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SOL (MSHA) V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of the Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 87-2 A.C. No. 46-01867-03692
v.	Blacksville No. 1 Mine Docket No. WEVA 87-4
CONSOLIDATION COAL COMPANY, RESPONDENT	A.C. No. 46-01968-03684 Blacksville No. 2 Mine
	Docket No. WEVA 86-457 A.C. No. 46-01867-03687
	Blacksville No. 1 Mine

DECISION APPROVING SETTLEMENTS

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company for violations of Part 50 of the Secretary's regulations. Part 50 imposes upon mine operators subject to the Act the requirements, inter alia, immediately to notify the Mine Safety and Health Administration (MSHA) of accidents, to investigate accidents, and to file reports pertaining to accidents, occupational injuries and occupational illnesses.

By prehearing order dated January 6, 1987, the parties were directed to discuss possible settlement and advise me of the results of their discussion by February 17, 1987. By further order dated January 29, 1987, the parties were directed that if they were unable to reach settlement, pretrial statements would be due on March 10, 1987, and the cases would be heard on March 31, 1987.

The parties informed me that they were unable to reach settlement and on February 27, 1987, the operator filed a motion to dismiss on the ground that Part 50 was invalid, to which the Solicitor responded with a memorandum of law in opposition. The Solicitor and the operator filed prehearing statements on March 11 and 12, 1987, respectively.

Thereafter, on March 23, 1987, counsel for both parties contacted me by means of a conference telephone call, stating that they now had reached an agreement to settle these cases. The terms of the settlement were explained. The original assessments for the four violations were $350 and the proposed settlements were for $2,000. I indicated my tentative approval and directed the Solicitor to file an appropriate motion by March 25, 1987, which he did. The scheduled hearing was cancelled.

Section 110(k) of the Act sets forth the settlement authority of the Commission and its Judges as follows:

> (k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The purposes of section 110(k) is explained in the legislative history as follows:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. Negotiations between operators and Conference Officers of MESA are not on the record. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge. Similarly, there is considerable opportunity for off-the-record settlement negotiations with representatives of the Department of Justice while cases are pending in the district courts. While the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and

> collection expenses should play no role in determining settlement amounts. The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
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> To remedy this situation, Section 111(l) provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. Similarly, under Section 111(l) a penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.
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> The Committee recognizes that settlement of penalties often serves a valid enforcement purpose. The provisions of Section 111(l) only require that such settlements be a matter of public record and approved by the Commission or Court.

S.Rep. No. 95Ä181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632Ä633 (1978).

In compliance with the mandate of section 110(k), the circumstances of these cases and the terms of the proposed settlements are set forth as follows.

Part 50, finally published on December 30, 1977, became effective on January 1, 1978. 42 Fed.Reg. 65534 (1977). This was, of course, between November 9, 1977, the enactment date of the Mine Act, and March 9, 1978, its effective date. Section 301(b) of the 1977 Amendments, provided for the transfer to the Mine Act of all mandatory health and safety standards in effect on November 9, 1977. However, it has always been the Secretary's position that the reporting and other requirements, both as they now exist in Part 50 and as they were contained in prior versions, are mandatory regulations and not mandatory health and

safety standards. There are conceptual and practical justifications for the Secretary's stance. Mandatory standards relate to actual practices inherent in the process of mining itself, whereas Part 50 deals with recording, reporting, and investigating certain events which arise out of mining activity, e.g., accidents and injuries. Considerable deference is due to the longstanding and established views of the Secretary in light of his enforcement responsibilities. Brock v. Cathedral Bluffs Shale Oil Co., et al., 796 F.2d 533, 538 (D.C.Cir.1986). As a mandatory regulation, there is no question that Part 50 was properly adopted. And as such there is no question that it was properly transferred to the Mine Act pursuant to section 301(c)(2) of the 1977 Amendments which provided that all orders, decisions and regulations issued, or allowed to become effective in the exercise of functions transferred under the law and which were in effect on March 9, 1978, should continue in effect until modified, terminated or set aside. The Commission, taking specific note of the procedures pursuant to which Part 50 was adopted, held Part 50 consistent with and reasonably related to the statutory provisions under which it was issued. Freeman United Coal Mining Company, 6 FMSHRC 1577 (1984). Accordingly, a violation of Part 50 constitutes a violation of its parent statutory provisions, including section 103(a), 103(b), 103(d), and 103(j). Finally, in Helca Mining Company, 1 FMSHRC 1872 (1979), Administrative Law Judge Koutras upheld the validity of Part 50. Nothing I am aware of would justify a departure from Judge Koutras's decision.

The subject cases involve four violations of 30 C.F.R. 50.20(a) which requires inter alia, that an operator report to MSHA accidents and occupational injuries which occur in its mine within 10 working days.

In Docket No. WEVA 87Ä2, Citation No. 2713196, dated June 12, 1986, sets forth that the operator failed to submit an accident-injury report on 7000Ä1 form to MSHA within 10 production days after an injury occurred to Mr. Kenneth Fox. On January 29, 1986, Mr. Fox, who was an underground mechanic, injured his back while attempting to lift a continuous miner pot. Mr. Fox went to the doctor on January 30, 1986, and was diagnosed as having a sprain to his back-spine area. The doctor wrote on a slip that Mr. Fox should be on light duty for two weeks. Mr. Fox returned to work on January 30, 1986, but for the next two weeks he merely sat in the bathhouse and lay on the benches there when his back hurt him. During the second week he was told to check permissibility on light sockets, but not to climb any ladders. During this period he was not scheduled for Saturday work whereas almost everyone else performed their Saturday shift as usual. Based upon the foregoing, the inspector determined that Mr. Fox did not return to his regular job as underground section mechanic, because he was unable to do so and that he remained in a restricted capacity status for approximately two weeks. The inspector further stated that due to the type of assignment and

location of this assignment it appeared the operator was aware of the situation.

Citation No. 2713197, dated June 16, 1986, sets forth that the operator failed to submit an accident-injury report on the specified 7000Ä1 form to MSHA after an injury occurred to Mr. Richard E. Leighty. Mr. Leighty injured his back picking up two wooden crib blocks. This work was being done on March 31, 1986, at approximately 7 p.m. on the afternoon shift. Shortly thereafter, Mr. Leighty went to the hospital by ambulance. The doctor prescribed a muscle relaxer and pain killer and instructed him to return if his back was not better in seven days. The doctor also instructed Mr. Leighty to take it easy for the next week. Mr. Leighty resumed work on April 8, 1986. Accordingly, the inspector found that there were at least 5 days away from the mine which constituted time lost due to injury. And the inspector determined, therefore, that the operator failed to meet the requirement of 30 C.F.R. 50.20(a) by not submitting a 7000Ä1 form indicating at least 5 lost work days due to the injury sustained by Mr. Leighty.

In Docket No. WEVA 87Ä4, Citation No. 2713199, dated July 16, 1986, sets forth that the operator failed to submit an accident and injury report on the 7000Ä1 form after an injury occurred to Mr. Roy Watson. On November 4, 1985, Mr. Watson fractured his right wrist in two places while attempting to cross over the continuous mining machine. He was a classified roof bolt operator and was roof bolting at the time of injury. On return from the hospital his right wrist was immobilized by a leather brace and placed in a cast four days later. The next shift he worked was on November 5, 1985, as a dispatcher on the surface. It further appeared that during the period Mr. Watson was a dispatcher, he underwent autroscopic surgery on his wrist to assist in healing and that it was projected he would have additional surgery. In light of the foregoing, the inspector concluded that during the time Mr. Watson was a dispatcher he was unable to perform his usual job as roof bolter and was on restricted duty. Accordingly, the inspector determined that the operator should have submitted a 7000Ä1 form indicating a reportable injury and the number of days of restricted duty.

In Docket No. WEVA 86Ä457, Citation No. 2713193, dated June 4, 1986, sets forth that the operator failed to submit an accident report on the 7000Ä1 form after an injury to Mr. Kenneth Fox. On April 28, 1986, at approximately 6:30 p.m. Mr. Fox was injured while removing a fuse from a panel of a roof bolting machine. The injury was to Mr. Fox's eyes due to a flash that occurred. Mr. Fox went to the doctor on the same evening of his injury and the doctor gave him medication for his eyes. The doctor told Mr. Fox that he should take the medication when he got home and that it should relieve much of the sand-in-the-eye feeling and irritation that might occur in the following 12 or so hours. The doctor indicated that Mr. Fox should be able to

return to work on April 30, 1986. Mr. Fox remained at home. According to the Citation, on April 29, 1986, Mr. Gross, the operator's safety supervisor, visited Mr. Fox who was in his garage at the time and asked him if he was coming to work. Mr. Fox said no and that he was going to follow the doctor's orders and return on the 30th. Mr. Gross followed up the visit with a phone call at approximately 3:30 p.m. and again asked Mr. Fox if he was coming to work and indicated to Mr. Fox that if he did not, it would be a lost-time day for the mine. Mr. Gross asked Mr. Fox to take a vacation day to prevent this record. Mr. Fox took the vacation day and returned to work on the afternoon shift of April 30, 1986. When the inspector asked Mr. Fox if he used the medication in his eyes, Mr. Fox said he did as soon as he got home and that it helped him a lot. When the inspector asked if he could have returned to work on the afternoon shift April 29, 1986, Mr. Fox said maybe, but with the sand-in-the-eye irritation he would have been afraid to return, because he might hurt himself further as well as other miners. His main concern was that he did not inflict further damage to his eyes while they were still irritated, with other types of mine dust. Mr. Fox said that upon returning to work he did not have to turn in a doctor's slip. On June 3, 1986, the inspector told the operator it should submit a lost-time injury report under Part 50, but the operator declined, alleging that because Mr. Fox had been working in his garage when the operator's safety supervisor visited him, he should have returned to work without any shift interruption. Relying upon the medical evidence and Mr. Fox's statements, the inspector required the operator to comply with Part 50 by submitting the appropriate 7000Ä1 form for the injury, indicating days away from work due to his injury and any days of restricted duty.

The motion for approval of settlements submitted by the Solicitor on March 25, 1987, is as follows:

> Now comes the Secretary of Labor (Secretary), by his undersigned attorney, and hereby moves for approval of a settlement which is acceptable to the Secretary. The parties agree that the voluntary civil penalty payment of $500.00 for each of the four violations of 30 C.F.R. Part 50 involved in these proceedings for a total penalty payment of $2,000.00 is an appropriate resolution of this matter. The four violations were originally assessed penalties totaling $350.00. These cases were set for hearing on March 31. On March 6, 1987, the parties entered into a motion to stay other similar cases pending the resolution of these proceedings. The January 14, 1987, prehearing order in these proceedings required the parties to file a response on

> March 10, 1987. The Respondent had filed a motion to dismiss on procedural grounds and the Secretary had filed a response in opposition to that motion.
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> After the parties reviewed their respective legal positions and the facts set forth in the files of these proceedings, discussions related to the hearing of these and other cases began on March 19, 1987. Extensive negotiations began on March 20, and on March 23, the parties agreed to settle these particular cases. A conference call was held with the presiding judge to advise him of the settlement.
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> The Secretary submits that the Respondent is a large operator. The Secretary further submits that each of the violations involved a high degree of both negligence and seriousness. The files include information related to the fact that the violations were abated after issuance in good faith and that the payment of the agreed to penalties will not adversely effect the Respondent's ability to remain in business. Respondent has an average history of prior violations for a mine operator of its size.

Thereafter by letter filed March 31, 1987 the operator stated that the parties had agreed to include the following language in the settlement motion which had been submitted:

> The Respondent takes the position that for purposes of actions other than actions or proceedings under the Federal Mine Safety and Health Act, nothing contained herein shall be deemed an admission that Respondent violated the Mine Act's regulations or standards.

Each of the violations in Docket Nos. WEVA 87Ä4 and WEVA 86Ä457 was originally assessed at $75 and each of the two violations in Docket No. WEVA 87Ä2 was originally assessed at $100 for total original assessments of $350. The proposed settlements of $500 for each of the four violations constitute very substantial increases from the original amounts. I have carefully reviewed the entire record to determine if they are justified. Upon such review, it is clear that the settlement motion is on strong ground in asserting the violations involved a high degree of seriousness and negligence. Gravity cannot be doubted in view of the fact that Part 50 is the cornerstone of enforcement under the Act. Since Part 50 statistics provide the basis for planning, training and inspection activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem

areas in a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities. The citations which are unusually detailed, further disclose an extraordinary degree of negligence and fault on the operator's part. The Solicitor's representations concerning size, history, ability to continue, and good faith abatement are accepted. In light of the statutory criteria set forth in section 110(i) of the Act, I determine the proposed settlements are appropriate and proper. As set forth in the legislative history of section 110(k), quoted supra, these penalties are intended to encourage the operator's compliance with the Act's requirements.

Accordingly, it is ORDERED the recommended settlements be APPROVED.

It is further ORDERED the operator pay $2,000 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge