

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, Suite 9500
Washington, D.C. 20001

January 8, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
ON BEHALF OF DANNY FOUST,	:	Docket No. KENT 2002-203-D
Complainant	:	BARB CD 2001-15
v.	:	
	:	Preparation Plant
MANALAPAN MINING COMPANY,	:	Mine ID 15-12602
Respondent	:	

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
RESPONDENT’S MOTION TO STRIKE, FOR SANCTIONS
AND ATTORNEY’S FEES**

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Danny Foust under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“the Act”). A hearing was duly scheduled and held on September 10-12, 2002, in Harlan, Kentucky. After the parties rested, the record was closed and a briefing schedule was established. Attached to the Secretary’s post-hearing brief were copies of a January 19, 2001, Order of the Commission approving a settlement agreement and dismissing a discrimination proceeding brought, *inter alia*, against Respondent, and several orders by Commission Administrative Law Judges approving settlements of discrimination actions brought against Respondent and/or other allegedly related entities. Also attached were an Order of Temporary Reinstatement by a Commission ALJ and copies of records from the State of Kentucky purporting to establish that Respondent’s chief executive officer had an interest in the entities that were the subject of the orders.

Respondent moved to strike the exhibits and related portions of the Secretary’s brief, arguing that they were submitted after the record was closed, were not disclosed in pre-hearing proceedings, involved matters that had been settled through confidential agreements including sealing of the records, and that the attempt to submit such evidence after the hearing deprived it of procedural due process. Respondent sought sanctions against the Secretary’s representative and an award of attorney’s fees. Respondent also requested an opportunity to present evidence regarding the circumstances of the various orders, in the event its motion to strike was denied.

The Secretary’s position is not entirely clear. In her most recent filing, a response to Respondent’s reply to her opposition to the motion, she argues that the Commission orders and decisions are simply “case law” cited for “legal precedent,” and that they are relevant to

Respondent's history of violations.¹ However, in her opposition to the motion, and in her brief, at pp. 94-96 and related portions of her reply brief, she went considerably further, asserting that the materials were relevant to evaluating the credibility of Respondent's witnesses. In essence, that the decisions establish that Manalapan (and other entities in which Manalapan's chief executive officer has, or has had, an interest) has previously discriminated against miners in violation of the Act, which tends to prove that Manalapan discriminated against Foust. In making that argument, the Secretary relies on factual matters that are not contained in, nor discernable from, the reported decisions. While it may be correct, as the Secretary asserts (without citation to authority), that legal and factual findings of earlier decisions are routinely discussed by courts, the ALJ decisions approving settlement contain no adjudicated facts. They establish only that discrimination cases were brought against the named respondents and that they were settled on largely undisclosed terms, with the respondents agreeing to pay a civil penalty.

I must reject any attempt by the Secretary to use the materials in dispute as substantive proof of discrimination. Such an attempt would violate orders establishing prehearing procedures in this case and would unduly delay resolution of this case by requiring that Respondent be given an opportunity to be fully heard on the asserted circumstances of the prior cases. In addition, the Secretary has completely failed to demonstrate that the mere fact of settlement of a prior allegation against Respondent, much less settlement of an allegation against a different entity, would have any relevance to the credibility of witnesses who testified on behalf of Respondent, or any other issue in this case.

The Notice of Hearing, issued May 9, 2002, directed the parties to submit prehearing reports containing, *inter alia*, a list of all exhibits they intended to offer into evidence at the hearing. The notice further provided that: "Failure to comply with any part of this order may result in sanctions against the defaulting party. . . . Absent good cause shown, no party will be permitted to offer an exhibit that has not been identified in the party's prehearing report and made available for inspection and copying by opposing parties prior to the scheduled hearing."

The documents submitted with the Secretary's brief were not identified on her prehearing report, were not made available to Respondent for inspection and copying prior to the hearing and were not offered, or even alluded to, during the course of the hearing. The hearing record closed after the parties rested and a briefing schedule was established. The Secretary has not requested that the record be re-opened to allow the submission of additional evidence. Nor has she offered any explanation for waiting until the filing of her brief to submit the challenged documents. Absent a showing of good cause for failure to comply with the Notice of Hearing, the proposed exhibits would not have been admitted at the hearing. Here, in the absence of a

¹ Commission Procedural Rule 72, 29 C.F.R. § 2700.72, provides that unreviewed decisions of ALJ's are not binding precedent. The only Commission order relied upon simply dismissed a case based upon a settlement agreement between the parties.

showing of good cause, they cannot be made a part of the record after the hearing record has closed.²

As noted above, in her most recent filing the Secretary asserts only that the orders and decisions are relevant to Respondent's violation history. A violation of the Act, or a safety or health standard contained in or created pursuant to the Act, is a necessary predicate to the imposition of a civil penalty. It also appears that evidence of all previous violations, including cases resolved through settlement, must be considered in evaluating an operator's history of violations for purposes of determining an appropriate civil penalty. *See, Sec'y of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 556-57 (April 1996). As noted above, the ALJ decisions approving settlement establish that a civil penalty was imposed on the respondents in those cases. It would, therefore, be permissible to consider prior violations in cases resolved against Respondent through settlement, and the fact of such settlements may properly be established by citation to final decisions of the Commission. Because the fact of settlement and the imposition of a civil penalty pursuant thereto, as reflected in final decisions of the Commission, could not be reasonably disputed, it would also be appropriate to take judicial notice of them.

² While the Secretary has not specifically requested that judicial notice be taken of the alleged circumstances of the prior settlements, it would be inappropriate to do so. Aside from the fact that in some of the decisions, a civil penalty was imposed upon Respondent pursuant to a settlement agreement, the decisions establish virtually no adjudicative facts not subject to reasonable dispute. Moreover, if the Secretary's assertions regarding the circumstances of the prior cases were to be considered, Respondent would, in fairness, have to be afforded an opportunity to be heard on those matters.

ORDER

Based upon the foregoing, it is **ORDERED** that Respondent's Motion to Strike, for Sanctions and Attorney's Fees is **granted in part and denied in part**. The materials submitted as Exhibit A to the Secretary's brief, as well as related portions of the brief and reply brief, shall not be made a part of the evidentiary record in this case and will not be considered in deciding the merits of the discrimination allegations advanced in the complaint. If Respondent is found to have violated the Act and a civil penalty is imposed for such violation, final orders of the Commission, including decisions approving settlement issued by ALJ's, in which a civil penalty was imposed against the Respondent, Manalapan Mining Co., will be considered solely for purposes of evaluating Respondent's history of violations. In all other respects, Respondent's motion is **denied**.

Michael E. Zielinski
Administrative Law Judge

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