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SOL (MSHA) V. WESTERN 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	Civil Penalty Proceeding Docket No. WEVA 83-41 A.O. No. 46-05793-03503
v.	Mine No. 14
WESTERN COAL CORPORATION, RESPONDENT	

DECISION

Statement of the Case

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed a timely answer contesting the proposed assessments, and pursuant to notice the matter was scheduled for hearing in Logan, West Virginia, May 11, 1983. However, by motion filed April 15, 1983, pursuant to Commission Rule 30, 29 CFR 2700.30, the parties seek approval of a proposed settlement of the matter. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
907844	12/8/81	50.10	$ 644	$ 112
907845	12/8/81	50.12	644	112
907845	12/8/81	77.1607(b)	259	250
907846	12/8/81	77.1605(b)	192	98
907847	12/8/81	77.1104	126	126
			$1865	$ 707

Discussion

In support of the proposed settlement, counsel for the petitioner states that she and respondent's counsel have discussed the six statutory civil penalty criteria found in section 110(i) of the Act. With regard

to Citation No. 907844, counsel states that it was issued because the respondent failed to notify MSHA of a nonfatal truck haulage accident that occurred on December 7, 1981. Counsel asserts that a further investigation has revealed that a reduction in the assessed civil penalty would be appropriate in that the gravity of the violation should be reduced to show that there was no likelihood that an event posing a risk of injury or illness would have occurred as a result of this violation. Additionally, counsel points out that the respondent's negligence should be reduced from reckless disregard to low negligence in that the respondent did in fact prepare a report for MSHA on the day of the nonfatal accident. However, the report was not officially received in the district MSHA office until the following morning because the respondent was under the impression that it had in fact complied with the regulation by filling out the report on the day of the incident. Counsel indicates that the inspector has deleted the "significant and substantial" finding in order to reflect low negligence and to show that an injury or illness was not reasonably likely to occur if the violation was not corrected.

With regard to Citation No. 907845, counsel states that it was issued because the respondent had not taken measures to prevent the altering of the scene of the December 7, 1981 accident in that the scraping of the road resulted in the removal of tire tracks, and the lectro haul truck had been removed from the scene of the accident. Counsel asserts that a reduction in penalty would be appropriate as a result of further investigation which indicates that the gravity of the violation should be reduced to show that there was no likelihood that an event posint a risk of injury or illness would have occurred as a result of this violation. Additionally, counsel asserts that the respondent's negligence should be reduced from reckless disregard to low negligence in that it had altered the scene of the accident because a fuel truck had been involved and damaged, and the respondent wanted to prevent any further danger or incident from occurring. By removing the truck, the site was unintentionally changed, and in view of these subsequent findings, the inspector deleted his "significant and substantial" finding.

Regarding Citation No. 907846, counsel asserts that it was issued because the truck driver of the lectro haul truck failed to maintain control of the truck in that it hit a fuel truck on a radius curve causing a nonfatal injury to the driver. Counsel states that the respondent's negligence was moderate in that the driver had been instructed by the respondent on how to maintain control of the vehicle, but due to excessive speed, a collision occurred.

With respect to Citation No. 907847, counsel stated that it was issued because the parking brake on the fuel truck was inoperative. Counsel argues that a reduction in penalty would be appropriate in light of a further investigation which indicates that the driver of the truck revealed that he discovered that the parking brake had become

inoperative at the beginning of the shift, but he did not report it to management or to a mechanic, nor did he record it in the daily inspection book as he had been trained by the respondent to do whenever the brakes became inoperative. Under the circumstances, counsel states that mine management had absolutely no knowledge of this condition, had no means for ascertaining this information prior to the inspector's observation of the condition, and had in fact taken reasonable steps during the training of the driver to avoid such a condition. Additionally, this condition was not present during the prior shift, and thus had not been recorded on the previous shift. Counsel concludes that the respondent's negligence should be reduced from moderate to very low, indicating that the respondent could not have known of this condition, but that the gravity of the violation was accurately assessed as reasonably likely in that injuries resulting in lost workdays or restricted duty to two miners could have occurred.

Finally, petitioner's counsel states that Citation No. 907848 was issued because materials such as diesel fuel were present on the tank and bed of the fuel truck. Counsel states further that the violation was originally assessed at $126, that the respondent has agreed to pay the penalty in full, that one miner would be affected by any injury, but that the respondent's negligence was low.

Petitioner's counsel has also submitted information reflecting that the respondent is a medium-to-small operator, that all of the citations were abated within the time fixed by the inspectors who issued them, and except for five prior citations of section 77.1104, and three for section 77.1605(b), the respondent has no history of prior citations for infractions of the other standards which were cited in this case.

After careful consideration of the arguments presented by counsel in support of the proposed settlement, I conclude and find that they support the proposed reductions in civil penalties as noted. However, with regard to Citation No. 907844, charging the respondent with a violation of section 50.10, Title 30 CFR, I take note of the fact that section 50.10 requires a mine operator to immediately contact the appropriate MSHA district or subdistrict office in the event of an "accident" as defined at section 50.2(h)(1) through (h)(12). If contact with these local MSHA offices cannot be made, the regulation requires immediate contact with MSHA's Washington, D.C. office by a toll free telephone call to the number listed therein.

I find nothing in section 50.10 that requires a mine operator to fill out a written form or to otherwise notify MSHA of an accident by submitting something in writing. Under the circumstances, I fail to understand the relevance of petitioner's assertion that a penalty reduction is warranted simply because thr respondent prepared a report the day of the accident but did not file it until the next day because of its belief that it was in compliance when it filled out the report the day of the accident. The clear language of the cited standard requires an

"immediate contact" with MSHA, and not the preparation or filing of any written report.

On the facts of this case, it seems obvious to me that the respondent failed to immediately contact MSHA as required by the cited section 50.10. As a matter of fact, in its answer to the petitioner's proposal for assessment of civil penalty for this violation, respondent "admits this violation and accepts the penalty assessed". In addition, I take note of the fact that even though the inspector who issued the citation stated on the face of his citation form that the respondent "failed to notify MSHA", in the termination notice issued by another inspector abating the violation, he stated that "MSHA has been notified on the proper forms, according to Part 50.10, 30 CFR". Thus, it would appear to me that this inspector believed section 50.10 required a written report, and that fact is what is relevant insofar as mitigating circumstances are concerned. In short, if an inspector believes that section 50.10 requires a written report to achieve compliance, then a mine operator should be able to rely on that representation in arguing that it too believed it. More importantly, for purposes of future application, as between these same parties, I suggest that petitioner's counsel take the necessary steps to insure that both the inspector and the mine operator are clear as to precisely what section 50.10 requires a mine operator to do when there is an accident at its mine.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, the motion IS GRANTED and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, these proceeding is dismissed. The scheduled hearing is cancelled.

George A. Koutras
Administrative Law Judge