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SOL (MSHA) V. ALLIANCE OF PUCKET
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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.	Assessment Control Nos.
v.		KENT 82-94	15-06778-03011
		KENT 82-95	15-06778-03012
		KENT 82-96	15-06778-03013

ALLIANCE OF PUCKETT COAL COMPANY,
INC.,
RESPONDENT

Rice Harlan Mine

DECISION APPROVING SETTLEMENT

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
United States Department of Labor
Carson Shepherd, General Superintendent, RB Coal
Company, Pathfork, Kentucky

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 9, 1983, as amended March 4, 1983, a hearing was held in the above-entitled proceeding on March 15, 1983, in Barbourville, Kentucky, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

Evidence was submitted at the hearing with respect to one alleged violation of the mandatory health and safety standards. I found that a violation had occurred and assessed a penalty of \$25.00 based on the evidence introduced by both petitioner and respondent (Tr. 5-35). Thereafter the parties negotiated a settlement under which respondent agreed to pay reduced penalties amounting to \$1,957 instead of the penalties of \$3,633 proposed by the Assessment Office.

Section 110(i) of the Act lists six criteria which are required to be considered in assessing civil penalties. Two of those criteria, the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business, are the primary factors which support acceptance of the parties' settlement agreement. Respondent was represented at the hearing by Mr. Carson Shepherd, who is general superintendent of RB Coal Company. Mr. Shepherd testified that the respondent in this proceeding, Alliance of Puckett Coal Company, is a contract operator owned by RB Coal Company. The facilities operated by RB Coal Company consist of three mines, a washing or cleaning plant, and a raw coal tipple. At the time of the hearing one of the mines had been shut down for 3 weeks, another one had been closed for 6 months, and the third one was working only 1 day each week. The small amount of coal being sold is on the basis of a spot market and RB Coal Company is "just trying to survive right now"

(Tr. 44).

The respondent in this proceeding began operating the Rice Harlan Mine in September 1981 and the coal seam ranges from 2 to 36 inches in height (Tr. 23-24). The low range of 2 inches occurs when respondent encounters faults comprised of rock which has to be extracted at high cost until an increased thickness of the coal seam is exposed. Even when conditions were good and coal was being produced on two working shifts, the mine produced only 100 tons of coal per shift (Tr. 28; 32).

Exhibit No. 1 was introduced by counsel for the Secretary of Labor for the purpose of showing respondent's history of previous violations (Tr. 4). Normally the Secretary shows a respondent's history of previous violations for the 24-month period preceding the occurrence of the violations involved in a given proceeding. Respondent, however, did not begin to operate the Rice Harlan Mine here involved until September 1981 and the earliest violations in this proceeding were not cited until December 1981. In such circumstances, Exhibit 1 could not list violations occurring 24 months prior to December 1981. Exhibit 1, therefore, simply lists the same 34 violations for which penalties are sought to be assessed in this consolidated proceeding. In light of the facts described above, I find that respondent has no history of previous violations to be considered in deriving penalties for the violations alleged in this proceeding.

In determining the proposed penalties under the penalty formula described in 30 C.F.R. 100.3, the Assessment Office did not assign any penalty points under the criterion of history of previous violations as to the alleged violations involved in Docket Nos. KENT 82-94 and KENT 82-95. Although the Assessment Office assigned 15 penalty points under the criterion of history of previous violations in determining the penalties proposed for the six violations involved in Docket No. KENT 82-96, that assignment of points was done under the old penalty formula effective prior to May 21, 1982, which included in the prior history any violations for which penalties had been proposed by the Assessment Office, whereas the current formula includes in the prior history only those violations which have been paid or finally adjudicated. None of the violations listed in Exhibit 1 in this proceeding have been paid or finally adjudicated. In such circumstances, I believe that it is inappropriate to attribute any portion of the penalties determined in this proceeding to the criterion of history of previous violations.

As to the criterion of whether respondent demonstrated a good-faith effort to achieve rapid compliance, the Assessment Office found that all of the violations were abated within the time provided for by the inspector, or within the "normal" period described in section 100.3(f) of the previously effective penalty formula, with two exceptions. The first exception to normal good-faith abatement occurred with respect to a violation alleged in Docket No. KENT 82-94 when the inspector issued Withdrawal Order No. 994723 because respondent failed to abate Citation No. 1100507 within the time given by the inspector. In that case, the Assessment Office assigned 10 additional points for

respondent's failure to abate in a timely manner and the parties' settlement agreement does not propose any reduction in the Assessment Office's proposed penalty of \$325 for the violation of section 75.400 charged in Citation No. 1100507.

The other exception to "normal" good-faith abatement occurred in connection with the proposal for assessment of civil penalty filed in Docket No. KENT 82-95 in which a penalty is sought for the violation of section 75.301 alleged in Citation No. 994729. In that case, the Assessment Office reduced by two the penalty points otherwise assignable under the other five criteria because respondent had abated the alleged violation within a much shorter period than had been allowed by the inspector. The parties' settlement agreement reduces the proposed penalty for the violation of section 75.301 alleged in Citation No. 994729 to \$25 from the penalty of \$90 proposed by the Assessment Office for reasons other than good-faith abatement. In such circumstances, I find that no penalty assessed in this proceeding under the other five criteria should be further reduced or increased under the criterion of respondent's good-faith effort to achieve compliance because the only two variances from "normal" abatement were taken into consideration by the Assessment Office when it reached the proposed penalties which are being evaluated in this proceeding.

The remaining two criteria of gravity and negligence will hereinafter be examined in a brief evaluation of the specific violations alleged in this proceeding.

Docket No. KENT 82-94

The proposal for assessment of civil penalty filed in Docket No. KENT 82-94 seeks assessment of penalties for 20 alleged violations of the mandatory health and safety standards. Six of the 20 citations involved alleged violations for failure to clean up loose coal and coal dust or apply adequate amounts of rock dust, five of the 20 citations alleged various types of failures to ventilate properly, four citations alleged failure to record various kinds of inspections of equipment or hazardous conditions, one citation alleged failure to install adequate roof supports, one citation alleged failure to ground equipment, one citation alleged failure to guard a tailpiece roller, one citation alleged failure to install a fire-warning device, and one citation alleged failure to maintain a starting box in a permissible condition.

The Assessment Office proposed penalties totaling \$1,906 for all 20 violations, whereas the parties agreed to a settlement amount of \$1,077. Counsel for the Secretary of Labor moved that the proposal for assessment of civil penalty be dismissed as to the violation of section 75.1704-2(e) alleged in Citation No. 1212377 because he believed that the wrong section of the regulations had been cited. The violation was for respondent's failure to record the results of fire drills in an approved book. The Secretary's counsel correctly concluded that section 75.1704-2(e) does not require that the results of such drills be recorded in an approved book. Therefore, the motion to dismiss with respect to the violation alleged in Citation No. 1212377 will hereinafter be granted. The Assessment Office assigned an appropriate number of penalty points for each alleged violation under the criteria of gravity and negligence.

As hereinbefore indicated, the parties did not propose any reduction in the penalty of \$325 proposed for the violation of section 75.400 alleged

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in Citation No. 1100507 because the relatively large assessment in that instance resulted from respondent's failure to abate the alleged violation within the time allowed by the inspector who issued a withdrawal order for what he considered to be a lack of a good-faith effort to achieve rapid compliance. The parties' settlement reductions are justified on the basis of respondent's evidence showing its lack of coal orders and the fact that the mine operates for only 1 day each week.

Docket No. KENT 82-95

The proposal for assessment of civil penalty filed in Docket No. KENT 82-95 seeks assessment of penalties for eight alleged violations of the mandatory health and safety standards. The Assessment Office proposed penalties totaling \$468 for the eight violations, whereas the parties have agreed to a settlement total of \$285. Each of the eight alleged violations involves a different mandatory health or safety standard. One of the citations alleged a failure to take a respirable dust sample, one citation alleged a lack of adequate ventilation at the last open crosscut, one citation alleged a failure to record preshift examinations in an approved book, one citation alleged a failure to apply an adequate amount of rock dust, one citation alleged a failure to hang communication wires on insulators, one citation alleged a failure to install a water line for a distance of 400 feet, one citation alleged a failure to install a sequence switch on the conveyor belt, and one violation alleged a failure to guard a tail roller.

Both parties presented evidence with respect to the violation of section 70.208(a) alleged in Citation No. 9934995 prior to the time they reached their settlement agreement. After the parties had completed their presentations with respect to the violation of section 70.208(a), I found that a violation of section 70.208(a) had occurred and I assessed a penalty of \$25.00 based on findings that the violation was nonserious, that respondent operated a small mine, and that the violation was associated with ordinary negligence. I also took into consideration the fact that respondent had hired a new employee whose duties include taking samples of respirable dust at the required intervals. The findings as to respondent's size and whether the payment of penalties would cause it to discontinue in business have already been discussed and support my assessment of a penalty of \$25 for the violation of section 70.208(a) alleged in Citation No. 9934995.

The Assessment Office proposed two penalties of \$72 each for the violation of section 75.1100-2(b) alleged in Citation No. 994726 and for the violation of section 75.1102 alleged in Citation No. 994731. The parties' settlement agreement does not reduce either of the \$72 penalties. The Assessment Office proposed a penalty of \$26 for the violation of section 75.516-2(a) alleged in Citation No. 994727 and the parties' settlement agreement does not provide for a reduction in that penalty either. The Assessment Office assigned an appropriate number of penalty points under the criteria of gravity and

negligence. As to the remaining four alleged violations, the parties agreed to reductions of about 50 to 60 percent. The reductions are justified by respondent's small size and the difficulties it is encountering in selling enough coal to remain in business.

The proposal for assessment of civil penalty filed in Docket No. KENT 82-96 seeks assessment of penalties for six violations of the mandatory health and safety standards. Two of the citations alleged violations for respondent's failure to reset timbers which had been knocked down for 700 and 1,200 feet, respectively, in two different entries, one citation alleged a violation for respondent's failure to install permanent stoppings, as opposed to temporary stoppings made of brattice cloth, between the return and intake aircourses in the third crosscut outby the working faces, one citation alleged a violation for respondent's failure to maintain a scoop in a permissible condition, one citation alleged a violation for failure to install an automatic fire-warning device, and one citation alleged a violation for failure of a section foreman to provide himself with a self-rescue device. The Assessment Office proposed penalties totaling \$1,259 for all six violations, whereas the parties have agreed to settlement penalties totaling \$595.

As hereinbefore indicated, the Assessment Office proposed relatively small penalties in connection with the violations alleged in Docket Nos. KENT 82-94 and KENT 82-95. The primary reason for the moderate penalties proposed in Docket Nos. KENT 82-94 and KENT 82-95 is that the Assessment Office assigned no penalty points at all in those two dockets under the criterion of respondent's history of previous violations. On the other hand, the penalties proposed by the Assessment Office in Docket No. KENT 82-96 are based on assignment of 15 penalty points under the criterion of respondent's history of previous violations pursuant to section 100.3(c) of the penalty formula which was in effect prior to May 21, 1982. The sole basis for assigning those 15 penalty points is that the inspector cited more than 1.7 violations during an inspection day. The penalty formula in use prior to May 21, 1982, relied on penalties proposed for any violations which had been written during the 24-month period preceding the violation under consideration by the Assessment Office. The penalty formula currently in use bases the assignment of penalty points for an operator's history of previous violations only on violations for which penalties have been paid or fully adjudicated. Exhibit 1 in this proceeding shows that none of the penalties proposed for respondent's alleged violations have been paid or fully adjudicated. Therefore, I believe that the penalties proposed by the Assessment Office in Docket No. KENT 82-96 are unwarrantably high because of the Assessment Office's assignment of 15 penalty points under the criterion of history of previous violations. If 15 points were to be subtracted from the total penalty points used by the Assessment Office in deriving the penalties proposed for the six alleged violations at issue in Docket No. KENT 82-96, all of the penalties proposed by the Assessment Office would be reduced considerably below the amounts which respondent has agreed to pay pursuant to the parties' settlement agreement without any adjustment being necessary with respect to assignment of penalty points under the criteria of negligence and gravity.

When consideration is given to respondent's present difficulties in remaining in business, the reductions agreed upon by the parties are justified. When those reduced penalties are additionally considered in light of

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the Assessment Office's above-described assignment of 15 points under the criterion of history of previous violations, it is quite apparent that the reductions agreed upon are clearly justified under the six criteria hereinbefore considered.

WHEREFORE, it is ordered:

(A) The motion to dismiss made by counsel for the Secretary of Labor with respect to the violation of section 75.1704-2(e) alleged in Citation No. 1212377 dated December 7, 1981, is granted and the proposal for assessment of civil penalty filed in Docket No. KENT 82-94 is dismissed to the extent that it seeks assessment of a civil penalty for the violation of section 75.1704-2(e) alleged in Citation No. 1212377 dated December 7, 1981.

(B) The motion for approval of settlement made by counsel for the Secretary of Labor at the hearing held in this proceeding on March 15, 1983, is granted and the parties' settlement agreement described at transcript pages 36 through 43 is approved.

(C) Pursuant to the parties' settlement agreement and the assessment of \$25 made by me on the basis of evidence presented by the parties at the hearing, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling \$1,957.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 82-94

Citation No. 1212377	12/7/81	75.1704-2(e).. (Dismissed)...	\$	0.00
Citation No. 1212378	12/7/81	75.512.....		20.00
Citation No. 1212379	12/7/81	75.507.....		20.00
Citation No. 1212380	12/7/81	75.703.....		20.00
Citation No. 1099706	12/9/81	75.400.....		100.00
Citation No. 1099707	12/9/81	75.400.....		40.00
Citation No. 1099708	12/9/81	75.1722.....		30.00
Citation No. 1099709	12/10/81	75.326.....		60.00
Citation No. 1099710	12/10/81	75.329-1.....		20.00
Citation No. 1099801	12/15/81	75.400.....		42.00
Citation No. 1099802	12/15/81	75.503.....		20.00
Citation No. 1099803	12/15/81	75.202.....		42.00
Citation No. 1099805	12/15/81	75.1103.....		98.00
Citation No. 1099807	12/15/81	75.326.....		30.00
Citation No. 1099713	12/17/81	75.403.....		50.00
Citation No. 1099714	12/17/81	75.403.....		100.00
Citation No. 1100507	1/12/82	75.400.....		325.00
Citation No. 1100500	1/12/82	75.300.....		20.00
Citation No. 1100509	1/12/82	75.512.....		20.00
Citation No. 2200520	1/12/82	75.1704-2(c)(1).....		20.00
Total Settlement Penalties in Docket No. KENT 82-94.....				\$1,077.00

Docket No. KENT 82-95

Citation No. 1100511 1/12/82	75.303.....	\$	20.00
Citation No. 994726 1/20/82	75.1100-2(b).....		72.00
Citation No. 994727 1/20/82	75.516-2(a).....		26.00
Citation No. 994728 1/20/82	75.1722.....		20.00
Citation No. 994729 1/20/82	75.301.....		25.00
Citation No. 994731 1/20/82	75.1102.....		72.00
Citation No. 994732 1/21/82	75.403.....		25.00
Citation No. 9934995 2/17/82	70.208(a) (Contested).....		25.00
Total Settlement and Contested Penalties in Docket No.			
KENT 82-95.....			\$ 285.00

Docket No. KENT 82-96

Citation No. 994721 1/14/82	75.503.....	\$	40.00
Citation No. 994722 1/14/82	75.1103.....		60.00
Citation No. 1100516 1/14/82	75.202.....		175.00
Citation No. 1100518 1/14/82	75.316.....		125.00
Citation No. 1100519 1/14/82	75.202.....		175.00
Citation No. 1100520 1/14/82	75.1714.....		20.00
Total Settlement Penalties in Docket No. KENT 82-96.....			\$ 595.00

Total Settlement and Contested Penalties in This
 Proceeding..... \$1,957.00

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