CCASE:
SOL (MSHA) v. LABELLE PROCESSING
DDATE:
19850523
TTEXT:

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. PENN 84-163 A.C. No. 36-00897-03527
v.	LaBelle Preparation Plant and Refuse Area
LABELLE PROCESSING COMPANY, RESPONDENT	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on May 16, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay reduced penalties totaling $1,580 for the four violations alleged in this proceeding instead of the penalties totaling $3,000 originally proposed by MSHA.

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 proposed assessment sheet in the official file does not indicate the number of tons of coal which are processed in respondent's preparation plant, perhaps because the preparation plant was in the process of being remodeled at the time the orders here involved were issued. The proposed assessment sheet does show that respondent's controlling company is in the category of a large operator because the controlling company produces over 12,606,000 tons of coal on an annual basis. Consequently, to the extent that the penalties in this case are based on the criterion of the size of respondent's business, penalties in an upper range of magnitude would be appropriate.

There is nothing in the official file or 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, 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. In such circumstances, it will be unnecessary to reduce any of the penalties, determined pursuant to the other criteria, under the criterion of whether the payment of penalties would cause respondent to discontinue in business.

The motion for approval of settlement states, as to respondent's history of previous violations, that respondent has been assessed for 164 violations during 166 inspection days, whereas the proposed assessment sheet in the official file shows 85 violations during 77 inspection days. If one applies the facts in the file or the facts in the motion for approval of settlement to make the calculation described in the assessment formula given in 30 C.F.R. 100.3(c), the result would require assignment of eight penalty points. The parties' proposed settlement penalties are sufficiently large to allow for an appropriate amount to have been assigned under the criterion of respondent's history of previous violations.

The motion for approval of settlement states that respondent demonstrated a good-faith effort to achieve compliance after the orders were issued. Since all the violations alleged in this proceeding were cited in orders, the inspector did not specify an abatement period for any of the violations. The inspector issued subsequent action sheets showing that three of the alleged violations had been corrected within 4 days after they were cited and that the remaining violation had been corrected within 10 days after it was cited. As hereinafter explained, respondent was confronted with some unusual adverse conditions at its plant at the time the orders were written. In such circumstances, I find that respondent did demonstrate a good-faith effort to achieve compliance and that the proposed settlement penalties were appropriately determined without attributing any portion of any penalty to a finding that respondent failed to demonstrate a good-faith effort to achieve rapid compliance.

A brief discussion of the specific violations is required to evaluate the remaining two criteria of negligence and gravity. Order No. 2251438 was first issued January 19, 1984, citing a violation of 30 C.F.R. 77.1104 because loose coal had accumulated at several places on the first floor of the plant. Thereafter, three additional orders were issued January 23, 1984, also citing violations of section 77.1104, because there were loose coal accumulations near the tailrollers of conveyor belt Nos. 285, 484, and 283. MSHA waived the penalty formula described in section 100.3 of the regulations and proposed penalties of $750 for each of the alleged violations on the basis of narrative findings which are included with the exhibits

submitted by MSHA in support of its petition for assessment of civil penalty. The motion for approval of settlement states that further investigation has revealed that a reduction in the proposed penalty to $395 for each alleged violation would be appropriate. The basic conditions which support the parties' settlement agreement are described in the following paragraph from pages two and three of the motion for approval of settlement:

> At the time of the issuance of these orders, the operator was in the process of renovating the outdated equipment at the plant. The work of installing and testing equipment was being done in mid-winter weather conditions which substantially complicated the process. Unintentional coal spillages did occur, but they resulted from the persistent malfunctioning of the newly installed computer monitoring and control system. Pumps over-pumped and under-pumped, slurry lines clogged, belts overloaded and sumps overfilled. Plant personnel were preoccupied with the need to remedy the sources of the operational difficulties. Furthermore, this problem was exacerbated by freezing weather conditions and the malfunctioning of the plant's heating system, interfering with clean-ups. The coal spillages would freeze as a result of the weather conditions and lack of heat, making clean-up difficult, if not impossible. As a result of the aforementioned factors, the problem of what to do and when developed. The weather conditions caused a lot of the problems with the equipment and made it very difficult for personnel to work.

Based on the description of the difficulties which confronted the plant personnel at the time the orders were issued, the motion for approval of settlement asserts that MSHA's former finding of high negligence should be reduced to low negligence because, while respondent could not help but be aware of the existence of the loose coal accumulations, there were mitigating circumstances which merit a reduction of the criterion of negligence.

Attached to the motion for approval of settlement is a copy of the National Weather Service report for the Pittsburgh area showing that for the days during which the orders were issued, the temperatures remained below freezing. Also attached to the motion is a report showing the ice conditions on the Monongahelia River at the time the orders were issued. The river was frozen to a 5-inch thickness during the same time period and that affected the ability of barges to transport coal away from the plant even if the plant had been operating in a satisfactory manner.

The aforesaid conditions also merit a reduction in the assessment of gravity because frozen accumulations are not as likely to present a fire hazard as dry accumulations. Moreover, not one of the orders refers to float coal dust which is the most likely type of accumulation to become ignited if it should be placed in suspension. It should additionally be borne in mind that all of the accumulations were on the surface and were much less hazardous than coal accumulations underground where methane is more likely to become concentrated in explosive quantities than it is on the surface.

I find that the parties have justified approval of their settlement agreement under which the proposed penalties would be reduced from $750 for each violation to $395 for each violation.

WHEREFORE, it is ordered:

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

(B) Pursuant to the parties' settlement agreement, LaBelle Processing Company shall, within 30 days from the date of this decision, pay civil penalties totaling $1,580.00 which are allocated to the respective alleged violations as follows:

Order No. 2251438	1/19/84	77.1104	$ 395.00
Order No. 2251442	1/23/84	77.1104	395.00
Order No. 2251443	1/23/84	77.1104	395.00
Order No. 2251444	1/23/84	77.1104	395.00
Total Settlement Penalties in This Proceeding			$1,580.00

Richard C. Steffey
Administrative Law Judge