CCASE:
SOUTHERN OHIO COAL v. SOL (MSHA)
SOL (MSHA) v. SOUTHERN OHIO COAL
DDATE:
19851219
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SOUTHERN OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 84-210-R Citation No. 2260516; 4/11/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 84-211-R Citation No. 2419672; 4/23/84
	Docket No. WEVA 84-212-R Order No. 2419748; 4/23/84
	Docket No. WEVA 84-216-R Citation No. 2419745; 4/23/84
	Docket No. WEVA 84-217-R Citation No. 2419488; 4/25/84
	Docket No. WEVA 84-219-R Citation No. 2419750; 5/1/84
	Docket No. WEVA 84-281-R Order No. 2419796; 5/24/84
	Martinka Mine No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-364 A.C. No. 46-03805-03590
v.	Docket No. WEVA 84-394 A.C. No. 46-03805-03594
SOUTHERN OHIO COAL COMPANY, RESPONDENT	Docket No. WEVA 85-59 A.C. No. 46-03805-03600
	Docket No. WEVA 85-80 A.C. No. 46-03805-03612
	Docket No. WEVA 85-90 A.C. No. 46-03805-03620
	Docket No. WEVA 85-110 A.C. No. 46-03805-03623
	Docket No. WEVA 85-116 A.C. No. 46-03805-03626
	Martinka Mine No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on July 18, 1985, and December 17, 1985, motions for approval of settlement in the above-entitled cases.(FOOTNOTE.1) All of the cases had been scheduled for hearing during the same week, but the cases in Docket Nos. WEVA 84-210-R, WEVA 84-281-R, WEVA 85-90, and WEVA 85-110 were scheduled for hearing by separate orders because different attorneys are representing the Secretary of Labor in those four cases from the attorney who is representing the Secretary in the remaining 10 cases. Shortly after the four cases were set for hearing, counsel for the parties settled them and promptly filed a motion for approval of settlement in those four cases. Counsel in the remaining 10 cases requested an extension of the hearing date so that the parties could further consider the possibility of settling those cases also. I did not act upon the first motion for approval of settlement because I wanted to consider all of the cases in a single decision and I anticipated that a settlement would be reached sooner than it was in the remaining 10 cases.

I shall first consider the motion for approval of settlement filed with respect to the four cases in Docket Nos. WEVA 84-210-R, et al. Under the motion for approval of settlement, SOCCO would pay reduced penalties totaling $605 instead of the penalties totaling $1,105 proposed by MSHA.(FOOTNOTE.2) Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in assessing civil penalties.

The proposed assessment sheets in the official files indicate that the Martinka Mine No. 1 here involved produces about 2,283,000 tons of coal annually and that SOCCO produces about 13,559,000 tons of coal per year at all of its mines. Those production amounts support a conclusion that SOCCO is a large operator and that penalties in an upper range of magnitude would be appropriate under the criterion of the size of SOCCO's business.

The motion for approval of settlement states that payment of civil penalties will not adversely affect SOCCO's ability to continue in business. Therefore, the penalties need not be reduced under the criterion of whether payment of penalties would cause SOCCO to discontinue in business.

As of the date when the violations here involved were cited, SOCCO had been assessed penalties for 382 violations during 1,299 inspection days. Application of those figures to MSHA's assessment formula described in 30 C.F.R. 100.3(c) requires assignment of zero penalty points under the criterion of SOCCO's history of previous violations. Consequently, no portion of the penalty has to be assessed under the criterion of history of previous violations.

In order to evaluate the remaining three criteria of SOCCO's good-faith effort to achieve rapid compliance, negligence, and gravity, a brief discussion of the specific alleged violations is appropriate. The only violation for which a penalty of more than $20 is sought in Docket No. WEVA 85-110 is for a violation of section 77.1605(p) because stop-blocks or derail devices had not been installed to protect persons from runaway cars where haulage equipment would enter the mine. MSHA considered that the violation was serious, that it was associated with a low degree of negligence, that SOCCO had demonstrated a good-faith effort to achieve rapid compliance, and proposed a penalty of $105 which SOCCO has agreed to pay in full. I find that the penalty proposed by MSHA under section 100.3 of its assessment formula is adequate in the circumstances and that SOCCO's agreement to pay the proposed penalty should be approved.

In addition to the alleged violation of section 77.1605(p) discussed above, the petition for assessment of civil penalty filed in Docket No. WEVA 85-110 seeks assessment of a civil penalty of $20 for a violation of section 75.1203 alleged in Citation No. 2420016 which was affirmed by my summary decision issued on April 15, 1985, in Docket No. WEVA 84-296-R, 7 FMSHRC 543. After issuance of that decision, counsel for SOCCO filed on June 10, 1985, a motion to withdraw its notice of contest in Docket No. WEVA 85-110 and thereby discontinue its opposition to paying the penalty of $20 proposed by MSHA for the violation of section 75.1203 alleged in Citation No. 2420016. The motion states that "payment of this amount is forthcoming." Counsel for the Secretary did not file an answer either opposing or favoring the granting of SOCCO's motion to withdraw its notice contesting Citation No. 2420016 and there is nothing in the official file to explain whether the proposed $20 penalty is still "forthcoming" or has been paid.

In Mettiki Coal Corp., 3 FMSHRC 2277 (1981), the Commission approved a somewhat similar disposition of a civil penalty case, except that the Secretary's counsel in that case filed a motion to withdraw the petition for assessment of civil penalty after Mettiki Coal had withdrawn its notice of contest of the penalties proposed by MSHA. In the Mettiki case, Mettiki actually paid the full amount of $10,000 being sought by the petition for assessment of civil penalty and the only reason the Secretary filed the motion to withdraw the petition for assessment of civil penalty was to defeat the judge's refusal to accept a settlement proposal previously submitted by the parties. The result of the filings in the Mettiki case was that the parties retroactively restored the posture of the case to the initial procedure provided for the proposing of penalties under section 105(a) of the Act. Under section 105(a), if a party declines to protest a proposed penalty, the "penalty shall be deemed a final order of the Commission and not subject to review by any court or agency."

In order to make this case conform with the procedure approved by the Commission in the Mettiki case, I shall hereinafter dismiss the petition for assessment of civil penalty filed in Docket No. WEVA 85-110 insofar as it seeks assessment of a penalty of $20 for the violation of section 75.1203 alleged in Citation No. 2420016 and grant the motion filed by SOCCO to withdraw its notice of contest insofar as it sought review of Citation No. 2420016. The grant of the motion will be conditioned upon the payment by SOCCO of the penalty of $20. If SOCCO has already paid the penalty, it may, of course, ignore the condition associated with the grant of its motion. Inasmuch as the violation involved pertained to the manner in which SOCCO went about making its mine map ultimately available to a person who resided on the surface of the land where SOCCO's mine is situated, it appears that a penalty of $20 is reasonable under the many extenuating circumstances which were associated with issuance of the citation.

The petition for assessment of civil penalty filed in Docket No. WEVA 85-90 proposes a penalty of $1,000 for an alleged violation of section 75.1722(a) because the guard for the chain drive at a belthead had been removed 2 days prior to the time the inspector examined it and no work was being done to replace the guard. Although a sign had been erected at one end of the travelway along the drive, no sign had been erected at the other end of the travelway to warn a person of the lack of a guard on the drive. The inspector cited the violation in an order issued under the unwarrantable failure provisions of section 104(d)(2) of the Act and MSHA waived the provisions of its regular

assessment formula in section 100.3 of the regulations and assessed the penalty on narrative findings written pursuant to section 100.5.

MSHA's narrative findings considered the violation to be very serious because the mine floor around the belt drive was wet and slippery and those conditions increased the likelihood of a person's falling into the exposed moving parts. The violation was considered to have resulted from a high degree of negligence because it was believed that SOCCO had been aware of the violation for about 2 days and had done nothing toward having the guard replaced.

The motion for approval of settlement is accompanied by a letter from SOCCO's counsel offering to settle the issues pertaining to Order No. 2419796 if MSHA would amend the order to allege the violation in a citation issued under section 104(a) of the Act so as to remove the inspector's finding that the violation was the result of an unwarrantable failure on SOCCO's part. SOCCO's counsel stated in his letter that if a hearing were to be held, the mine foreman would testify that he had erected danger signs at both ends of the travelway and the firebosses who examined the area at the end of the day and afternoon shifts would testify that they did not report any violation or hazardous conditions existing in the vicinity of the belthead. Finally, one of SOCCO's safety assistants would testify that he had accompanied an MSHA inspector who checked the area of the belthead on the day before the instant order was issued and cited no violation or hazardous condition in the vicinity of the belthead.

The motion for approval of settlement states that it would be difficult to prove at a hearing that the alleged violation of section 75.1722(a) was the result of an unwarrantable failure in light of the evidence which would be presented by SOCCO. Consequently, MSHA agreed to modify the order to a citation issued under section 104(a) so as to delete the inspector's finding that the violation was the result of an unwarrantable failure.

I find that the parties have given adequate reasons to warrant a reduction in the proposed penalty from $1,000 to $500 because it is obvious that a large part of the proposed penalty was based on the inspector's finding that unwarrantable failure was involved. The violation was still serious and therefore it is appropriate to approve the settlement agreement under which SOCCO will still be paying a substantial penalty of $500 for the violation of section 75.1722(a).

The second motion for approval of settlement filed on December 17, 1985, discusses the petitions for assessment of civil penalty filed in Docket Nos. WEVA 84-394, WEVA 85-59, and WEVA 85-80. Only a single alleged violation is being contested in each of those cases. The parties' settlement of the civil penalty issues also permits me to dismiss the notices of contest which were filed in the related contest proceeding in Docket Nos. WEVA 84-219-R, WEVA 84-212-R, and WEVA 84-211-R.

I have already discussed the three criteria of SOCCO's ability to pay penalties, history of previous violations, and the size of its business. The previous findings with respect to those three criteria remain unchanged and will be applicable for considering the second motion for approval of settlement. The remaining three criteria of negligence, gravity, and good-faith abatement will be considered in evaluating the parties' settlement agreement pertaining to the three civil penalty cases mentioned in the preceding paragraph.

The petition for assessment of civil penalty filed in Docket No. WEVA 84-394 seeks to have a penalty assessed for an alleged violation of section 77.1700 because the driver of a truck was operating alone in a remote area without a communication system to call for help should he become exposed to a hazardous condition. MSHA used the assessment formula in section 100.3 and proposed a penalty of $119 after finding that the violation was relatively serious, was associated with a moderate degree of negligence, and was abated within the time given by the inspector in his citation. The motion for approval of settlement states that SOCCO has agreed to pay the full amount of $119 proposed by MSHA. I find that MSHA proposed a reasonable penalty pursuant to its assessment formula and that the parties' settlement agreement provides a satisfactory means of disposing of the case in Docket No. WEVA 84-394.

In Docket No. WEVA 85-59, a penalty is sought to be assessed for an alleged violation of section 77.1104 because an accumulation of loose coal, coal dust, and float coal dust existed under the Nos. 17- and 54-inch belt conveyors. MSHA waived the use of its regular assessment formula described in section 100.3 and proposed a penalty of $800 on the basis of narrative findings written pursuant to section 100.5. While the narrative findings do not separate the amount of the penalty which was assigned under the criterion of negligence from the amount attributed under the criterion of gravity, it is likely that a large portion of the penalty was assigned under the criterion of negligence because the violation was cited in an order

issued under the unwarrantable-failure provisions of section 104(d)(2) of the Act. The inspector based the finding of unwarrantable failure on his belief that SOCCO had failed to provide adequate personnel to clean up the accumulations and had not tried to stop the excessive amount of water which appeared to be a contributing factor to the accumulations.

The motion for approval of settlement shows that MSHA has changed the order to the category of a citation issued under section 104(a) of the Act and that SOCCO has agreed to pay a reduced penalty of $550. The reduced penalty is based on a further investigation of the circumstances surrounding the conditions which were observed by the inspector. It appears that SOCCO had assigned two employees to work on cleaning up the accumulations shortly after they occurred and that they were in the process of cleaning up the spillage at the time the order was issued. Also water was coming out of the mine onto the inclined conveyor belt and then washing coal back down the incline but SOCCO was not intentionally putting water on the conveyor belt as the inspector had first concluded.

I find that the parties have given adequate reasons for reducing the degree of negligence previously considered to be associated with the violation. Additionally, the description of the accumulations shows that they were extremely wet and would not have been likely to have caused a fire or an explosion. SOCCO showed a good-faith effort to achieve rapid compliance by cleaning up the accumulations within 2 hours after the inspector cited the violation.

In Docket No. WEVA 85-80, a penalty is sought for an alleged violation of section 77.205(a) because a sloped roof under the scale house needed to be protected by installing a railing or barrier to prevent a person from falling off the roof when work is required to be done by a person standing on the roof. MSHA proposed a penalty of $157 under section 100.3 of its assessment formula after finding that the violation was relatively serious, was associated with a moderate degree of negligence, and was abated within the time provided for by the inspector in his citation.

The motion for approval of settlement states that the parties have agreed to reduce the penalty to $120 because it was established that employees are seldom required to go onto the roof to work. The citation was originally written to allege a violation of section 77.204 and was thereafter modified to allege a violation of section 77.205(a). Section 77.204 applies to protecting persons from falling through openings in surface installations by erecting railings or barriers, whereas section 77.205(a) requires an

operator to provide a safe means of access to all working places. Since the violation pertains to an undescribed type of work which is required to be performed on top of a roof which exists under a scale house, it may well be that no standard precisely covers the type of hazard from which the inspector was trying to protect employees. After the violation was cited SOCCO did install a railing to protect any person from falling who might have to work on the roof. It is obvious that the inspector accomplished the purpose for which the citation was written. In such circumstances, SOCCO is paying a reasonable penalty in agreeing to pay a reduced penalty of $120 instead of the penalty of $157 proposed by MSHA. Therefore, I find that the parties' settlement agreement should be approved.

The motion for approval of settlement states that SOCCO will file a motion to withdraw its notices of contest in the event the judge approves the parties' settlement agreement. I see no need to delay disposition of the contest cases in Docket Nos. WEVA 84-211-R, WEVA 84-212-R, and WEVA 84-219-R until after this decision has been issued and SOCCO has filed motions to withdraw three of the seven notices of contest which are involved in this proceeding. This decision disposes of all issues raised in the seven contest cases and the seven related civil penalty cases either because SOCCO has withdrawn its notice of contest of the penalty proposed by MSHA under section 105(a) of the Act, or because SOCCO has agreed to pay the full penalty proposed by MSHA, or because SOCCO, for justifiable reasons, has agreed to pay reduced penalties, or because MSHA has moved to have two citations vacated. In each case, there is no longer any reason to wait for the further filing of one or more pleadings by SOCCO before disposing of the contest cases which are related to the civil penalty cases. Cf. Old Ben Coal Co., 7 FMSHRC 205 (1985).

Motion To Vacate Two Citations

The petitions for assessment of civil penalty filed in Docket Nos. WEVA 84-364 and WEVA 85-116 seek assessment of penalties for alleged violations of sections 75.317 ($119) and 77.107-1 ($20), respectively. The alleged violations of sections 75.317 and 77.107-1 were the subject of notices of contest filed in Docket Nos. WEVA 84-216-R and WEVA 84-217-R. Granting the motions to vacate the underlying citations will make it possible to dismiss the four interrelated cases without assessing any civil penalties.

The citation involved in Docket Nos. WEVA 84-364 and WEVA 84-216-R is No. 2419745 which alleged a violation of section 75.317 because only one of three methane detecting

devices was operative. That section provides that methane detecting devices shall be in a permissible condition before each shift is worked. The motion to vacate the citation notes that the alleged violation pertained to SOCCO's preparation plant where only one methane test has to be made each shift pursuant to section 77.201-1. Since one operative methane detector is adequate for checking the few areas which have to be tested for methane accumulations, the parties concluded that section 75.317 had not been violated so long as one of three detectors was in working order. The parties also doubt that the cited underground standard is applicable to a surface facility like the preparation plant here involved.

I find that the motion to vacate has given valid reasons for requesting that Citation No. 2419745 be vacated. The motion to vacate is hereinafter granted, Citation No. 2419745 is vacated, and the pertinent contest and civil penalty cases in Docket Nos. WEVA 84-216-R and WEVA 84-364 are dismissed.

The citation involved in Docket Nos. WEVA 85-116 and WEVA 84-217-R is No. 2419488 which alleged a violation of section 77.107-1 because SOCCO had not given proper emphasis to the work of surface electricians when it administered its electrical retraining program. Section 77.107-1 provides for each operator to submit for approval by MSHA a program setting forth "what, when, how, and where he will train and retrain persons whose work assignments require that they be certified or qualified." The primary thrust of the alleged violation was that SOCCO's annual retraining program was structured to give primary emphasis upon the retraining of underground electricians without providing enough specific retraining for persons who work only as surface mine electricians. The motion to vacate the citation explains that SOCCO had in effect at the time the citation was issued an annual retraining plan which had been approved by MSHA. The violation was cited in response to a complaint by an employee filed under section 103(g) of the Act. Investigation of the complaint resulted in a conclusion by MSHA that SOCCO's program for surface electrical personnel could be improved and SOCCO subsequently agreed to modify its instruction program. In such circumstances, the parties say that they do not believe SOCCO should be cited for violating an annual retraining plan which MSHA had approved. Therefore, counsel for the Secretary requests that the citation be vacated and that the related contest and civil penalty cases be dismissed.

I find that the motion to vacate has given valid reasons for requesting that Citation No. 2419488 be vacated. The motion to vacate is hereinafter granted, Citation No. 2419488

is vacated, and the pertinent contest and civil penalty cases in Docket Nos. WEVA 84-217-R and WEVA 85-116 are dismissed.

WHEREFORE, it is ordered:

(A) The motions for approval of settlement filed on July 18, 1985, and December 17, 1985, are granted and the settlement agreements are approved.

(B) The motion to vacate Citation No. 2419745 issued April 23, 1984, alleging a violation of section 75.317 and Citation No. 2419488 issued April 25, 1984, alleging a violation of section 77.107-1 is granted and those two citations are vacated.

(C) On the basis of the vacation of Citation No. 2419745 in paragraph (B) above, the petition for assessment of civil penalty filed in Docket No. WEVA 84-364 is dismissed and the related notice of contest filed in Docket No. WEVA 84-216-R is dismissed.

(D) On the basis of the vacation of Citation No. 2419488 in paragraph (B) above, the petition for assessment of civil penalty filed in Docket No. WEVA 85-116 is dismissed and the related notice of contest filed in Docket No. WEVA 84-217-R is dismissed.

(E) Pursuant to the settlement agreement filed on July 18, 1985, SOCCO shall, within 30 days from the date of this decision, pay civil penalties totaling $605.00 which are allocated to the respective alleged violations as follows:

	Docket No. WEVA 85-110	
Citation No. 2260516 4/11/84	77.1605(p)	$ 105.00
Total Settlement Penalties in Docket No. WEVA 84-110		$ 105.00
	Docket No. WEVA 85-90	
Order No. 2419796 5/24/84	75.1722(a), modified to a citation	$ 500.00
Total Settlement Penalties in Docket No. WEVA 85-90		$ 500.00
Total Settlement Penalties Pursuant to Motion of 7/18/85		$ 605.00

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(F)(1) The petition for assessment of civil penalty filed in Docket No. WEVA 85-110 is dismissed to the extent that it sought assessment of a proposed penalty of $20.00 for the violation of section 75.1203 alleged in Citation No. 2420016 dated June 19, 1984, so that the proposed penalty may be paid pursuant to section 105(a) of the Act. (2) SOCCO's motion to withdraw the notice of contest is granted subject to SOCCO's paying the proposed penalty of $20 within 30 days from the date of this decision if SOCCO has not already paid the proposed penalty.

(G) Pursuant to the settlement agreement filed on December 17, 1985, SOCCO shall, within 30 days from the date of this decision, pay civil penalties totaling $789.00 which are allocated to the respective alleged violations as follows:

	Docket No. WEVA 84-394		
Citation No. 2419750	5/1/84	77.1700	$ 119.00
Total Settlement Penalties in Docket No. WEVA 84-394			$ 119.00
	Docket No. WEVA 85-59		
Order No. 2419748	4/23/84	77.1104, modified to a citation	$ 550.00
Total Settlement Penalties in Docket No. WEVA 85-59			$ 550.00
	Docket No. WEVA 85-80		
Citation No. 2419672	4/23/84	77.205(a)	$ 120.00
Total Settlement Penalties in Docket No. WEVA 85-80			$ 120.00
Total Settlement Penalties Pursuant to Motion of 12/17/85			$ 789.00

(H) The notices of contest filed in Docket Nos. WEVA 84-210-R, WEVA 84-211-R, WEVA 84-212-R, WEVA 84-219-R, and WEVA 84-281-R are dismissed.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 The Secretary's counsel also filed on December 16, 1985, a motion to vacate the citations which are the subject of the notices of contest in Docket Nos. WEVA 84-216-R and WEVA

84-217-R. The motion additionally asks that the related civil penalty cases in Docket Nos. WEVA 84-364 and WEVA 85-116 be dismissed.

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2 The second motion for approval of settlement filed on December 17, 1985, agrees to reduce total penalties to $789 from the total penalties of $1,076 proposed by MSHA.