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OLD BEN COAL v. SOL (MSHA)
SOL (MSHA) v. OLD BEN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

OLD BEN COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 84-229-R Order No. 2142766; 4/25/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 84-230-R Order No. 2142767; 4/25/84
	Docket No. WEVA 84-231-R Citation No. 2143361; 7/10/84 Formerly Order No. 2143361; 4/26/84
	Docket No. WEVA 84-232-R Order No. 2272727; 4/26/84
	Docket No. WEVA 84-269-R Order No. 2143410; 5/22/84
	Docket No. WEVA 84-270-R Order No. 2143411; 5/22/84
	Docket No. WEVA 84-271-R Order No. 2145709; 5/22/84
	Docket No. WEVA 84-272-R Order No. 2145710; 5/22/84
	Docket No. WEVA 84-273-R Order No. 2145712; 5/22/84
	Docket No. WEVA 84-274-R Order No. 2145713; 5/22/84
	Docket No. WEVA 84-275-R Order No. 2145716; 5/22/84
	Docket No. WEVA 84-276-R Order No. 2438191; 5/22/84
	Mine No. 20

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-324 A.C. No. 46-02052-03517
v.	Docket No. WEVA 85-56 A.C. No. 46-02052-03527
OLD BEN COAL COMPANY, RESPONDENT	Docket No. WEVA 85-71 A.C. No. 46-02052-03528 Docket No. WEVA 85-78 A.C. No. 46-02052-03529 Mine No. 20

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on December 18, 1985, a motion for approval of settlement in the above-entitled proceeding. Under the parties' settlement agreement, Old Ben Coal Company would pay penalties totaling $10,650 instead of the penalties totaling $16,200 proposed by MSHA.

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. MSHA proposes penalties by using various types of assessment procedures which are described in Part 100 of Title 30 of the Code of Federal Regulations. If MSHA considers alleged violations to be somewhat routine in nature, it employs an assessment formula which is described in section 100.3 of its assessment procedures. When penalties are proposed under section 100.3, penalty points are assigned under the four criteria of the size of the operator's business, the operator's history of previous violations, the operator's negligence, if any, and the gravity of the alleged violation.

The points assigned under each of the four criteria are then added and converted to a dollar amount by referring to the conversion table set forth in section 100.3(g) of the assessment formula. If the operator abates the alleged violation within the time given by the inspector in his citation, the monetary amount determined under the four criteria is reduced by 30 percent under the fifth criterion of the operator's good-faith effort to achieve rapid compliance after the violation was cited. The sixth criterion of whether the payment of penalties would cause the operator to

discontinue in business is normally not given any weight because MSHA does not consider that criterion unless the operator submits financial data to one of MSHA's district managers.

If alleged violations are considered by MSHA to be unusual in nature, particularly if the citations or orders alleging violations were issued pursuant to the imminent-danger or unwarrantable-failure provisions of the Act, MSHA waives the use of the regular assessment formula set forth in section 100.3 and proposes penalties on the basis of narrative findings made pursuant to section 100.5 of its assessment procedures. All of the penalties involved in this proceeding were proposed by MSHA on the basis of narrative findings because all of the orders or citations were issued in conjunction with imminent-danger orders or pursuant to the unwarrantable-failure provisions of the Act, i.e. sections 107(a) and 104(d).

MSHA's narrative findings mention facts pertaining to all the criteria, except whether payment of penalties would cause the operator to discontinue in business. MSHA's findings concentrate on the two criteria of negligence and gravity. At the conclusion of its findings, MSHA gives a monetary amount, but does not specify how much of the penalty has been proposed under any single one of the five criteria which have been discussed. Therefore, all of MSHA's penalties proposed in this proceeding are the result of a subjective process which is not well defined. In such circumstances, a motion for approval of settlement only has to show the existence of extenuating circumstances, which could not have been known by MSHA when its narrative findings were written, to justify a reduction in MSHA's proposed penalties.

The motion for approval of settlement follows the procedure discussed above and gives ameliorating facts not considered by MSHA to support the parties' agreement to reduce all of MSHA's proposed penalties, except for the penalty proposed by MSHA for the violation of section 75.303 alleged in Order No. 2145037, by an amount ranging from $100 to $2,000. Before I consider the reasons for reducing penalties given in the Secretary's motion for approval of settlement, I shall discuss four of the six criteria in a generalized manner because the motion for approval of settlement justifies all the reductions in MSHA's proposed penalties under the two criteria of negligence and gravity.

The proposed assessment sheet in the official file in Docket No. WEVA 85-78 indicates that Old Ben's No. 20 Mine, here involved, produces about 604,000 tons of coal annually and that all of Old Ben's mines produce approximately 10,658,000 tons of coal per year. Those production figures

support a conclusion that Old Ben is a large operator and that any penalties approved in this proceeding should be in an upper range of magnitude to the extent that they are determined under the criterion of the size of Old Ben's business.

The motion for approval of settlement states that payment of penalties will not cause Old Ben to discontinue in business. Therefore, it will be unnecessary to reduce any of the penalties under the criterion that payment of penalties would cause Old Ben to discontinue in business.

The motion for approval of settlement and all of the inspectors' terminations of orders or citations indicate that Old Ben demonstrated a good-faith effort to achieve rapid compliance. As indicated above, when MSHA is proposing penalties under section 100.3, it reduces penalties by 30 percent when an operator demonstrates a good-faith effort to achieve rapid compliance. Since the penalties in this proceeding were all proposed under section 100.5, MSHA has not indicated what weight, if any, it has given to Old Ben's good-faith abatement of all alleged violations.

When I am assessing penalties in a contested proceeding, I do not decrease a penalty otherwise determined under the other criteria unless an operator shows an outstanding effort to achieve rapid compliance by doing something unusual such as voluntarily shutting down production and assigning his entire work force to abating one or more alleged violations. Likewise, I do not increase a penalty otherwise determined under the other criteria unless the operator shows outright recalcitrance in trying to achieve compliance. Since the motion for approval of settlement and the inspectors' termination sheets fail to show either an outstanding effort to achieve rapid compliance or a lack of good-faith in trying to achieve compliance, I shall assume that no penalty proposed by MSHA has been increased or reduced under the criterion of good-faith abatement.

It is not possible to determine from MSHA's narrative findings how much of the proposed penalties were attributed to the criterion of Old Ben's history of previous violations. The narrative findings simply state that the "number of previously assessed violations * * * appear on the attached Proposed Assessment." The proposed assessment sheets show the number of assessed violations, excluding $20 penalties assessed under section 100.4 and promptly paid, for the 24-month period preceding the occurrence of the violations alleged in each docket.

Under section 100.3(c) of MSHA's regular assessment formula, assessed violations are divided by the number of inspection days to derive a factor which is then applied to a table in section 100.3(c) to determine the number of penalty points which should be assigned for a given violation. The proposed assessment sheet in each of the four dockets here involved provides numbers which result in factors ranging from 2.0 in Docket No. WEVA 84-324 to a factor of .81 in Docket No. WEVA 85-56. Application of those factors to the table in section 100.3(c) would require that 18 penalty points be assigned in Docket No. WEVA 84-324 and only 6 penalty points in Docket No. WEVA 85-56. The assessed penalties and inspection days shown in the proposed assessment sheets are completely different from a tabulation of assessments and inspection days included in the back-up materials in Docket No. WEVA 85-71. In that docket, MSHA shows that Old Ben was assessed 80 penalties during 172 inspection days for the years 1983 and 1984. The factor resulting from use of the aforesaid information would require assignment of only two penalty points under section 100.3(c).

The motion for approval of settlement (p. 22) provides some additional facts to be considered in evaluating Old Ben's history of previous violations. It is there stated that Old Ben has not previously been assessed for a violation of sections 75.503, 75.509, 75.603, 75.703, and 75.1725(a). When I am assessing penalties in a contested proceeding, I increase penalties when there is evidence showing a large number of previous violations of the same standard which is under consideration and I assess no amount under the criterion of history of previous violations if there is evidence showing that the operator has not previously violated that particular standard. The motion for approval of settlement also shows that Old Ben has been cited for only one previous violation of sections 75.514 and 75.807, has been cited for two previous violations of section 75.1003, and has been cited for 10 previous violations of section 75.200.

Previous violations of section 75.200 are a matter of concern because a large number of all fatalities in underground coal mines are caused by roof falls. Knowing that Old Ben has 10 previous violations of section 75.200 is not, by itself, very useful information unless facts are also known concerning two aspects of the 10 previous violations. One aspect is the date on which an alleged violation occurred. The date is important because the time of occurrence shows whether Old Ben is improving its record of previous violations by reducing the violations which have recently occurred. The other important consideration is

the dollar amount assessed for a given violation because usually the size of the penalty provides an indication of the seriousness of the previous violations. Since neither the motion for approval of settlement nor the official files contain any information as to the dates of the previous violations or the amounts of the assessments, there is no way to be certain that the penalties proposed by MSHA in this proceeding include an appropriate amount which has been included in each proposed penalty under the criterion of history of previous violations.

Probably the most useful information as to the criterion of history of previous violations is the fact that Old Ben had a relatively favorable history of previous violations for the two years of 1983 and 1984. Inasmuch as all but one of the violations under consideration in this proceeding were cited in April, May, and June of 1984, I believe it is safe to conclude that the proposed penalties, all of which are in an upper range of magnitude, include an appropriate amount under the criterion of history of previous violations. Only one settlement penalty is for an amount of less than $500. Therefore, I conclude that the settlement amounts are adequate, even in the case of a large operator, to allow for attributing an appropriate amount of the penalties under the four criteria of size of the operator's business, ability to pay penalties, history of previous violations, and good-faith abatement.

I shall hereinafter discuss the two remaining criteria of negligence and gravity in each of the cases here involved and summarize the reasons given by the parties in support of the grant of their motion for approval of settlement.

Docket No. WEVA 84-324

MSHA seeks assessment of penalties for two alleged violations in Docket No. WEVA 84-324. The first violation was alleged in Citation No. 2272911 which stated that section 75.200 had been violated in the Nos. 2 and 5 entries in 3rd Right Section because Old Ben had deviated from its roof-control plan by not following the sight lines established by survey spads provided by Old Ben's engineers. MSHA's narrative findings proposed a penalty of $500 after finding that the violation was serious because it could have contributed to a roof fall and that Old Ben was highly negligent for failure to recognize that the entries had been developed off center.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $150. The parties have justified the reduction by explaining that the

primary hazard associated with developing entries off center is that pillar sizes may become dangerously eroded and thereby leave excessively wide entries with inadequate roof support. The actual facts showed, however, that while the entries had been developed off center, there was no indication of a reduction in pillar size. In such circumstances, MSHA recognized that the alleged violation was not as serious as it had originally been considered. As a result of MSHA's recognition of the nonserious nature of the violation, the order was modified to a citation issued under section 104(a) of the Act and the inspector's designation of "significant and substantial" (FOOTNOTE.1) was eliminated.

The second violation for which a penalty is sought to be assessed in Docket No. WEVA 84-324 was cited in Order No. 2143361 which alleged a violation of section 75.703 because proper frame ground protection was not provided for a scoop while the batteries were being changed at the charging station. MSHA proposed a penalty of $650 after finding that the violation was serious in that it could have contributed to an electrical shock hazard and that Old Ben was highly negligent in failing to maintain a proper ground while batteries were being changed.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $500. The parties justify a reduction in the proposed penalty by emphasizing that the frame ground was still connected at the time the order was written. While it is true that the ground wire was loose and could eventually have resulted in a shock hazard, it was still connected and the parties believe that some reduction of the proposed penalty is warranted in light of that extenuating fact. In such circumstances, the Secretary's counsel states that the degree of negligence is reduced which, in turn, supports the parties' agreement to reduce the penalty to $500.

I find that the parties have given sufficient justification to support a reduction of the penalties proposed in Docket No. WEVA 84-324.

MSHA seeks assessment of penalties for three alleged violations in Docket No. WEVA 85-56. The first violation was alleged in Citation No. 2142768 which stated that Old Ben had violated section 75.1725(a) by failing to maintain the No. 6 shuttle car in a safe operating condition in that the reverse accelerator rod was out of adjustment which caused it to stick in the reverse direction. The citation was issued in conjunction with imminent-danger Order No. 2142766. MSHA proposed a penalty of $5,000 on the basis of findings that the violation was extremely serious because one miner was killed when she was pinned against a coal rib and that Old Ben was highly negligent for failing to have the shuttle car in safe operating condition.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $3,000 and states that a reduction is warranted because there is evidence to show that the shuttle car was being greased at the time of the accident and that the very controls which were cited as sticking by the inspector had just been greased prior to the accident and were thought to be in proper condition. The reason that the shuttle car was energized was for the purpose of turning the wheels so that grease fittings could be reached. The person in charge of the maintenance work had warned the victim twice before the shuttle car was energized and she had indicated that she was "okay". Old Ben takes the position that its employees were unaware of any defects in the shuttle car's controls and says that the sticking of the controls may have resulted from the panic and haste with which the pedals were applied when the shuttle car began to move toward the victim after it was energized.

I find that the motion for approval of settlement provides adequate reasons for the parties' agreement to reduce the penalty to $3,000. A penalty in that amount is warranted because the motion indicates that the inspector found the accelerator rod to be out of adjustment which may have caused the controls to stick in the reverse position.

MSHA seeks assessment of a penalty for another alleged violation of section 75.1725(a) in connection with Citation No. 2142769 which stated that the No. 7 shuttle car was not maintained in a safe operating condition because it also had a reverse accelerator rod out of adjustment so that the accelerator would stick in reverse direction. MSHA proposed a penalty of $2,000 based on findings that the violation was very serious because the shuttle car could have moved when

energized so as to cause injury to another miner. The citation was issued in conjunction with imminent-danger Order No. 2142767 which was the second order issued with respect to sticking accelerator rods.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $1,500 for the second alleged violation of section 75.1725(a). The reduction is based on some of the same points made with respect to the first alleged violation of section 75.1725(a) in addition to the pertinent observation that the No. 7 shuttle car, like the No. 6 shuttle car, was in the process of being serviced so that it is somewhat inappropriate to charge that Old Ben had failed to maintain the shuttle car in a safe operating condition while Old Ben's employees were engaged in the process of bringing the shuttle car into a safe operating condition.

In a settlement proceeding, it is not possible to deal with conflicting points of view because there are no witnesses whose statements may be scrutinized under cross-examination. In such circumstances, I believe that the motion for approval of settlement has shown adequate reasons for reducing the penalty to $1,500.

The third violation for which a penalty is sought to be assessed in Docket No. WEVA 85-56 was alleged in Order No. 2142771 which was issued under section 104(d)(2) of the Act and which states that Old Ben violated section 75.509 by allowing its shuttle cars to be oiled and greased while they were energized. MSHA proposed a penalty of $2,000 based on findings that the practice of working on energized shuttle cars was well known to management and that energized cars could move and crush any employee who might be working on them.

The motion for approval of settlement states that a reduction in the proposed penalty to $1,000 is warranted because MSHA's narrative findings in the official file conflict with the findings of the inspector who wrote the order here involved. The inspector interviewed the witnesses and he considered the degree of negligence to be moderate and he believed that any injury that might result from the practice of oiling and greasing energized equipment would be lost work days or restricted duty for one employee.

It is obvious that the person who wrote the narrative findings in the official file was influenced by the same inspector's findings written at the time an employee was killed when the No. 6 shuttle car was energized so that oiling and greasing could be completed on it. The area from

which employees were withdrawn by the instant order involves the No. 6 shuttle car along with three others. Therefore, it is debatable as to whether the inspector's findings are more accurate than the narrative findings which served as the basis for proposing a penalty of $2,000.

On the other hand, it is a fact that section 75.509 prohibits working on energized equipment "except when necessary for trouble shooting or testing." The motion for approval of settlement states that the No. 6 shuttle car which killed an employee had been energized for the sole purpose of turning the wheels so that grease fittings could be reached. It would appear that such an energization might be considered as coming within the exception to the prohibition against working on energized equipment. If that kind of temporary energization was the practice about which management had knowledge, then it would seem that a penalty of $1,100 is adequate because Order No. 2142771 may have cited a borderline violation which should not be associated with an excessive penalty. Therefore, I find that a reduction in the proposed penalty to $1,100 is appropriate.

Docket No. WEVA 85-71

MSHA seeks to have penalties assessed for seven violations in Docket No. WEVA 85-71. The first violation was alleged in Order No. 2145709 which alleged that Old Ben had violated section 75.1003(c) because an energized 300-volt DC trolley wire was not guarded where miners had to pass under it in order to check pumps. Also two carloads of mine supplies were parked under the unguarded wire which was about 4 or 5 feet off the mine floor. MSHA proposed a penalty of $1,000 on the basis of narrative findings to the effect that the violation was very serious and that Old Ben was highly negligent in failing to assure that the wire was guarded.

The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $800. The only reason the motion gives for reducing the proposed penalty by $200 is that Old Ben's negligence was only moderate. In connection with the last alleged violation discussed above, the motion for approval of settlement correctly observed that MSHA's narrative finding of high negligence was in conflict with the inspector's finding of moderate negligence. I found in that instance that a conflict between the inspector's finding and the narrative finding was some indication that the narrative finding might be in error. In this instance, however, the inspector also rated Old Ben's negligence as being high so that there is no conflict between the narrative finding and the inspector's finding as to negligence.

I believe that other reasons exist for reducing the penalty by $200. Neither the inspector's order nor the narrative findings discuss whether the mine supplies parked under the unguarded wire had been loaded while the cars were parked in that location or whether the supplies were parked in that location for the purpose of being unloaded or had been left there only temporarily until they could be transported to another area of the mine. Although the cars were at a mantrip station, there is no discussion in the order or the narrative findings as to whether employees were required to get in and out of mantrips under the place where the trolley wire was unguarded. Moreover, if loaded supplies were parked under the trolley wire, it is unlikely that a person who was going to check pumps would go to the trouble of climbing over loaded cars to get to the pumps. The fact that the inspector believed that only one person might be injured by the unguarded wire is a rather strong indication that employees did not get in and out of mantrip cars at the location where the trolley wire was unguarded. The lack of information on which to base a finding that the violation was very serious justifies a reduction of the penalty to $800.

The second violation was alleged in Order No. 2145713 which stated that Old Ben had violated section 75.200 because loose coal brows existed along the ribs in an active haulage and travelway. The size of the coal brows ranged from 3 to 6 feet in length, 2 to 6 inches in thickness, and from 24 to 36 inches in height. MSHA proposed a penalty of $800 on the basis of narrative findings to the effect that the violation was serious and that it was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 on the basis that the degree of Old Ben's negligence was not as great as the narrative findings indicated.

There is a dearth of information as to whether the coal brows were of such a nature that Old Ben's section foreman and preshift examiners could not have avoided seeing the loose coal brows, as the narrative findings allege. Sometimes conditions which are obviously hazardous to an inspector are not perceived in the same way by conscientious section foremen. Therefore, I believe that the motion has shown an adequate reason to reduce the proposed penalty to $500.

The third violation was alleged in Order No. 2145714 which stated that Old Ben had violated section 75.603 because a temporary splice in the trailing cable to a shuttle car had not been made in a workmanlike manner and was not mechanically strong and well insulated. MSHA proposed a

penalty of $600 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and that the reduction has been agreed to by the parties because the location of the splice was such as to reduce Old Ben's negligence sufficiently to warrant a reduction in the penalty. I find that the parties have shown a reason for reducing the penalty by $100.

The fourth violation was alleged in Order No. 2145031 which stated that Old Ben had violated section 75.514 because a splice in a trolley wire was not properly made and the trolley wire was sagging and out of two hangers. MSHA proposed a penalty of $750 on the basis of narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and that the parties have agreed to the reduction because the nature of the violation and its location justify a finding that Old Ben's degree of negligence was less than it was found to be in the narrative findings. I agree that a reduction in the penalty to $500 is warranted, particularly since the hazard was the possibility of a fire rather than exposure of miners to a possible shock hazard.

The fifth violation was alleged in Order No. 2145035 which cited Old Ben for a violation of section 75.1003 because a trolley feeder wire was not guarded at a place where miners passed under it at a point near the Foundation Mains 15 stopping. MSHA proposed a penalty of $600 based on narrative findings to the effect that the violation was serious because it exposed miners to an electrical shock hazard and that Old Ben was highly negligent for having failed to guard the wire. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and the motion supports the reduction in the penalty by observing that the constantly changing conditions in the workplace made the degree of Old Ben's negligence, in failing to realize that the trolley wire needed guarding, less than was indicated in MSHA's narrative findings. I conclude that the parties have given a satisfactory reason for reducing the proposed penalty by $100.

The sixth violation was alleged in Order No. 2145036 which stated that Old Ben had violated section 75.200 because the roof had not been properly supported in the third right 013 working section in that spalling had occurred around some bolts from rib to rib, and some roof bolts measured from 6 to 8 feet from the rib. The lack of proper supports existed

for a distance of about 200 feet. MSHA proposed a penalty of $1,000 based on narrative findings to the effect that the violation was serious as it could have contributed to a roof-fall accident and that Old Ben was highly negligent in allowing the roof supports to deteriorate to the extent found by the inspector.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $600. The reduction in the proposed penalty is primarily based on the fact that the inspector on August 1, 1984, issued a modification of the order reducing his finding of high negligence to moderate. The person who wrote the narrative findings apparently did not take that change in the inspector's finding as to negligence into consideration in proposing a penalty of $1,000. I find that the parties have shown an adequate reason for reducing the proposed penalty to $600.

The seventh violation was cited in Order No. 2145037 which stated that Old Ben had failed to report in the preshift book the existence of bad roof conditions and ventilation deficiencies. MSHA proposed a penalty of $500 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement indicates that Old Ben has agreed to pay the proposed penalty of $500 in full. The proposed penalty is reasonable in the circumstances and Old Ben's agreement to pay the full proposed penalty is approved.

Docket No. WEVA 85-78

MSHA seeks to have only one penalty assessed in Docket No. WEVA 85-78. That penalty was alleged in Order No. 2145712 which cited Old Ben for a violation of section 75.807 because a high-voltage cable had not been placed in a position which would prevent its being accidentally touched by miners or damaged by mining equipment. MSHA proposed a penalty of $800 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $500 and the motion justifies the parties' agreement to reduce the penalty on the ground that a high-voltage cable has a great deal more protection built into its layers of insulation than low-voltage cable and that Old Ben's negligence in failing to place the cable where it would not be accidentally contacted by a miner was less than the narrative findings

had indicated. It is also noted that all the protective layers of insulation were in good condition at the time the violation was cited. I find that the parties have given a satisfactory reason for agreeing to reduce the proposed penalty to $500.

The motion for approval of settlement (p. 22) contains a paragraph giving the type of exculpatory language approved by the Commission in Amax Lead Company of Missouri, 4 FMSHRC 975 (1982), to the effect that Old Ben has made the agreements and stipulations set forth in the motion for approval of settlement only for the purpose of reaching a settlement of the issues without having to resort to a hearing and that its agreements in this proceeding are to be used only for carrying out the purposes of the Federal Mine Safety and Health Act of 1977.

The Contest Proceeding

The motion for approval of settlement does not refer to any of the notices of contest which were filed by Old Ben in this consolidated proceeding. Section 105(d) of the Act requires that notices of contest be filed within 30 days after a citation or order is issued. Therefore, notices of contest are sometimes filed for protective reasons and are not always followed by the filing of related penalty proceedings before the Commission because Old Ben may pay penalties proposed by MSHA pursuant to section 105(a) of the Act without such proposed penalties ever becoming the subject of a penalty case filed before the Commission.

Some of Old Ben's contest cases involve imminent-danger orders issued under section 107(a) of the Act without citing violations as a part of the orders. The inspectors, however, did issue citations under section 104(a) of the Act, and the citations referred to the fact that they had been issued in conjunction with imminent-danger orders. Therefore, while it may not appear that some of Old Ben's notices of contest were precisely related to the issues raised in the civil penalty cases, the dates on which the various orders were issued and contested by Old Ben show that Old Ben filed its notices of contest to oppose the issuance of the citations and orders which have been disposed of in the parties' settlement agreements discussed in the first part of this decision approving settlement.

Counsel for Old Ben has advised me that he has no objection to my dismissing all of the notices of contest listed in the caption of this decision at the time I issue my decision in this consolidated proceeding.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed on December 18, 1985, is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Old Ben, within 30 days from the date of this decision, shall pay civil penalties totaling $10,650.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 84-324	
Citation No. 2272911 2/21/84 - 75.200	$ 150.00
Order No. 2143361 4/26/84 - 75.703	500.00
Total Settlement Penalties in Docket No. WEVA 84-324	$ 650.00
Docket No. WEVA 85-56	
Citation No. 2142769 4/25/84 - 75.1725(a)	$ 1,500.00
Citation No. 2142768 4/25/84 - 75.1725(a)	3,000.00
Order No. 2142771 4/26/84 - 75.509	1,100.00
Total Settlement Penalties in Docket No. WEVA 85-56	$ 5,600.00
Docket No. WEVA 85-71	
Order No. 2145709 5/22/84 - 75.1003(c)	$ 800.00
Order No. 2145713 5/22/84 - 75.200	500.00
Order No. 2145714 5/22/84 - 75.603	500.00
Order No. 2145031 6/1/84 - 75.514	500.00
Order No. 2145035 6/4/84 - 75.1003	500.00
Order No. 2145036 6/4/84 - 75.200	600.00
Order No. 2145037 6/4/84 - 75.303	500.00
Total Settlement Penalties in Docket No. WEVA 85-71	$ 3,900.00
Docket No. WEVA 85-78	
Order No. 2145712 5/22/84 - 75.807	$ 500.00
Total Settlement Penalties in Docket No. WEVA 85-78	$ 500.00
Total Settlement Penalties in This Proceeding	$10,650.00

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(C) The 12 notices of contest filed in Docket Nos. WEVA 84-229-R, WEVA 84-230-R, WEVA 84-231-R, WEVA 84-232-R, WEVA 84-269-R, WEVA 84-270-R, WEVA 84-271-R, WEVA 84-272-R, WEVA 84-273-R, WEVA 84-274-R, WEVA 84-275-R, and WEVA 84-276-R are dismissed.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 The citation was originally issued under section 104(d)(1) of the Act which provides for a finding that the alleged violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Even after a citation is modified to show issuance under section 104(a), the inspector may indicate on the citation whether he considers the violation to be "significant and substantial". Consolidation Coal Co., 6 FMSHRC 189 (1984).