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SOL (MSHA) V. S & P COAL
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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.	Civil Penalty Proceeding Docket No. VA 81-63 Assessment Control No. 44-04460-03014
S & P COAL COMPANY, RESPONDENT	No. 1 Mine

DECISION AND ORDER OF DISMISSAL

Counsel for the Secretary of Labor filed on October 22, 1982, a motion for approval of settlement. Under the settlement agreement, respondent would pay a reduced penalty of $5 instead of the penalty of $38 proposed by the Assessment Office for the single violation of 30 C.F.R. 70.208(a) which is involved in this proceeding.

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

> Citation No. 9924829 was issued when MSHA records indicated that the operator had failed to submit a valid respirable dust sample. A civil penalty of $38 was proposed, but it is believed that it should be reduced to $5.00 as the operator's negligence is very low. It was discovered that the operator had submitted a respirable dust sample. However, in transmitting the sample the operator indicated the incorrect section number for the sample, resulting in an invalidation of the sample by MSHA's computer. As the sampling period had passed, the operator was unable to submit the necessary sample. While the operator was somewhat negligent in submitting the sample in an incorrect form, thus rendering it invalid, it is felt that the negligence involved was very low thus warranting the proposed reduction. In addition, the gravity of such a violation, essentially a bookkeeping one, is extremely low further justifying the proposed settlement. The good faith of the operator was normal. The operator is small, payment of the proposed penalty will have no effect on the operator's ability to remain in business. In the 24 month period prior to the issuance of this citation the operator had a history of 10 assessed violations, a good history.

Respondent's answer to the show-cause order issued in this proceeding states as follows:

> The reason why we disagree with the violation is we sent in a dust sample on this section, but in filling

out the dust card, we made a mistake on the number. Instead of 200-0, we put 200-2.

> This is only a small 1 section mine. The sample was voided. When a sample is voided, we are notified. Another sample is taken and sent in. We were never notified. I got M.S.H.A. office in Richlands, Va., to trace it to find out what happened. We were issued a violation by Richlands Office by direction of Computer. Therefore, we don't think we deserved this violation.

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 very similar 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.

Section 70.208(a) provides as follows:

> (a) Each operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly period beginning with the bimonthly period of December 1, 1980. * * *

The violation here involved was for the first bimonthly period referred to in section 70.208(a), that is, from December 1, 1980, to January 31, 1981. Both the motion for approval of settlement and respondent's answer to the show-cause order agree that the respirable-dust sample was taken and submitted to MSHA for the bimonthly period beginning December 1, 1980. The provisions of section 70.208(a) were complied with when respondent took the respirable--dust sample and submitted it within the required sampling period. The only mistake respondent made was in writing "200-2" on the dust card instead of "200-0". Since MSHA's computer had been programmed to give respondent credit for submitting a sample for section 200-0, it naturally rejected a sample bearing the number "200-2".

Inasmuch as the sample here involved appears to be the very first submittal required by section 70.208(a), it is understandable that respondent may have thought the proper designation to enter on the dust card was "200-2". Respondent's answer to the show-cause order notes that it is customary for it to be advised when MSHA voids a sample so that a new sample may be submitted, but respondent states that it was not advised of the fact that its sample had been voided by the computer.

It is true that section 70.208(a) provides that "each operator shall take one valid respirable dust sample" [Emphasis supplied.]. It would be possible to argue that a dust sample is not "valid" unless it has been given the correct section number by the operator. If an operator were to persist in submitting

its samples with an incorrect number on them for two or three bimonthly periods in succession, and such repeated mistakes were to prevent a determination from being made on a long-term basis as to whether respondent's miners were being exposed to an excessive concentration of respirable dust, then a finding might eventually have to be made that respondent was deliberately engaged in thwarting MSHA's enforcement of its respirable-dust program.

In the factual situation which existed in this proceeding, however, it appears that respondent made a single mistake in submitting the first bimonthly sample required by section 70.208(a). In such circumstances, there is considerable merit to respondent's contention that it did not "deserve this violation."

In Amherst Coal Co., 4 FMSHRC 1236 (1982), a case almost identical to this one, I held that no violation of the respirable-dust standards had occurred. In the Amherst case, I stated that respondent should not have to pay a civil penalty for having made a clerical error. In that proceeding, I cited Old Ben Coal Co., 2 FMSHRC 1187 (1980), as an example of a case in which an inspector made a clerical error in writing section 104(c)(1), instead of section 104(c)(2), on four different unwarrantable-failure orders. Yet, it was held in the Old Ben case that the inspector's clerical error should not be considered as a reason for invalidating the orders in that proceeding because the inspector's mistake did not in any way prejudice Old Ben.

The facts in this case do not show that MSHA's respirable-dust program is going to be adversely affected if respondent is absolved of the violation of section 70.208(a) alleged in Citation No. 9924829. As the motion for approval of settlement notes, respondent has been assessed for only 10 violations during the 24-month period preceding the writing of Citation No. 9924829. An operator with as favorable a history of previous violations as the respondent in this proceeding has is not likely deliberately to submit successive respirable dust samples with incorrect section numbers on them. Consequently, for the reasons given above, I find that no violation of section 70.208(a) occurred and that the petition for assessment of civil penalty should be dismissed.

WHEREFORE, it is ordered:

(A) Citation No. 9924829 dated February 12, 1981, was issued in error and is hereby vacated.

(B) The Petition for Assessment of Civil Penalty filed June 17, 1981, in Docket No. VA 81-63 is dismissed.

(C) The motion for approval of settlement filed on October 22, 1982, is denied.

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