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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MONTEREY COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 83-136-R
Order No. 2034234; 3/2/83

Docket No. WEVA 83-137-R
Citation No. 2034235 3/7/83

Wayne Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

MONTEREY COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 83-199
A. C. No. 46-05121-03513

Docket No. WEVA 83-230
A. C. No. 46-05121-03514

Wayne Mine

DECISION APPROVING SETTLEMENT AND
ORDER GRANTING MOTION TO DISMISS

Before: Judge Steffey

Counsel for the Secretary of Labor filed on November 16, 1983, in the above-entitled proceeding motions to approve settlement with respect to the two civil penalty cases listed above. Under the settlement agreements, respondent has agreed to pay the full amount of \$3,500 proposed for the violations alleged in both civil penalty cases. Counsel for Monterey Coal Company filed on November 18, 1983, a motion to withdraw the contest pleadings filed in Docket Nos. WEVA 83-136-R and WEVA 83-137-R on the grounds (1) that the witnesses on whose testimony Monterey would have to rely at a hearing are unavailable and (2) that Monterey has entered into settlement agreements with respect to the civil penalty cases. I find that the motions to approve settlement and the motion to withdraw should be granted for the reasons hereinafter given.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be considered in determining civil penalties. One of those criteria is whether the payment of penalties would cause respondent to discontinue in business. There are no data in the official file or in the motions for approval of settlement providing any information about respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that when an operator

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fails to present any evidence concerning its financial ability in a civil penalty proceeding, a judge may presume that payment of penalties will not cause the operator to discontinue in business. In the absence of any information in this proceeding to support a contrary finding, I find that payment of penalties will not adversely affect respondent's ability to continue in business.

As to the criterion of the size of the operator's business, the proposed assessment sheets attached to the motions for approval of settlement show that Monterey Coal Company produces about 18,670,610 tons of coal on an annual basis and that the Wayne Mine, here involved, produces approximately 149,220 tons of coal per year. Those production 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.

A third criterion listed in section 110(i) is respondent's history of previous violations. The proposed assessment sheets accompanying the motions for approval of settlement indicate that Monterey has been assessed penalties for 60 violations during 129 inspection days in the 24-month period preceding the occurrence of the two violations alleged in this proceeding. That history of previous violations caused MSHA to assign two penalty points under section 100.3(c) of the penalty formula described in 30 C.F.R. 100.3. Inasmuch as an operator may be assigned up to 20 penalty points under section 100.3(c), I find that respondent has a very favorable history of previous violations and that low penalties should be assessed to the extent that they are determined under the criterion of respondent's history of previous violations.

A fourth criterion listed in section 110(i) requires consideration of whether respondent demonstrates a good-faith effort to achieve compliance after an alleged violation has been cited. Both of the motions for approval of settlement state that respondent did demonstrate a good-faith effort to achieve compliance after the violations here involved were cited. Therefore, respondent should be given credit for having reacted properly when it was advised that the inspector believed it had violated two mandatory health and safety standards.

The remaining two criteria of gravity of the violations and whether respondent was negligent with respect to their occurrence should be considered in light of the specific violations alleged by the inspector. Both of the violations involve the same factual situation in that six miners, including a section foreman, were making repairs to a continuous-mining machine. In Citation No. 2034235, the inspector cited respondent for a violation of section 75.1726(b) because of respondent's failure to block the raised ripper head of the machine. Citation No. 2034236 cited respondent for a violation of section 75.1725(c) because the cathead of the machine's power cable had not been tagged and locked out.

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The motion for approval of settlement states that both alleged violations were the result of a high degree of negligence because a section foreman was assisting in making the repairs and he should have made certain that the ripper head was secured to prevent it from falling and should have made certain that the power would not come on while the repairs were being made. The motion also states that both alleged violations were serious because the same continuous-mining machine on the same working section had previously been involved in a fatal accident in similar circumstances.

In view of the fact that a large operator is involved and that the alleged violations were both serious and associated with a high degree of negligence, it appears that MSHA appropriately proposed a penalty of \$2,000 for the violation of section 75.1726 (b) and a penalty of \$1,500 for the violation of section 75.1725 (c). Since respondent has agreed to pay the full amounts proposed by MSHA, I find that the motions for approval of settlement should be granted and that Monterey's motion for withdrawal of the contest pleadings should be granted.

WHEREFORE, it is ordered:

(A) Monterey Coal Company's motion to withdraw is granted, the contest pleadings filed in Docket Nos. WEVA 83-136-R and WEVA 83-137-R are deemed to have been withdrawn, and the proceedings in those two dockets are dismissed.

(B) The motions for approval of settlement filed by the Secretary of Labor are granted and the settlement agreements are approved.

(C) Pursuant to the parties' settlement agreements, Monterey Coal Company shall, within 30 days from the date of this decision, pay civil penalties totaling \$3,500 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 83-199		
Citation No. 2034235	3/2/83	75.1726(b).....\$2,000.00
Docket No. WEVA 83-230		
Citation No. 2034236	3/2/83	75.1725(c).....\$1,500.00
Total Settlement Penalties in This Proceeding.....\$3,500.00		

Richard C. Steffey
Administrative Law Judge