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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. VA 81-87
v.	A. C. No. 44-05630-03001
BILLY RAY MASTERS, RESPONDENT	No. 1 Mine

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on August 2, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent would pay reduced penalties totaling $147, instead of the penalties totaling $294 proposed by the Assessment Office for the five violations involved in this proceeding.

The motion for approval of settlement appropriately discusses the six criteria and gives reasons to support the parties' agreement under which respondent would pay penalties only half as great as those proposed by the Assessment Office. Respondent's answer to the Secretary's petition for assessment of civil penalty raises jurisdictional issues which should be addressed by me in this decision for respondent's future guidance even though the Secretary's counsel, in a settlement proceeding, was under no obligation to discuss the jurisdictional issues.

Respondent's answer contends that his operations are not subject to the provisions of the Federal Mine Safety and Health Act of 1977 or to the regulations promulgated thereunder. Respondent explains that he is the owner and sole operator of equipment used to improve real estate for third parties. Respondent says that he does not employ any workers and that the mere fact that coal was removed from construction sites does not require him to comply with a set of complicated regulations because Congress did not intend for the Act to protect an individual from himself.

All of the foregoing arguments have been made by other persons and have been rejected by the courts and the Commission. In Cyprus Industrial Minerals Corp., 3 FMSHRC 1 (1981), the Commission held that a site where an independent contractor was clearing land so that assessment of an ore claim could be made was a mine within the meaning of the Act. The Commission cited S. Report No. 95-181, 95th Cong., 1st Sess, 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess, Legislative History of Federal Mine Safety and Health Act of 1977, p. 602, in support of its ruling:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of the Committee that doubts be resolved in favor of inclusion of a facility within coverage of the Act.

In Ray Marshall v. Bobby Donofrio, 465 F.Supp. 838 (U.S.D.C.E.D. Pa 1978), the court held that the Act covers coal businesses being operated by the owners of the businesses. The court noted that a miner is any individual working in a coal mine and that the Act does not exclude a person who owns and works in a mine. The court observed that the proposed Act to exclude coverage of mines worked by two or fewer persons was never passed.

In Kraynak Coal Co. v. Ray Marshall, 604 F.2d 231 (3rd Cir. 1979), the court affirmed a district court's holding that Kraynak Coal Company was subject to the Act even though the only persons involved in operating the mine were four brothers. In Secretary of the Interior v. Shingara, 418 F.Supp. 693 (M.D.Pa. 1976), Ed and Fred Shingara had a small coal mine which they alone operated. Ed went underground and Fred operated a hoist. They produced only 10,000 tons of coal per year which was sold to a company which ground up the Shingara's coal and shipped it with other coal in interstate commerce. The court held that the Shingaras were subject to the Act and noted that the term "affecting commerce" used in the Act was employed by Congress when it wanted to achieve the farthest reach of the commerce clause.

In this proceeding, respondent removes coal after he has removed earth and rocks to prepare a site for construction by other parties. According to information in the official file, respondent sells about 12,500 tons of coal on an annual basis which is a larger tonnage than that involved in the Shingara case, supra, but even if respondent removed much less coal than 12,500 tons per year and even if respondent did not sell the coal to persons outside the state of Virginia where the coal is produced, his operations would be subject to the jurisdiction of the Act and the regulations promulgated thereunder because respondent's operations would have an effect on interstate commerce.

Now that respondent's jurisdictional arguments have been considered, further attention may be given to the motion for approval of settlement. Section 110(i) of the Act lists six criteria which are required to be used in determining civil penalties. As to the criterion of the size of respondent's business, the proposed assessment sheet attached to the motion shows that respondent produces only about 12,500 tons of coal on an annual basis. That volume of coal supports a finding that respondent operates a very small coal mine. Under the penalty formula described in 30 C.F.R. 100.3 which was in effect prior

to May 21, 1982, when the violations involved in this proceeding were being considered, the Assessment Office assigned no penalty points under the criterion of the size of respondent's business.

As to the criterion of respondent's history of previous violations, the motion for approval of settlement states that respondent has no history of previous violations and the Assessment Office assigned no penalty points under that criterion under section 100.3(c). As to the criterion of whether the payment of penalties will cause respondent to discontinue in business, the motion for approval of settlement states that payment of the settlement penalties agreed upon by the parties will not adversely affect respondent's ability to continue in business.

The remaining three criteria of negligence, gravity, and respondent's demonstrated good faith in achieving rapid compliance will be discussed in connection with the violations alleged in this proceeding. The five violations are all related to the paper work associated with opening and operating a coal mine. Citation No. 686584 alleged a violation of 30 C.F.R. 41.20 because respondent had not filed a notification of legal identity with MSHA. Citation No. 686585 alleged a violation of section 77.1000-1 because respondent failed to file a ground-control plan. Citation No. 686586 alleged a violation of section 77.107-1 because respondent failed to file a plan regarding the training and retraining of certified or qualified personnel. Citation No. 686587 alleged a violation of section 77.1702(c) because respondent had failed to make arrangements for obtaining emergency medical assistance. Citation No. 686588 alleged a violation of section 48.23(a)(1) because respondent had not filed a training plan for new miners or for retraining of experienced miners. A withdrawal order was issued with respect to each of the five citations described above when respondent failed to file the required reports or plans. The Assessment Office considered all of the alleged violations, except failure to arrange for emergency medical assistance, to have been nonserious, to have been associated with a high degree of ordinary negligence, to have shown a lack of good faith in achieving compliance, and proposed a penalty of $60 for the first three violations described above, $66 for the fourth violation, and $48 for the fifth violation.

The motion for approval of settlement states that the proposed penalties should be reduced to half of the amounts proposed by the Assessment Office. In support of the reductions, the motion avers that the operator's failure to comply with the cited standards did not in and of itself create any safety or health hazards, that the violations were essentially bookkeeping oversights, that respondent was working by himself and honestly believed that the unique activities he was performing exempted him from the provisions of the Act and regulations, and that respondent's attitude was not wholly unreasonable when it is considered that several of the plans he was required to file referred to training of employees whom he had not hired and did not plan to hire.

I find that the motion for approval of settlement has given adequate reasons for approving the parties' settlement agreement under which respondent would pay half of the penalties proposed

by the Assessment Office. It should be noted that an amount of $20 of each of the penalties proposed by the Assessment Office was assigned to the penalties under the criterion of respondent's lack of good faith in failing to file the required

reports and plans. It should be observed, however, that respondent did submit all of the required reports and plans within 5 or 6 days after the citations were written. Respondent was convinced clear up to the time that he filed his answer on September 21, 1981, in this proceeding that he was not subject to the jurisdiction of the Act. Since respondent, in good faith, believed that he was on sound legal ground in refusing initially to file the required reports and plans, a fair evaluation of the basis for his action justifies a reduction in the penalties under the criterion of respondent's good faith in achieving compliance.

The same type of consideration is warranted with respect to the criterion of negligence which accounts for nearly all of the remaining portion of the penalties proposed by the Assessment Office. A respondent should not be given a high penalty under the criterion of negligence when the facts show that the failure to file the reports and plans is attributable to an honest conviction that the Act does not apply to the operations of a single person who is scooping up coal from sites prepared for construction projects.

WHEREFORE, for the reasons given above, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $147.00 which are allocated to the respective alleged violations as follows:

Citation No. 686584 4/15/81	41.20	$ 30.00
Citation No. 686585 4/15/81	77.1000-1	30.00
Citation No. 686586 4/15/81	77.107-1	30.00
Citation No. 686587 4/15/81	77.1702(c)	33.00
Citation No. 686588 4/15/81	48.23(a)(1)	24.00
Total Settlement Penalties in This Proceeding		$147.00

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