CCASE:
SOL (MSHA) V. PECKS BRANCH MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 92-702 A.C. No. 15-12699-03570
v.	:	
PECKS BRANCH MINING COMPANY, INCORPORATED,	:	Docket No. KENT 93-418 A.C. No. 15-12699-03580
and	:	
JERRY SMITH, Employed by PECKS BRANCH MINING COMPANY, INCORPORATED,	:	Docket No. KENT 93-558 A.C. No. 15-12699-03581A
and	:	
TROY HUNT, Employed by PECKS BRANCH MINING COMPANY, INCORPORATED, Respondents	:	Docket No. KENT 93-559 A.C. No. 15-12699-03582A Mine No. 1

ORDER DENYING MOTION TO APPROVE SETTLEMENT

PROCEDURAL BACKGROUND

These are civil penalty cases in which the Secretary of Labor on behalf of his Mining Enforcement and Safety Administration (MSHA) and pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 815, 820, seeks the assessment of a $123,800 in civ penalties for violations of various mandatory safety and health standards for underground coal mines as set forth in Part 75, Title 30, Code of Federal Regulations. In Docket Nos. KENT 92-702 and KENT 93-418 the Secretary charges Pecks Branch Mining Company, Incorporated (Pecks Branch) with two such violations each; in Docket No. KENT 93-558 the Secretary charges Jerry Smith, as an agent of Pecks Branch, with four knowing violations, and in Docket No. KENT 93-559 the Secretary charges Troy Hunt, as an agent of Pecks Branch, with two knowing violations. The Secretary's allegations of violation with respect to Smith and Hunt are the same as those against Pecks Branch and all appear to have arisen out of MSHA's investigation of a fatal roof fall accident that occurred at Pecks Branch's No. 1 Mine on August 1, 1992. Thomas A. Grooms represents the Secretary. William K. Doran represents the Respondents.

CHRONOLOGY OF EVENTS

These matters were the subject of prehearing orders directing the parties to confer to determine, inter alia, whether the cases could be settled. When I was advised a settlement would not be possible the cases were consolidated for a hearing that was scheduled to commence in Pikeville, Kentucky in early November 1993. At the request of counsels the hearing was continued and ultimately was rescheduled for December 7, 1993.(Footnote 1)

In a conference telephone call on December 1, 1993, counsels orally stated the captioned matters had been settled, that Pecks Branch, Smith and Hunt had agreed to accept the alleged violations and to pay the proposed penalties.(Footnote 2) On the basis of these assurances, I canceled the scheduled hearing and informed counsels that motions to approve the settlement would be due in my office within thirty (30) days.

The motions did not arrive. On January 12, 1994, I telephoned counsel for the Secretary to determine their whereabouts. I was told he was out of the office and would not be back until January 14. I then called counsel for the Respondents who advised me there was no longer a settlement agreement. In a later conference telephone conversation, counsel for the Secretary maintained a valid settlement agreement still existed and that it should be enforced. Counsel for the Secretary then stated that he intended to file a motion to approve the settlement, which he has done.

In the meantime, I reset the matters for hearing in Pikeville commencing on February 15, 16 and 17, 1994. Upon counsel for the Secretary's statement that he was committed to another trial on that date in a different city and upon counsel for the Respondents agreement, I rescheduled the hearing to commence March 8. I advised the parties that I intended to rule on any pending motions, including any motion to approve a settlement, at the commencement of the March 8 hearing. In a subsequent conference telephone call, counsel for the Secretary argued, I think correctly, that deferring a ruling until the hearing could unnecessarily cost the parties considerable time and expense in trial preparation.

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1 In addition to the captioned cases, another civil penalty case, Secretary of Labor, Mine Safety and Health Administration v.Jimmy Daugherty, Employed by Pecks Branch Mining Co. Inc., Docket No. KENT 93-506, also was consolidated for hearing. The facts underlying the Daugherty case appear essentially to be the same as those underlying the captioned cases. William Doran does not represent Daugherty, who is proceeding pro se.

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2In addition, counsel for the Secretary stated that he would be able to negotiate a settlement in Daugherty.

THE SECRETARY'S MOTION AND ARGUMENTS

Counsel for the Secretary states the parties agreed that the violations alleged occurred, that the gravity of the violations was as characterized on the subject citations and orders, and that the negligence of the Respondents also was as characterized. Counsel further asserts that the parties agreed regarding the size of the operator, that although Pecks Branch is no longer in business the proposed penalties would not, if it were still operating, affect Pecks Branch's ability to continue in business, and that the operator demonstrated good faith in attempting to achieve rapid compliance following citation of the violations. The motion to approve the settlement was served by counsel for Secretary on Respondents' counsel on January 19, 1994.

In his memorandum in support of the motion, counsel argues that the parties reached agreement on the settlement on December 1, 1993, the essential term being that Respondents would pay in full the proposed civil penalties. Counsel further states that on December 15, 1993, counsel for Respondents notified him that the Respondents wished to alter the settlement by paying less than the amount to which they had agreed on December 1 and that on December 21, 1993, he forwarded a written settlement agreement setting forth the terms of the settlement as worked out initially to counsel for the Respondents, but no response was received.

Citing Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988), counsel for the Secretary states his client is entitled to an order approving the settlement because there was agreement between the parties as to the material facts, the essential one being the amount of the penalty. Not only would it be contrary to law to disregard the settlement, it would be contrary to sound policy as well. If the settlement is not enforced "the [R]espondents will have flaunted the Commission's authority and procedures and will benefit from their wrongful refusal to comply with a validly entered settlement agreement." Memorandum 4.

Counsel for the Respondents' position is that a post-settlement communication by MSHA inspector altered the circumstances under which the parties had entered into the agreement and further that despite the purported settlement the parties did not agree upon the material facts.

According to counsel, Respondents' approval of the settlement was "based on its understanding of MSHA's stance on settlement as communicated by counsel for the Secretary." Opposition To Sec.'s Motion 2. However, following the agreement MSHA Inspector James Hager, an inspector who had issued some of the violations alleged in these proceedings, informed Respondent Jerry Smith that Respondents understanding of MSHA's bargaining

stance was incorrect and the Respondents withdrew their approval. Id. Smith, who is the husband of Phyllis Smith, co-owner of Pecks Branch, states in the affidavit that subsequent to the agreement, Hager told stated to him that a 50 percent in reduction in the penalties assessed had never been proposed and Hager implied that MSHA would have considered such a reduction. Affidavit 1. The only reason Respondents had agreed to pay the penalties as assessed is that counsel for the Respondents advised them MSHA was unwilling to accept any lesser penalty.

Counsel for Respondents further agues that counsels never envisioned settlement negotiations completed, until the language of the settlement motion was drafted and agreed upon. A draft settlement agreement was not forwarded to counsel for the Respondents until after the Smith/Hager communication. Moreover, the Respondents would have accepted -- specifically the provision that "the penalties ... would not affect ... [the operator's] ability to continue in business." Opposition to Sec.'s Motion 5, citing Motion To Approve Settlement 2.

RULING

Counsel for the Secretary has stated the law correctly. The courts have made clear that a settlement may be enforced even if it has not been reduced to writing, provided there is agreement on all material terms. Scheuner Corp. at 154; Bowater North American Corp. v. Murray Machinery, Inc., 773 F.2d 71 (6th Cir. 1985; Odomes v. Nucare, Inc., 653 F.2d. 246, 252 (6th Cir. 1981). Counsel, likewise had presented a persuasive argument that despite the absence of a motion stating the terms of the settlement and one presented to the undersigned prior to the initiation of the present dispute, there was a genuine agreement concerning the material facts. In this regard I particularly note there is no dispute that the Respondents and the Secretary agreed to settle the matters by payment in full of the penalties proposed.

The settlement negotiations were conducted by counsels who had full authority to represent and speak for the parties. If I accept as factual the statements in Smith's affidavit, they amount to Smith (a party) being told by a person not a party to the proceedings or to the settlement negotiations that counsels might have reached a different result had different terms been proposed and accepted. Such might be said of any settlement agreement and has nothing to do with the material terms of the settlement. The implication of the affidavit is not so much that MSHA would have accepted a different agreement had it been offered, but rather that Smith is unhappy his counsel did not negotiate a different agreement. A party cannot void an agreement merely because he or she subsequently believes it

insufficient. See Taylor v. Gordon Flesch Co., Inc., 793 F.2d 858, 863 (7th Cir. 1986).

Further, I am not persuaded by counsel for Respondent's statement that the Respondents did not envision the agreement completed until the language of the settlement motion had been drafted and agreed upon. Both counsel were very clear in their joint telephone conversation with me on December 1, 1993, that the matters had been settled. There was no discussion of ongoing negotiations and, indeed, if there had been I would not have canceled the December 7 hearing. What seemed certain at the time was that Respondents had agreed, for whatever reason, to pay the proposed assessments, even though Pecks Branch was no longer in the mining business and that by doing so they had alleviated themselves of the further expenses of trial. There was no mutual mistake among the parties in reaching the agreement and there was no fraud inducing them to agree.

Were these the only considerations I would be inclined to grant the motion, but they are not. There are interests, inherent in these matters beyond those of the parties. These interests affect the credibility of the Commission as an impartial adjudicator of Mine Act cases. As I have noted, the proceedings apparently have arisen as a result of a fatal roof fall accident and involve significant aggregate proposed civil penalties. In such cases, it is especially important that the record be free of any hint that due process was not completed afforded. It is equally important that all arguments for and against any violations found and any penalties ultimately assessed have been fully raised and considered. The very ability of the Mine Act to provide "a more effective means ... for improving the working conditions and practices in the Nations's coal ... mines ... [and] to prevent death and serious physical harm" rests in large part on public confidence that due process is always available to all litigants and that their concerns can be always aired publicly. 30 U.S.C. 801(c).

I conclude that to approve the settlement and order compliance with its terms could open the door to subsequent charges -- unfair though they might be --that Respondents were denied their day in court and to a resulting diminution of public confidence in the Commission. The Commission has emphasized that oversight of proposed settlements is, in general, committed to its sound discretion. Utah Power and Light Co., Mining Division, 12 FMSHRC 1548, 1554 (August 1990); Birchfield Mining Co., 11 FMSHRC 1428 (August 1989). Given the potential for misunderstanding that would be inherent in the granting of counsel for the Secretary's motion and given the nature of these cases, I am convinced that sound discretion requires the motion be DENIED.

Counsel for the Secretary fears this result will allow the Respondents to flaunt "the Commission's authority and procedures and ... benefit from their wrongful refusal to comply with a validly entered settlement agreement." Mem. In Support of Motion to Approve Settlement 4. It is important to remember, however, that the Secretary and Respondents now will proceed to hearing, that the hearing will be de novo and that I will in no way be bound by the penalties proposed. Any penalties assessed will fully reflect the evidence adduced at hearing and any may reach the maximum allowed by the statute. The Respondent's should bear in mind that in judicial proceedings as in the market place, shoppers do not always find a better bargain. It is also important to note that my ruling on the Secretary's motion might well have been different had counsel submitted a timely motion to approve the settlement.

David F. Barbour
Administrative Law Judge
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