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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. PENN 82-328 A.C. No. 36-04281-03501
v.	Dilworth Mine
UNITED STATES STEEL MINING CO., INC., RESPONDENT	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this case, the Secretary seeks to have civil penalties assessed for two alleged violations of mandatory safety standards: one cited on April 19, 1982, alleging a violation of 30 C.F.R. 75.316; the other cited on June 1, 1982, alleging a violation of 30 C.F.R. 75.400. A notice of hearing was issued February 22, 1983, scheduling this case (and 5 other cases involving the same parties) for hearing commencing April 27, 1983, in Uniontown, Pennsylvania.

On March 31, 1983, the Secretary filed a motion to approve a settlement agreement covering the two alleged violations. The motion stated that the "significant and substantial" characterization on the two citations had been deleted and the penalty for each violation was reduced pursuant to 30 C.F.R. 100.4 to $20 from the original assessments of $158 and $112 respectively.

By order issued April 4, 1983, I denied the motion.

The case was heard on the merits on April 29, 1983. James Lough and Robert Newhouse, Federal Coal Mine inspectors, testified on behalf of Petitioner. James R. Williams testified on behalf of Respondent. Respondent has submitted a posthearing brief on the issue whether the Commission is bound by MSHA regulations providing a $20 penalty for violations which are not significant and substantial. Petitioner declined to file a brief on the issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Respondent is a large operator. The parties have stipulated that the imposition of penalties will not affect Respondent's ability to continue in business. With respect to both citations, Respondent abated the violations promptly and in good faith. Between June 1980 and June, 1982, Respondent's history shows five paid violations of 30 C.F.R. 75.316 and 10 prior paid violations of 30 C.F.R. 75.400.

CITATION 1144514

On April 19, 1982, a citation was issued to Respondent alleging a violation of 30 C.F.R 75.316. Respondent was cited for having a metal stopping separating the belt conveyor entry and the intake escapeway in violation of the approved ventilation plan. The condition was abated and the citation terminated by the construction of a masonry stopping between the two entries, within the 3-day abatement time.

There is no question but that the condition cited was a violation of the ventilation plan. The fact that it had existed for many years without being cited is not a defense. The inspector testified that the condition did not pose a hazard, and on the basis of his testimony, I find that the violation was not serious. However, the violation was known or should have been known to Respondent. Therefore, it was caused by Respondent's negligence. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $75.

CITATION 1146067

On June 1, 1982, a citation was issued to Respondent alleging a violation of 30 C.F.R. 75.400 because of an accumulation of loose dry coal and float coal dust under and around the tailpiece. The accumulations were up to 24 inches deep, 14 feet long and 6 feet wide. The mine was idle and the belt was not in operation. Twelve miners including a foreman were working in the area however. The section had been idle since March 24, 1982. Because of the absence of sources of ignition, the inspector was of the opinion that the condition did not pose "a significant hazard" of injury. The condition was obvious to visual observation. It was known or should have been known to Respondent. Therefore it resulted from Respondent's negligence. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $75.

THE EFFECT OF 30 C.F.R. 100.4 ON THE COMMISSION'S JURISDICTION TO ASSESS PENALTIES

On May 21, 1982, MSHA adopted new regulations on the criteria and procedures for civil penalty assessment.

30 C.F.R. 100.4 provides as follows:

> An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the $20 single penalty and will be processed through either the regular assessment provisions (100.3) or special assessment provisions (100.5).

The Respondent argues (1) that any violation not cited as "significant and substantial" comes under this provision and must be assessed as a "single penalty" at $20, and (2) the Review Commission is bound by MSHA's assessment regulation. Respondent asserts that in rejecting the proposed settlement in this case, I attempted to create a violation undefined and unknown to the law called a "token violation." In fact, the term token is a rather common adjective, the meaning of which is much more obvious than the term "single penalty." Neither term, however, is included in the criteria in section 110(i) of the Act by which I am bound in assessing civil penalties.

I conclude as follows:

1. Whether a cited violation is checked as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. As an aside, I believe it was a mistake for the Commission to review the propriety of a significant and substantial designation on citations in contested penalty cases.

2. The Commission is not bound by the Secretary's regulations setting out how he proposes to assess penalties. Secretary v. Sellersburg Stone, 5 FMSHRC 287, 291 (1983):

> "Thus in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act . . . ."

3. My assessment of the penalties herein is based on the following criteria:

> (a) Respondent is a large operator;
> (b) Respondent was negligent in permitting each of the violations to occur;
> (c) a penalty will have no effect on Respondent's ability to continue in business;
> (d) the violations were not serious;
> (e) Respondent has a moderate history of previous violations;

(f) Respondent showed good faith in attempting to achieve rapid compliance.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $150 within 30 days of the date of this decision for the two violations found herein to have occurred.

James A. Broderick
Administrative Law Judge