CCASE:
WESTMORELAND COAL V. SOL (MSHA)
DDATE:
19840511
TTEXT:

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

| | |
|---|---|
| WESTMORELAND COAL COMPANY,<br>CONTESTANT | CONTEST PROCEEDING |
| v. | Docket No. WEVA 82-340-R<br>Order No. 2002585; 7/15/82 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>RESPONDENT | Docket No. WEVA 82-341-R<br>Order No. 2002586; 7/15/82 |
| | Docket No. WEVA 82-342-R<br>Order No. 2002587; 7/15/82 |
| UNITED MINE WORKERS OF<br>AMERICA,<br>RESPONDENT | Docket No. WEVA 82-343-R<br>Order No. 2002588; 7/15/82 |
| | Docket No. WEVA 82-344-R<br>Order No. 2002589; 7/15/82 |
| | Docket No. WEVA 82-345-R<br>Order No. 2002590; 7/15/82 |
| | Docket No. WEVA 82-346-R<br>Order No. 2002591; 7/15/82 |
| | Docket No. WEVA 82-347-R<br>Order No. 2002592; 7/15/82 |
| | Docket No. WEVA 82-348-R<br>Order No. 2002593; 7/15/82 |
| | Docket No. WEVA 82-349-R<br>Order No. 2002594; 7/15/82 |
| | Docket No. WEVA 82-350-R<br>Order No. 2002595; 7/15/82 |
| | Docket No. WEVA 82-351-R<br>Order No. 2002596; 7/15/82 |
| | Docket No. WEVA 82-352-R<br>Order No. 2002597; 7/15/82 |
| | Ferrell No. 17 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEVA 83-73<br>A.C. No. 46-02493-03504 |
| v. | Docket No. WEVA 83-143<br>A.C. No. 46-02493-03515 |
| WESTMORELAND COAL COMPANY,<br>RESPONDENT | Ferrell No. 17 Mine |

DECISION APPROVING SETTLEMENT
AND DISMISSING NOTICES OF CONTEST

Before: Judge Steffey

Counsel for both the Secretary of Labor and Westmoreland Coal Company (WCC) filed on April 20, 1984, in the above-entitled proceeding a motion for approval of settlement and for dismissal of the notices of contest. Under the parties' settlement agreement, WCC has agreed to pay reduced civil penalties totaling $38,000 instead of the civil penalties totaling $55,040 proposed by MSHA.

In orders issued in this proceeding on May 4, 1983, and August 2, 1983, I consolidated the civil penalty issues raised in Docket Nos. WEVA 83-73 and WEVA 83-143 with the issues raised in the notices of contest which seek review of 13 withdrawal orders issued on July 15, 1982, under the unwarrantable-failure provisions of section 104(d) of the Federal Mine Safety and Health Act of 1977. The aforesaid order of May 4 also granted in part motions for summary decision filed by WCC and, in doing so, vacated all 13 of the withdrawal orders as having been issued in error under section 104(d) of the Act. The order of May 4 held, however, that the violations alleged by MSHA in the 13 orders survived vacation of the orders so that the 13 violations would have to be considered on their merits in the civil penalty cases (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). The parties' settlement agreement renders moot the issues raised in the notices of contest and makes it appropriate for me to grant the motion for dismissal of the notices of contest, as hereinafter ordered.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. The proposed assessment sheet in the official file in Docket No. WEVA 83-143 shows that WCC produces about 5,866,000 tons on an annual basis which supports a finding that WCC is a large operator. Consequently, to the extent that civil penalties are based on the criterion of the size of the operator's business, the penalties should be in an upper range of magnitude.

There is no information in the official file or in the motion for approval of settlement pertaining to the operator's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator supplies no facts regarding its financial condition, a judge may find that an operator is able to pay civil penalties. In the absence of any facts to support a contrary conclusion, I find that WCC's ability to continue in business will not be adversely affected by the payment of civil penalties. Therefore, no civil penalties

in this proceeding need to be reduced under the criterion of whether the payment of penalties would cause the operator to discontinue in business.

The proposed assessment sheet in the official file in Docket No. WEVA 83-73 shows that WCC had less than .3 of a violation per inspection day when its history of previous violations is evaluated under the assessment procedures used by MSHA, as described in 30 C.F.R. 100.3(c). When an operator has less than .3 of a violation per inspection day, MSHA assigns zero penalty points under section 100.3(c). There are no facts in the record to show that MSHA incorrectly evaluated the criterion of WCC's history of previous violations. Consequently, none of the penalties to be assessed in this proceeding need to be increased under the criterion of the operator's history of previous violations.

Three criteria remain to be considered, namely, negligence, gravity, and whether the operator demonstrated a good-faith effort to achieve rapid compliance after the violations were cited. The circumstances involved in the citing of the 13 violations involved in this proceeding are unique so that all three of the remaining criteria should be borne in mind in light of the facts hereinafter discussed.

An explosion occurred on November 7, 1980, in the 2 South Section of WCC's Ferrell No. 17 Mine. Five miners were killed in the explosion. Immediately after rescue and recovery operations had been completed, the 2 South Section was sealed off and MSHA has not yet completed its physical inspection of the 2 South Section. Although other sections of the mine were allowed to produce coal after MSHA's investigation was completed, except for the sealed off 2 South Section, the motion for approval of settlement (p. 2) states that the Ferrell No. 17 Mine is presently closed in its entirety and that it is doubtful if the 2 South Section will ever be reopened.

The motion for approval of settlement states that WCC, without regard to its potential civil and criminal liability, cooperated fully in the investigations of the disaster. Subsequently, WCC and several of its employees were indicted for violations of the Act with respect to the explosion. WCC ultimately pleaded quilty to 16 violations and paid a total of $600,000 in fines. As part of the disposition of the criminal charges, WCC also made $475,000 in charitable contributions for improved health care, the education of physicians, and safety training in Boone County, West Virginia, where the Ferrell No. 17 Mine is located.

The 13 violations involved in this proceeding were all written on July 15, 1982, by an inspector in Arlington, Virginia, on the basis of his examination of sworn statements obtained by

MSHA's investigators in December 1980. The alleged violations pertain to conditions which the inspector thought contributed to the explosion which occurred on November 7, 1980. MSHA proposed large penalties ranging from $5,000 to $10,000 for six of the alleged violations and all of those violations are alleged in the proposal for assessment of civil penalty filed in Docket No. WEVA 83-143. MSHA proposed the large penalties in Docket No. WEVA 83-143 under section 100.5 of its assessment procedures which specify that MSHA may waive the use of the formula described in section 100.3 and propose penalties under section 100.5 by making narrative findings pertaining to the six criteria. The remaining seven violations were alleged by MSHA in the petition for assessment of civil penalty filed in Docket No. WEVA 83-73. The penalties proposed for those seven violations range from $420 to $655 and were determined by assigning penalty points as described in section 100.3 of MSHA's assessment procedures.

While the discussion above is helpful for an understanding of how the alleged violations in this proceeding were cited and how the penalties were proposed, it does not specifically show why WCC's agreement to pay $38,000 in civil penalties, as opposed to the $55,040 in civil penalties proposed by MSHA, is justified when evaluated under the six criteria. That sort of showing cannot be demonstrated without making a specific examination of the violations which were alleged. I shall briefly consider each of the alleged violations under the docket number in which the respective civil penalties were proposed by MSHA.

Docket No. WEVA 83-143

As previously indicated above, all of the alleged violations were cited in orders written pursuant to section 104(d) of the Act. Since I have already found in my order issued May 4, 1983, that all 13 of the orders are invalid, they will hereinafter be discussed as vacated orders, but the violations alleged in the orders survived the vacation of the orders because they could have been issued as valid citations pursuant to section 104(a) of the Act (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)).

Vacated Order No. 2002586 alleged a violation of section 75.316 because permanent stoppings had been replaced by plastic stoppings and the plastic stoppings had not been properly maintained. MSHA believed that the improperly maintained stoppings may have prevented air from going to the 2 South Section where the explosion occurred. MSHA proposed a maximum penalty of $10,000 for the aforesaid violation and WCC has agreed to pay in full that proposed penalty. Since WCC is paying the maximum penalty permitted by the Act, no discussion is required to justify the settlement proposal with respect to the violation alleged in vacated Order No. 2002586.

Vacated Order No. 2002587 alleged a violation of section 75.316 because WCC had failed to follow its approved ventilation plan by not providing crosscuts at or near the face of each entry before the entries were abandoned. The order states that there is no evidence to show that it was unsafe to develop the required crosscuts. MSHA considered the violation to have been serious, to have been associated with a high degree of negligence, and proposed a penalty of $5,000 which WCC has agreed to pay in full. Inasmuch as MSHA properly proposed a large penalty which WCC has agreed to pay in full, no discussion is required to justify acceptance of the settlement proposal with respect to vacated Order No. 2002587.

Vacated Order No. 2002588 alleged that a violation of section 75.316 occurred because WCC had frequently failed to keep in a closed position the ventilation doors which had been installed in 1 South between 1 East and 1 West. MSHA considered the violation to have been very serious, to have been associated with a high degree of negligence, and proposed a penalty of $8,000, whereas WCC has agreed to pay a reduced penalty of $2,500. A reduction is justified in this instance because the language used in citing the violation speaks of "numerous occasions during the course of last year" when the doors were not closed. If a hearing had been held, it is doubtful that MSHA would have been able to prove that the doors were open at the time the explosion occurred so as to support a finding that failure to keep the doors closed specifically contributed to the cause of the explosion.

Vacated Order No. 2002589 alleged a violation of section 75.305 because WCC's section foreman admitted that he did not examine at least one entry of each intake and return air course in its entirety when he made a weekly examination for hazardous conditions. The section foreman traveled in the track entry and made intermittent examinations of the intake and return entries. MSHA considered the violation to have been very serious, to have been associated with a high degree of negligence, and proposed a penalty of $8,000, whereas WCC has agreed to pay a reduced penalty of $2,500. A substantial reduction is warranted in this instance because the section foreman's failure to examine the intake and return entries in their entirety during a weekly inspection could hardly be shown to have directly contributed to the explosion.

Vacated Order No. 2002590 alleged a violation of section 75.303 because WCC's personnel were not making preshift examinations on each shift prior to the entrance of miners into 2 South for the purpose of removing mining equipment during a 2-week period in late August and early September 1980. MSHA considered the violation to have been extremely serious, to have been

associated with a very high degree of negligence, and proposed a penalty of $10,000, whereas WCC has agreed to pay a reduced penalty of $6,000. A reduction in the proposed penalty in this instance is also warranted because no facts are given in the file or MSHA's narrative findings which show how a failure to make a preshift examination during a 2-week period in August and September would have contributed to an explosion which occurred on November 7, 1980.

Vacated Order No. 2002593 alleged a violation of section 75.303 because WCC's personnel failed on November 7, 1980, to make an inspection for methane and oxygen deficiencies in the 2 South Section within 3 hours before five miners entered that section for the purpose of retrieving some track rails. The miners entered the 2 South Section about 1:55 a.m. and were killed by the explosion which occurred a short time later. MSHA considered the violation to have been extremely serious, to have been associated with a very high degree of negligence, and proposed a maximum penalty of $10,000 which WCC has agreed to pay in full. WCC's agreement to pay the proposed maximum penalty makes it unnecessary to discuss the matter of whether the settlement proposal may be accepted with respect to the violation alleged in vacated Order No. 2002593.

Docket No. WEVA 83-73

Vacated Order No. 2002585 alleged a violation of section 75.322 because WCC's personnel had made a change in ventilation on October 27, 1980, which materially affected the main air current. MSHA assessed a penalty under the provisions of section 100.3 by assigning a maximum number of points under the criteria of negligence and gravity which resulted in a proposed penalty of $655, whereas WCC has agreed to pay a reduced penalty of $250. A reduction in the proposed penalty is justified in this instance because there is nothing in the order to show that a change in ventilation on October 27, 1980, contributed to the explosion which occurred over a week afterwards. Also the change in ventilation involved stopping one out of two fans. There is nothing to show that only one fan was being used on November 7, 1980, when the explosion occurred.

Vacated Order No. 2002591 alleged that a violation of section 75.314 occurred because WCC's personnel frequently failed to make the required examinations in idle and/or abandoned areas not more than 3 hours before miners who check and install pumping equipment entered such areas to work. MSHA assigned a maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of $655, whereas WCC has agreed to pay a reduced penalty of $250. The parties' agreement to reduce the penalty in this instance is also justified because the order fails to explain how the alleged violation contributed to the occurrence of the explosion on November 7, 1980.

Vacated Order No. 2002592 alleged a violation of section 75.303 because WCC's personnel failed to make the required pre-shift examination of haulageways and travelways within 3 hours preceding the oncoming shift. The order states that inspections of haulageways and travelways were made, but the examinations were made at the start of the shift while the miners were on their way to the working sections. MSHA assigned less than the maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of $420, whereas WCC has agreed to pay a reduced penalty of $200. A reduction in the proposed penalty is warranted in this instance because the order shows that WCC's personnel did make examinations of the haulageways and travelways before miners began working, but did not make the examinations at the required time.

Vacated Order No. 2002594 alleged a violation of section 75.303 because WCC's personnel failed on November 7, 1980, to make a preshift examination in the 3 East off 2 North Section within 3 hours before miners entered that section. MSHA assigned a maximum number of penalty points, and almost a maximum number of penalty points, under the criteria of negligence and gravity, respectively, and proposed a penalty of $500 which WCC has agreed to pay in full. MSHA properly proposed a penalty of $500 because the failure to perform the preshift examination occurred on the same day as the explosion even though the failure to make the preshift examination, in this instance, did not pertain to the 2 South Section where the explosion occurred.

Vacated Order No. 2002595 alleged that a violation of section 75.303 occurred because WCC's personnel failed to make a preshift examination in the 1 East Section on October 24, 1980, before miners entered that section to recover belt structures. MSHA assigned the maximum number, and almost the maximum number, of points under the criteria of negligence and gravity, respectively, and proposed a penalty of $500 which WCC has agreed to pay in full. MSHA properly proposed the penalty in this instance and WCC's agreement to pay the full amount should be approved.

Vacated Order No. 2002596 alleged a violation of section 75.301 because the rescue team, while recovering the bodies of five miners killed by an explosion, found water which was within 12 inches of the mine roof in the No. 2 entry. The inspector who wrote the order speculates that the water may have contributed to the inadequate ventilation which resulted in the explosion. MSHA assigned a maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of $655, whereas WCC has agreed to pay a reduced penalty of $200. A reduction in the penalty is warranted in this instance because the person who wrote the order is speculating about whether water observed in an entry after occurrence of an explosion contributed to the cause of the explosion. The explosion could have caused a pump to stop working or could have broken a

waterline which could have produced the accumulation of water. Payment of a substantial penalty ought to be based on more than mere speculation.

Vacated Order No. 2002597 alleged a violation of section 75.1106 because one of WCC's miners used a cutting torch on November 6, 1980, in the 1 East belt entry near the mouth of 2 South Section. He failed to use a fireproof enclosure and a qualified person did not test continuously for methane while the torch was being used. MSHA assigned the maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of $655, whereas WCC has agreed to pay a reduced penalty of $100. The reduced penalty is warranted in this instance because large penalties have been assessed in this proceeding primarily on the basis of whether a given violation may have contributed to the cause of the explosion which occurred on November 7, 1980. The torch was used on the day preceding the explosion and there is nothing in the file to show that a torch had been used on the 2 South Section at the time the explosion occurred. Moreover, section 75.1106 provides for the use of a fireproof enclosure "whenever practicable". The order does not say that use of a fireproof enclosure is practicable when the miner using the torch is cutting down belt conveyor hangers, as was being done in this instance. Finally, use of a torch in a belt entry, which has a neutral split of intake air, is not as hazardous as it would be if the torch had been lighted in a return entry or at the working faces.

I find, on the basis of the foregoing discussion of the six criteria, that the motion for approval of settlement should be granted and that the settlement agreement should be approved.

The motion for approval of settlement stresses the fact that WCC demonstrated good faith in cooperating in the investigation of the explosion and in making a large voluntary charitable contribution to improve health and safety in Boone County, West Virginia. I believe that those are additional reasons which support acceptance of the settlement agreement.

Another point which should be emphasized is that all of the alleged violations were cited in orders written on July 15, 1982, by an MSHA inspector who reviewed sworn statements obtained in December 1980 by MSHA's investigators. If a hearing had been held, those sworn statements would have had to have been reexamined by the parties and any party who might have wished to controvert anything in a sworn statement would have had the burden of trying to find witnesses with vivid memories who could recall details of events which occurred nearly 4 years ago.

In such circumstances, acceptance of a settlement is preferable to holding a hearing, especially when it is considered that WCC has agreed to pay substantial penalties totaling $38,000.

WHEREFORE, it is ordered:

(A) The joint motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Westmoreland Coal Company, within 30 days from the date of this decision, shall pay civil penalties totaling $38,000 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 83-73

| | | | |
|---|---|---|---|
| Vacated Order No. 2002585 | 7/15/82 | 75.322 ... | $ 250.00 |
| Vacated Order No. 2002591 | 7/15/82 | 75.314 ... | 250.00 |
| Vacated Order No. 2002592 | 7/15/82 | 75.303 ... | 200.00 |
| Vacated Order No. 2002594 | 7/15/82 | 75.303 ... | 500.00 |
| Vacated Order No. 2002595 | 7/15/82 | 75.303 ... | 500.00 |
| Vacated Order No. 2002596 | 7/15/82 | 75.301 ... | 200.00 |
| Vacated Order No. 2002597 | 7/15/82 | 75.301 ... | 100.00 |

Total Settlement Penalties in Docket No. WEVA 83-73 ..... $ 2,000.00

Docket No. WEVA 83-143

| | | | |
|---|---|---|---|
| Vacated Order No. 2002586 | 7/15/82 | 75.316 ... | $10,000.00 |
| Vacated Order No. 2002587 | 7/15/82 | 75.316 ... | 5,000.00 |
| Vacated Order No. 2002588 | 7/15/82 | 75.316 ... | 2,500.00 |
| Vacated Order No. 2002589 | 7/15/82 | 75.305 ... | 2,500.00 |
| Vacated Order No. 2002590 | 7/15/82 | 75.303 ... | 6,000.00 |
| Vacated Order No. 2002593 | 7/15/82 | 75.303 ... | 10,000.00 |

Total Settlement Penalties in Docket No. WEVA 83-143 ..... $36,000.00

Total Settlement Penalties in This Proceeding..... $38,000.00

(C) The motion for dismissal of the notices of contest is granted and the 13 notices of contest filed by Westmoreland Coal Company in Docket Nos. WEVA 82-340-R through WEVA 82-352-R are dismissed.

Richard C. Steffey
Administrative Law Judge