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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. KENT 81-141
v.	A. C. No. 15-04338-03044 F
EASTOVER MINING COMPANY, RESPONDENT	Brookside No. 3 Mine

DECISION APPROVING SETTLEMENT

When a hearing was convened on May 13, 1982, in Barbourville, Kentucky, in the above-entitled proceeding, counsel for the Secretary of Labor stated that the parties had reached a settlement of the issues. The Secretary's counsel then made an oral motion for approval of settlement. Under the settlement agreement, respondent would pay reduced penalties of $1,250 instead of the penalties of $2,250 proposed by the Assessment Office for the two alleged violations involved in this proceeding.

Since the oral motion for settlement was made in the presence of a court reporter, it is normal procedure to wait until a transcript of the hearing is received from the reporter before acting upon the oral motion for approval of settlement. After the transcript is received, the judge normally issues his decision on the basis of the motion which has been transcribed by the reporter. In this instance, the court reporter failed to submit a transcript of the hearing. We have been unable to talk to the reporter by telephone to ask whether he ever intends to transcribe the hearing, and he will not accept a letter sent by certified mail. Therefore, I am issuing this decision on the basis of the notes which I took at the hearing.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The six criteria were considered by the parties when they reached their settlement agreement. As to the criterion of the size of respondent's business, the proposed assessment sheet in the official file shows that respondent produces over 2,000,000 tons of coal on an annual basis and that the Brookside No. 3 Mine involved in this proceeding produces over 200,000 tons of coal per year. Those figures support a finding that respondent is a large operator and that any civil penalties assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

The parties have presented no evidence, and the official file contains no facts, pertaining to respondent'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 (1974), that a judge may presume that an operator is able to pay civil penalties if the operator fails to present any evidence regarding its financial condition. In the absence of any statements by the Secretary's counsel or facts in the official file indicating that a contrary conclusion should be drawn, I find that payment of penalties will not cause respondent to discontinue in business.

As to the criterion of respondent's history of previous violations, counsel for the Secretary stated that during the 24 months preceding the writing of the two citations involved in this proceeding, respondent had been assessed for a total of 243 violations during 390 inspection days. Application of those figures to the assessment formula in 30 C.F.R. 100.3(c), which was in effect prior to May 21, 1982, when the penalties in this proceeding were proposed by the Assessment Office, shows that a total of nine penalty points should be assigned under the criterion of respondent's history of previous violations. I find that the settlement penalties are sufficiently large to allow for an appropriate amount to be included under the criterion of respondent's history of previous violations.

The remaining three criteria of negligence, gravity, and the operator's good-faith effort to achieve rapid compliance will be considered in the ensuing discussion of the allegations contained in each citation. Citation No. 741492 alleged that respondent had violated 30 C.F.R. 75. 1725 by failing to remove from service a track vehicle which had a defective device for holding the trolley pole against the trolley wire which supplied the vehicle with electrical power. One of respondent's foremen used the track vehicle even though he knew that the trolley pole frequently came loose from the trolley wire. The foreman was electrocuted when he tried to reattach the trolley pole to the source of power. The Assessment Office waived the normal penalty formula described in section 100.3 and proposed a penalty of $1,000 for the violation based on narrative findings of fact.

A copy of the narrative findings is a part of the official file. Those findings show that the Assessment Office considered the violation to have been the result of negligence and to have been very serious. The Secretary's counsel stated that the parties had agreed to reduce the proposed penalty of $1,000 to $600 primarily because the facts do not warrant a finding that respondent was as negligent as the Assessment Office found it to be. A foreman had used the car with the defective power attachment device with knowledge that the track vehicle was not in safe operating condition. I believe that the Commission's decision in Nacco Mining Co., 3 FMSHRC 848 (1981), can be cited as a precedent for allowing some reduction in the proposed penalty under the criterion of negligence. In the Nacco case, the Commission found that the operator was nonnegligent for a violation of section 75.200 in circumstances which showed that a

foreman

had gone out from under roof support for a distance of 10 to 12 feet in violation of the operator's roof-control plan. The foreman was killed when the roof fell on him. The facts showed that the foreman had received proper training and that he had shown good judgment on prior occasions with respect to following safety regulations, but on the day of the accident, he acted aberrantly and engaged in conduct which was wholly unforeseen. The foreman's action did not expose anyone else to harm or risk. The Commission stated that finding an operator negligent in such circumstances would discourage pursuit of a high standard of care because, regardless of what an operator did to insure safety, a finding of negligence would always result.

Using a track vehicle with a defective trolley wire attachment necessarily exposes the operator of such a vehicle to a hazardous condition, especially if he undertakes to reattach the trolley pole to the trolley wire without deenergizing the trolley wire, as the foreman did in this instance. Therefore, the Assessment Office correctly found that the violation was serious.

The second civil penalty sought in this proceeding is based on Citation No. 741493 which alleged a violation of section 75.512 because a weekly examination of the track vehicle cited in the preceding discussion was not being made. The Assessment Office found the violation to have been serious, to have been the result of a high degree of negligence, and proposed a penalty of $1,250. The reason that the Assessment Office proposed a larger penalty for the alleged violation of section 75.512, than it had for the violation of section 75.1725 described above, is that the Assessment Office concluded that the cause of the foreman's death was respondent's failure to make the required weekly examination of electrical equipment and to repair such equipment when defects were found.

Counsel for the Secretary stated that the parties had agreed to a reduction of the proposed penalty from $1,250 to $650 because, if a hearing had been held, there was some doubt that a violation of section 75.512 could have been proven. Also the Secretary's counsel noted that there was a considerable amount of overlapping of the two alleged violations in that both the previous violation of section 75.1725 and the instant violation of section 75.512 depended to the same extent upon a failure to inspect and correct the defects in the device which was supposed to keep the trolley pole attached to the trolley wire.

As the Commission observed in Lone Star Industries, 3 FMSHRC 2526, 2529 (1981), the occurrence of an accident or of a fatality does not by itself prove or disprove existence of a violation. Occurrence of an accident, however, may cause inspectors to notice violations which they may have overlooked on previous occasions. The doubt as to occurrence of the violation, coupled with the overlapping nature of the violations, warrants a reduction of the proposed penalty from $1,250 to $650.

The only criterion which has not been discussed is the question of whether respondent demonstrated a good-faith effort to achieve rapid compliance. The Assessment Office found that respondent abated both alleged violations " * * * within a reasonable period of time." The inspector observed the alleged violation of section 75.1725 at 7 a.m. and gave respondent an hour within which to terminate the violation. The subsequent action sheet terminating the citation indicates that the track vehicle was removed from the mine and taken completely away from the track by 9 a.m.. While respondent did not achieve abatement within the hour given by the inspector, it appears that abatement within a period of 2 hours is sufficiently close to the time allowed for abatement by the inspector to support a finding that respondent demonstrated a good-faith effort to achieve abatement so that no additional monetary amount should be assessed under the criterion of good-faith abatement.

The subsequent action sheet terminating Citation No. 741493 was not written until November 20, 1980, or nearly 6 months after the citation was written. Sometimes the inspectors who initially write citations overlook the need to write subsequent action sheets to terminate the citations. Thereafter, another inspector will check the files in MSHA's office and find that a given citation is still outstanding. He will then go to the mine and determine whether the citation should be abated. The termination sheet in this instance was written by a different inspector from the two inspectors who originally wrote the citation. Since abatement was achieved for Citation No. 741493 by taking out of service the same vehicle which was removed from service to abate Citation No. 741492, it is safe to conclude that there is no basis to make a finding of a lack of good faith in connection with the 6-month abatement period associated with Citation No. 741493. Therefore, no additional monetary amount should be assessed for the alleged violation of section 75.512 under the criterion of good-faith abatement.

I believe that the foregoing discussion of the six criteria shows that the Secretary's counsel gave sufficient reasons to warrant the grant of his oral motion for approval of settlement.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement made at the hearing on May 13, 1982, 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 $1,250 which are allocated to the respective alleged violations as follows:

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Citation No. 741492 5/19/80	75.1725	$	600.00
Citation No. 741493 5/19/80	75.512		650.00

Total Settlement Penalties in This Proceeding ... $1,250.00

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