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SOL (MSHA) V. PYRO MINING
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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. KENT 84-151 A.C. No. 15-13881-03520
v.	
SPYRO MINING COMPANY, RESPONDENT	Pyro No. 9 Slope William Station

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on August 30, 1984, a motion for approval of settlement in the above-entitled proceeding. Under the parties' settlement agreement, respondent would pay a reduced penalty of $450 for a single alleged violation of 30 C.F.R. 75.200 in lieu of the penalty of $800 proposed by MSHA.

The alleged violation here at issue is one which could not be disposed of in my decision issued July 26, 1984, in this proceeding because it was not a part of the record resulting from the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R which was the basis for the decision issued on July 26, 1984. Although the Commission issued a "Direction for Review" of that decision on August 24, 1984, the issues to be considered by the Commission do not pertain to the remaining issues in this proceeding which have been settled by the parties.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement discusses those criteria. The mine here involved produces about 1,600,000 tons of coal annually and respondent's production on a company-wide basis is approximately 3 million tons per year. Those figures support a finding that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are determined under the criterion of the size of the operator's business.

The motion for approval of settlement states that respondent paid penalties for 40 previous violations during the period from December 1982 to December 1983, whereas the proposed assessment sheet in the official file indicates that

respondent paid penalties for 25 alleged violations during 125 inspection days for the 24-month period from January 1982 to January 1984. MSHA's proposed penalty of $800 is based on the history of previous violations given in the proposed assessment sheet. When 25 violations occurring during 125 inspection days are evaluated under the provisions of MSHA's assessment formula in 30 C.F.R. 100.3(c), the violations per inspection day are so few that no part of the penalty proposed by MSHA could have been assigned under the criterion of history of previous violations. Since I am dealing with a motion to approve settlement of MSHA's proposed penalty, it is appropriate for me to consider the information given in the proposed assessment sheet, rather than the somewhat inconsistent figure of 40 previous violations given in the motion for approval of settlement.

Additionally, it should be noted that a single number of previous violations is hardly suitable for evaluating a respondent's history of previous violations because it cannot be applied under section 100.3(c) of the assessment formula unless the number is also associated with the number of inspection days which occurred during the time that the violations were accumulated. In most cases which go to hearing, the Secretary's counsel provides a computer printout which lists previous violations along with the dates on which they were cited. That kind of information enables a judge to determine whether the violations occurred many months prior to the violation under consideration or immediately prior to the violation under consideration. Violations of the same standard occurring immediately prior to the violation under consideration show that respondent's history is not favorable, whereas violations which have occurred a year or more prior to the violation under consideration show a trend toward an improvement in safety. Unless a judge has the kind of information described above, it is difficult to evaluate the criterion of history of previous violations. As indicated above, however, I am relying upon the information given in the proposed assessment sheet in this proceeding and that shows that no part of MSHA's proposed penalty was assigned under the criterion of history of previous violations.

The motion for approval of settlement states that respondent abated the violation within the time provided and MSHA's narrative findings indicate that the violation was abated "within a reasonable period of time", but neither the motion for approval of settlement nor MSHA's narrative findings indicate whether any portion of the penalty was assigned under the criterion of the operator's good-faith effort to achieve rapid compliance. My practice has always been to increase a penalty only if there is information available to show that respondent did not make a good-faith effort to comply, and to decrease the penalty only if there is evidence to show that the operator made an outstanding effort to comply. If the operator achieves compliance within the time given by the inspector, I consider that to

be a normal good-faith effort which requires neither an increase nor decrease in the penalty. That appears to be the treatment given to the criterion of good-faith abatement by MSHA and I find that it was appropriate for no portion of the penalty to be assigned under the criterion of good-faith abatement.

The motion for approval of settlement states that payment of the penalty will not have an adverse effect on the ability of respondent to continue in business. Therefore, MSHA appropriately did not reduce the penalty under the criterion that payment of large penalties would cause respondent to discontinue in business.

Consideration of the remaining two criteria of negligence and gravity requires a brief discussion of the nature of the alleged violation. The inspector alleged that a violation of section 75.200 had occurred because respondent had failed to install 6 timbers at each crosscut along the supply entry to within 240 feet of the tailpiece of the conveyor belt, as required by the roof-control plan. Out of 11 crosscuts, four had the timbers set, four of them had timbers set on one side, and three did not have timbers set at all. The motion for approval of settlement agrees that the inspector properly considered the violation to have been associated with a high degree of negligence so that no reduction in the penalty should be made under the criterion of negligence.

Since the parties have not based a reduction of MSHA's proposed penalty on any of the five criteria discussed above, it is obvious that all of the reduction has to be made under the criterion of gravity. The motion for approval of settlement bases the reduced penalty primarily on the fact that the inspector had evaluated the criterion of gravity by checking item 21C on his citation to show that nine persons could have been expected to be exposed to injury if a roof fall had occurred. The motion states that all of the crosscuts at issue were a long distance from the face area and that it would be highly unlikely that a roof fall in the supply entry would affect all nine persons working on the section which was served by the supply entry.

The fact that less than nine persons would be affected by a roof fall, if one had occurred, is a reason to reduce the penalty, but some additional discussion may be helpful in showing why the parties' settlement agreement should be granted. It should be noted that MSHA's proposed penalty of $800 is based on narrative findings which state that the inspector's evaluation of the alleged violation has been considered. The narrative findings do not indicate, however, how much of the penalty was assigned under the criterion of gravity as opposed to the criterion of negligence. Therefore, it is not possible to know

how much should be deducted from the proposed penalty just because the inspector may have assumed incorrectly that nine persons would have been affected by any roof fall that might have occurred in the supply entry.

On the other hand, the narrative findings do state that the six timbers were required to be set at crosscuts to within 240 feet of the face, whereas the inspector's citation stated that they had to be set within 240 feet of the tailpiece of the conveyor belt. Therefore, the person who prepared the narrative findings may have considered the violation to be more serious than it really was because he or she may have been evaluating the lack of timbers as a matter which was a rather constant threat during actual production operations, rather than a danger which would only have affected a person traveling in the supply entry at a considerable distance from the working section.

Any time that penalties are determined on the basis of subjective judgments, as occurred in this instance, it is difficult to say that a penalty should be precisely $800 as proposed by MSHA or $450 as agreed upon by the parties for purpose of settlement. I believe that the discussion above shows that a penalty of $450 is reasonable in this instance and I find that the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

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

(B) Pursuant to the parties' settlement agreement, Pyro Mining Company, within 30 days from the date of this decision, shall pay a civil penalty of $450 for the violation of section 75.200 alleged in Citation No. 2074793 dated January 14, 1984.

Richard C. Steffey
Administrative Law Judge