalty of $34 proposed by the Assessment Office.

Citation No. 694946 was issued on June 4, 1979, alleging that the operator had violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by failing to compensate a miners' representative who accompanied an inspector on May 14, 1979, with respect to a 5-day "spot" inspection. Inasmuch as the court's decision in the UMWA case cited above holds that a miners' representative is entitled to compensation when he accompanies an inspector during both "spot" and regular inspections, I find that my decision issued on September 11, 1980, in this proceeding erroneously vacated Citation No. 694946 and improperly dismissed the petition for assessment of civil penalty filed in Docket No. VA 80-9.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. As to the criterion of the size of the operator's business, the proposed assessment sheet in the official file shows that the operator produces over 8 million tons of coal on an annual basis, thereby supporting a finding that Island Creek Coal Company is a large-sized company and that civil penalties should be in an upper range of magnitude insofar as they are based on the size of the operator's business.

As to the criterion of whether payment of penalties would cause the operator to discontinue in business, there are no facts in the official file pertaining to the operator's financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1979), that if an operator fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties will not cause a respondent to discontinue in business. In the absence of any data in the file to support a contrary conclusion, I find that payment of penalties will not cause the operator to discontinue in business.

As to the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance after having been cited for a violation of section 103(f), the abatement portion of the citation shows that the operator paid the miner immediately after Citation No. 694946 was issued. Under the assessment formula then applicable, the Assessment Office assigned six negative penalty points, thereby giving the operator proper credit for prompt abatement of the alleged violation.

The pleadings contain no data pertaining to the criterion of the operator's history of previous violations other than showing assignment of four penalty points under that criterion on the proposed assessment sheet in the

official file. In the absence of any other data, I find that a sufficient amount was assigned by the Assessment Office under the criterion of the operator's history of previous violations.

The remaining two criteria of negligence and gravity are discussed in the motion for approval of settlement. The motion states that reduction from the $34 proposed by the Assessment Office to the settlement amount of $15 is warranted because the operator declined to pay the miners' representative so that the operator could institute a legal challenge of the walk-around compensation provisions of section 103(f). The legal challenge did not expose miners to unsafe conditions.

There is legal precedent for assessing low penalties in the circumstances which existed in this proceeding. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court noted that it would be necessary for an operator to violate section 103(f) of the Act in order to obtain judicial review of the enforcement procedures which MSHA intended to use with respect to a miner's walk-around rights. The court also recognized that the operator would be subject to a civil penalty for violating the section just to test MSHA's enforcement procedures. The court then stated (82 F.R.D. at 354) that "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety."

On the basis of the discussion above, I find that the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) Ordering paragraphs (A) and (B) accompanying the decision issued September 11, 1980, in this proceeding are vacated as having been issued in error.

(B) The notice of contest filed in Docket No. VA 79-74-R is denied and Citation No. 694946 dated June 4, 1979, is reinstated and affirmed.

(C) The petition for assessment of civil penalty filed in Docket No. VA 80-9 is reinstated.

(D) Pursuant to the parties' settlement agreement, Island Creek Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of $15.00 for the violation of section 103(f) alleged in Citation No. 694946 dated June 4, 1979.

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