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SOL (MSHA)  V.  BCNR MINING
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Federal Mine Health and Safety Review Commission
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. PENN 82-83 |
| v. | A. C. No. 36-00967-03107 F |
| BCNR MINING CORPORATION,<br>RESPONDENT | Clyde Mine |

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on December 13, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement respondent would pay a reduced civil penalty of $2,000 instead of the penalty of $10,000 proposed by the Assessment Office for the single violation of 30 C.F.R. 75.200 involved in this proceeding.

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. As to the criterion of whether the payment of civil penalties would cause respondent to discontinue in business, there are no data with respect to respondent's financial condition in the motion or in the official file. 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 when an operator fails to present any evidence with respect to its financial condition, a judge may presume that the payment of penalties would not affect the operator's ability to continue in business. In the absence of anything in the record to indicate that a contrary conclusion should be reached, I find that the payment of penalties will not cause respondent to discontinue in business.

There is a considerable amount of materials in the file pertaining to the criterion of respondent's history of previous violations. Those materials show that during the 24 months preceding the writing of the violation alleged in this proceeding, respondent was assessed penalties for 608 violations at its Clyde Mine which is here involved. Under the assessment formula which was in effect prior to May 21, 1982, when the violation here involved was cited, a total of five penalty points would be assessed under section 100.3(c)(1) of the penalty formula described in 30 C.F.R. 100.3. It is not possible to determine the number of penalty points which should be assessed under section 100.3(c)(2) of the penalty formula because the record does not contain information showing the number of inspection days which were associated with the assessment of penalties for 608 violations.

A computer printout submitted by the Secretary's attorney does show, however, that 8 violations of section 75.200 were

cited at the Clyde Mine during the 4 months of 1979 included in the 24-month period preceding the

issuance of the withdrawal order involved in this proceeding. During 1980, the inspectors cited 32 violations of section 75.200 at the Clyde Mine, and during the applicable 9 months of 1981, the inspectors cited 26 violations of section 75.200. If the aforesaid number of violations for each applicable period is divided by the number of months during which the violations were cited, it will be seen that an average of 2 violations per month of section 75.200 was cited in 1979, an average of 2 violations per month of section 75.200 was cited in 1980, and an average of 2.8 violations per month of section 75.200 was cited in 1981. During that same period of time, production at the Clyde Mine fell from 496,846 tons in 1980 to 293,515 tons in 1981. The foregoing data, therefore, support a conclusion that respondent has been cited for an increasing number of violations of section 75.200, despite a sharp decline in production, which indicates an unfavorable history of previous violations. In such circumstances, I would have assessed a penalty of at least $400 under the criterion of history of previous violations if I had been assessing a penalty in a decision issued on the basis of a hearing, assuming that respondent could not, at a hearing, have been able to adduce evidence to show that its history of previous violations is not as bad as the figures given above seem to indicate.

As to the criterion of the size of respondent's business, the motion for approval of settlement shows that respondent's total production from all mines declined from 3,967,334 tons in 1980 to only 1,993,552 tons in 1981. As indicated in the preceding paragraph, there has been a similar decline of production at the Clyde Mine. Even so, respondent should still be classified as a large company as to which penalties should be assessed in an upper range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

The motion for approval of settlement states that respondent demonstrated a good-faith effort to achieve rapid compliance by closing down the entire section, trimming any loose, unsupported ribs, installing rib posts where needed, and reviewing the roof-control plan with the miners. Since a withdrawal order was the vehicle used to cite the violation, the inspector did not give a specific period of time within which the violation had to be abated, but the violation was abated in a subsequent action sheet issued at 10:30 a.m. on the day following the citing of the violation. In such circumstances, respondent probably should be given some reduction in the penalty otherwise assessable under the other five criteria. I believe that the settlement penalty of $2,000 reflects some tempering of the penalty under the criterion of rapid good-faith abatement.

The motion for approval of settlement shows that the primary criteria considered by the Secretary's counsel in agreeing to a reduction of the proposed penalty to $2,000 was based on an evaluation of the two criteria which have not yet been discussed, that is, gravity and negligence. The violation of section 75.200 was cited in Order No. 1050164 which alleged that respondent had

violated Safety Precaution No. 29 of its roof-control plan because there were loose and unsupported ribs in the No. 5 entry and crosscuts right and left of the No. 5 entry near survey station 28á60 in the 2 Flat Section.  Safety Precaution No. 29 requires that loose ribs be taken down or supported by erection of cribs or other supports in addition to the installation of roof bolts on 4-foot centers.

There can be no doubt but that the ribs were loose in the vicinity of the continuous-mining machine because the operator of the machine was killed when the ribs on the left side of the entry fell on him. The motion for approval of settlement, however, states that the inspector cited the violation of section 75.200 on the basis of an inspection of the mine at 5 a.m. on Thursday which was about 6-1/2 hours after the occurrence of the fatal accident on Wednesday evening. The motion for approval of settlement states that interviews of the miners working on the 2 Flat Section at the time the accident occurred do not show that the ribs on the left side of the entry were observably loose prior to the occurrence of the accident. In such circumstances, the motion for approval of settlement concludes that, if a hearing had been held, it would have been difficult for the inspectors to support that respondent was negligent in failing to observe the loose ribs and erect additional rib supports prior to the occurrence of the accident.

The motion for approval of settlement shows the applicability of the Commission's observation in Old Ben Coal Co., 4 FMSHRC 1800, 1804 (1982) where the Commission noted that:

> * * * A violation may occur absent an accident, and an injury or death does not ipso facto make out a violation. As here, however, an accident may sometimes shed light on an unsafe situation that had escaped previous notice or citation. * * *

In this proceeding, it is obvious that the ribs were loose or they would not have fallen upon the operator of the continuous-mining machine. On the other hand, there may have been no indication that the ribs were loose enough to be observable prior to the occurrence of the accident. The copy of MSHA's accident report in the official file shows that the helper to the operator of the continuous-mining machine stated that the rib did not appear to be loose on the left side of the entry until after a portion of the coal pillar had been taken on the left side of the entry.

The discussion above shows that most of the settlement penalty of $2,000 would be assessable under the criterion of gravity because roof and rib falls still account for a large percentage of injuries and deaths in underground coal mines. As the foregoing discussion of respondent's history of previous violations shows, respondent is still being cited for an increasing number of violations of section 75.200. Nearly all violations of section 75.200 have a capacity of causing injury or death. Therefore, it is appropriate that respondent be assessed a penalty of $2,000 primarily under the criterion of gravity in the hope that respondent will devote an increasing effort to reducing violations of section 75.200 at its Clyde Mine.

The facts discussed above support a conclusion that the settlement agreement should be approved because there were sufficient mitigating factors surrounding the occurrence of the alleged violation to support a reduction of the proposed penalty

of $10,000 to the settlement amount of $2,000.

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WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed on December 13, 1982, is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay a civil penalty of $2,000.00 for the violation of section 75.200 alleged in Order No. 1050164 dated September 24, 1981.

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