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SOL (MSHA) v. INDUSTRIAL RESOURCES
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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. VA 85-13 A.C. No. 44-04856-03501 R15
v.	Buchanan No. 1 Mine
INDUSTRIAL RESOURCES, INC., RESPONDENT	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on May 2, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay the total penalty of $105 proposed by MSHA for the single violation of 30 C.F.R. 77.200 which is 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 assessing civil penalties. The motion for approval of settlement states that respondent operates a small business, but neither the motion nor the proposed assessment sheet in the official file provides any facts regarding the hours worked by respondent's employees or the tons of coal produced by respondent. The proposed assessment sheet does show that zero penalty points were assigned under MSHA's penalty formula described in 30 C.F.R. 100.3(b). Therefore, I find that respondent does operate a small business and that, insofar as the penalty is determined under the criterion of the size of respondent's business, the penalty should be in a low range of magnitude.

There is nothing in the official file or in the motion for approval of settlement regarding 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. Therefore, I find that payment of civil penalties will not adversely affect respondent's ability to continue in business. Consequently, 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 MSHA assigned zero penalty points under section 100.3(c) of the penalty formula because respondent has not previously been cited for a violation of the mandatory health and safety standards. In such circumstances, no portion of the penalty in this proceeding should be assessed under the criterion of respondent's history of previous violations.

A brief discussion of the facts pertaining to the alleged violation is necessary in order to evaluate the remaining criteria of negligence, gravity, and respondent's good-faith effort to achieve rapid compliance after the violation was cited. The motion for approval of settlement states that the violation occurred on November 2, 1984, when a fatality occurred at the mine because a subcontractor was using scaffolding equipment which had not been maintained in a safe operating condition. The equipment was being used by a subcontractor, Western Avella Contractors, Inc., which was performing work for respondent. The inspector's citation alleges that respondent had failed to take "precautionary measures to ensure that subcontractors working at the construction site were utilizing equipment that was in a good state of repair to prevent accidents."

The inspector's subsequent action sheet indicates that the citation was abated within the time given by the inspector and that abatement was accomplished by another company which had been assigned to replace the previous subcontractor. MSHA followed the inspector's ratings as to negligence and gravity and assigned a maximum number of penalty points under the criterion of gravity and 15 penalty points under the criterion of negligence. MSHA also reduced the proposed penalty by 30 percent under section 100.3(f) of the assessment formula because respondent had abated the violation within the time given by the inspector.

Respondent has taken the position that nothing stated in this proceeding is to be deemed to be an admission of a violation except for the purposes of enforcement of the Act. That is an acceptable position under the Commission's decision in Amax Lead Company of Missouri, 4 FMSHRC 975 (1982).

I find that the parties have given satisfactory reasons for approving their settlement agreement under which respondent has agreed to pay in full the penalty of $105 proposed by MSHA after applying its penalty formula to the facts hereinbefore described.

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, Industrial Resources, Inc., shall, within 30 days from the date of this decision, pay a civil penalty of $105.00 for the violation of 30 C.F.R. 77.200 alleged in Citation No. 2455472 dated December 6, 1984.

Richard C. Steffey
Administrative Law Judge