

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

July 29, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-63
Petitioner	:	A.C. No. 29-00096-03570
	:	
v.	:	McKinley Mine
	:	
PITTSBURG & MIDWAY COAL	:	
MINING CO.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner filed a motion to approve a settlement agreement and to dismiss this case. A reduction in the penalty from \$35,000.00 to \$10,000.00 is proposed.

Citation No. 4060756 was issued for a significant and substantial violation of 30 C.F.R. ' 77.404(c), which requires that repairs and maintenance not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments. The inspector assessed the negligence as "high," the probability of an occurrence of "occurred" and the gravity of injury as "fatal." A penalty of \$35,000.00 was specially assessed for this violation.

The inspector's site inspection indicated that the Respondent had attempted to remove an adapter from a chuck on the Schroeder Brothers drill in the No. 2 pit using the power of the drill. A wrench that was affixed to the adapter flew off once machine power was engaged and struck a miner in the head. The miner later died. The inspector had predicated the unwarrantable failure on the fact that miners would step back whenever the procedure for removal of a drill adapter was performed using machine power and supervisory personnel knew that the miners would retreat to safe positions at such times. The inspector concluded that because the mine operator continued to use the procedure, the operator was indifferent to the safety of the miners.

The parties advise that investigation into this 104(d)(1) citation revealed that the evidence does not support the inspector's determination of "high negligence" or "unwarrantable failure." Interview statements from the miners established that the procedure had been used for at least two years before the fatality. During that time, a wrench had never been thrown but rather would simply rotate against the drill mast and fall to the ground. None of the mine mechanics who had used the procedure had thought the procedure unsafe before the fatality.

Other evidence revealed that a representative of the drill manufacturer had shown the operator the procedure as an efficient way to unscrew the adapter and that Schroeder Brothers mechanics also had used that same procedure when they were at the mine performing maintenance and repairs. The drill's service manual was silent about how to remove the adapters, leaving the impression that the demonstration by the manufacturer's representative was as safe as any other means of removing the adapters.

The parties, after further investigation, agree that rather than establishing plain indifference or a reckless disregard of miner safety and the regulatory requirements, the evidence shows the operator's actions not to be in conformance with safe and prudent operating practices. The operator's actions were neither willful nor unwarrantable. More accurately, the operator acted with moderate negligence by not employing an alternative, safer method of accomplishing the task.

Under the proffered settlement, the citation is modified from a "high negligence" 104(d)(1) violation to a "moderate negligence" 104(a) violation and the penalty is reduced from \$35,000.00 to \$10,000.00.

I have considered the representations and documentation submitted in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Citation No. 4060756 be modified as agreed and indicated above and that the Respondent, Pittsburg and Midway Coal Mining Company, **PAY** a civil penalty of \$10,000.00 to the Secretary of Labor within 30 days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

The hearing previously set for July 30, 1996, in Albuquerque, New Mexico, is canceled.

August F. Cetti
Administrative Law Judge

Distribution:

Connie M. Ackermann, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

John W. Paul, Esq., PITTSBURG & MIDWAY COAL MINING CO., 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991

/sh

CONNIE M ACKERMANN ESQ
OFFICE OF THE SOLICITOR
U S DEPARTMENT OF LABOR
525 GRIFFIN ST #501
DALLAS TX 75202

JOHN W PAUL ESQ
PITTSBURG & MIDWAY COAL MINING CO
6400 S FIDDLER'S GREEN CIRCLE
ENGLEWOOD CO 80111-4991