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SOL (MSHA) V. VOYAGER 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 84-86 A.C. No. 15-13547-03503
v.	Voyager Mine
VOYAGER MINING COMPANY, RESPONDENT	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on January 7, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent has agreed to pay a civil penalty of $20 instead of the penalty of $42 proposed by MSHA for the single violation of 30 C.F.R. 70.501 involved in this proceeding.

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. The official file and the motion for approval of settlement contain information pertaining to the six criteria. The proposed assessment sheet indicates that respondent is a large operator which produces about 14 million tons of coal on an annual basis. Therefore, to the extent that the penalty is determined under the criterion of the size of respondent's business, a penalty in an upper range of magnitude would be appropriate.

Neither the official file nor the motion for approval of settlement contains any information concerning respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd. 736 F.2d 1147 (7th Cir.1984), that if an operator fails to furnish any evidence concerning its financial condition, that a judge may presume that the operator is able to pay penalties. Consequently, I find that payment of civil penalties will not adversely affect respondent's ability to continue in business. In such circumstances, it will not be necessary to reduce the penalty, determined pursuant to the other criteria, under the criterion of whether the payment of penalties will cause respondent to discontinue in business.

The proposed assessment sheet indicates that respondent has not previously violated any mandatory health or safety standards. Therefore, no portion of the penalty to be assessed should be based upon the criterion of respondent's history of previous violations.

Consideration of the remaining three criteria of good-faith abatement, negligence, and gravity require a discussion of the violation here involved. Citation No. 2059582 alleged that respondent had violated section 70.501 by failing to maintain the noise in an employee's working environment at or below a permissible level. The inspector who wrote the citation considered the violation to be associated with a low degree of negligence and believed that it was reasonably likely that an injury involving lost workdays or restricted duty was likely to be experienced by one employee. As a result of the inspector's evaluation of negligence and gravity, MSHA proposed a penalty of $42 after giving respondent a 30 percent reduction in the penalty because respondent had demonstrated a good-faith effort to achieve compliance after the citation was written.

The parties' agreement to reduce the penalty to $20 is well supported by an affidavit attached to the motion for approval of settlement. The affidavit was given by Stephen C. Davis, respondent's Manager of Environmental Services who has a Master of Public Health degree from the University of California. Mr. Davis began working on noise problems at respondent's mine in November 1982 before the citation here involved was issued. The problem arose primarily from the noise generated by a diesel-driven teletram manufactured by the Wagner Mining Machinery Co. Through Mr. Davis' efforts, respondent participated in a noise-control project conducted by the United States Bureau of Mines' Pittsburgh Research Center. Respondent also sought the assistance of MSHA's Pittsburgh Health Technology Center, Physical and Toxic Agents Division. Inasmuch as respondent had obtained the assistance of two different agencies of the Federal government to assist it in reducing noise levels at its mine prior to the writing of the citation, I believe that the motion for approval of settlement correctly expresses a belief that respondent's failure to reduce the noise to a permissible level was a nonnegligent violation.

Mr. Davis' affidavit also indicates that respondent conducted an educational program to make its employees aware of noise problems at its mine and to encourage its employees to engage in hearing conservation measures. Finally, in April 1983 a designated teletram was made the subject of a quieting modification which involved the installation of sound-absorption material around the engine and radiator fan exhaust compartments as well as the installation of newly fabricated sound-absorbing louvers. Shortly after the retrofitting had been performed, respondent's mine was closed because of depressed market conditions. The motion for approval of settlement states that the

parties agreed that the settlement reached in this proceeding is subject to the following condition (Motion, page 3):

> In the event that the Voyager Mine of Voyager Mining Company is reopened and the subject equipment is put back into service, Voyager Mining Company agrees to cooperate with the U.S. Bureau of Mines, Pittsburgh Research Center, in an effort to find a solution to the noise problem.

The motion for approval of settlement states that respondent's efforts to bring about a reduction of noise levels at its mine supports findings to the effect that MSHA overevaluated the criterion of gravity in proposing a penalty of $42 because it is unlikely that any of respondent's employees would have experienced a hearing injury which would have resulted in restricted duty or lost workdays. I believe that the parties have shown adequate reasons for reducing the penalty to $20 on the ground that MSHA's proposed penalty of $42 was derived without taking into consideration respondent's extensive efforts to reduce noise levels at its mine.

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, respondent, within 30 days from the date of this decision, shall pay a civil penalty of $20.00 for the violation of section 70.501 alleged in Citation No. 2059582 dated January 19, 1983.

(C) The approval of the parties' settlement agreement is also subject to the condition that respondent will continue to cooperate with the Bureau of Mines "in an effort to find a solution to the noise problem," as hereinbefore indicated.

Richard C. Steffey
Administrative Law Judge