

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 18, 2000

KYBER COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket Nos. KENT 94-574-R
	:	through KENT 94-797-R
	:	and KENT 94-862-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-272
Petitioner	:	A. C. No. 15-16856-03536
	:	
v.	:	
KYBER COAL COMPANY,	:	Docket No. KENT 95-276
Respondent	:	A. C. No. 15-16856-03537
	:	
	:	Docket No. KENT 95-280
	:	A. C. No. 15-16856-03538
	:	
	:	Docket No. KENT 95-284
	:	A. C. No. 15-16856-03539
	:	
	:	Docket No. KENT 95-288
	:	A. C. No. 15-16856-03540
	:	
	:	Docket No. KENT 95-689
	:	A. C. No. 15-16856-03544
	:	
	:	Docket No. KENT 95-692
	:	A. C. No. 15-16856-03542
	:	
	:	Docket No. KENT 95-697
	:	A. C. No. 15-16856-03547

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

A A & W COALS, INCORPORATED,
Respondent

:
:
: Docket No. KENT 95-701
: A. C. No. 15-16856-03545
:
:
: Docket No. KENT 95-707
: A. C. No. 15-16856-03548
:
:
: Docket No. KENT 95-713
: A. C. No. 15-16856-03543
:
:
: Docket No. KENT 95-715
: A. C. No. 15-16856-03546
:
:
: Docket No. KENT 95-776
: A. C. No. 15-16856-03549
:
:
: Elmo No. 5 Mine
:
: CIVIL PENALTY PROCEEDINGS
:
:
: Docket No. KENT 95-242
: A. C. No. 15-16856-03536
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: Docket No. KENT 95-243
: A. C. No. 15-16856-03537
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: Docket No. KENT 95-244
: A. C. No. 15-16856-03538
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: Docket No. KENT 95-245
: A. C. No. 15-16856-03539
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: Docket No. KENT 95-246
: A. C. No. 15-16856-03540
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: Docket No. KENT 95-651
: A. C. No. 15-16856-03542
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: Docket No. KENT 95-652
: A. C. No. 15-16856-03543
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: Docket No. KENT 95-653
: A. C. No. 15-16856-03544
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: Docket No. KENT 95-654
 : A. C. No. 15-16856-03545
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 : Docket No. KENT 95-655
 : A. C. No. 15-16856-03546
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 : Docket No. KENT 95-656
 : A. C. No. 15-16856-03547
 :
 : Docket No. KENT 95-657
 : A. C. No. 15-16856-03548
 :
 : Docket No. KENT 95-740
 : A. C. No. 15-16856-03549
 :
 : Elmo No. 5 Mine

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER TO VACATE
ORDER OF DISMISSAL

Appearances:

Before: Judge Barbour

In the civil penalty cases, the Secretary of Labor, on behalf of the Mine Safety and Health Administration, seeks the assessment of civil penalties against Kyber Coal Company (Kyber) and A &W Coal Company (A &W) for numerous alleged violations of mandatory safety standards for coal mines found in parts 48, 75 and 77 of Title 30 C.F.R. The citations and orders in which the violations are alleged were issued jointly to Berwind Natural Resources Corporation (Berwind), Kentucky Berwind Land Company (Kentucky Berwind), Jesse Branch Coal Company (Jesse Branch), Kyber and A &W. All of the companies, except A &W, contested the validity of the citations and orders on jurisdictional grounds. To resolve the questions of liability, I bifurcated the contest and civil penalty proceedings and first addressed the jurisdictional issues. In subsequent proceedings, I found that of the four contestants only Kyber was subject to Mine Act jurisdiction (Berwind Natural Resources Corporation, et al., 18 FMSHRC 202 (February 1996)).

My decision was appealed to the Commission. Although A &W did not contest jurisdiction, I stayed the civil penalty proceedings against A &W pending the Commission's decision. A &W and the other companies were charged with the same violations, and I agreed with A &W that it was necessary to know which party or parties were potentially responsible for the alleged violations before ruling on the merits of the violations and before assessing penalties for those that were found to have occurred (Order Staying Proceedings (April 15, 1996)).

On appeal, a majority of the Commission held that Berwind, Kentucky Berwind and Jesse Branch were not operators, but that Kyber was (Berwind Natural Resources Corporations, et al., 21 FMSHRC 1284 (December 1999)) and the Commission remanded the cases for further proceedings. Following the remand, I dissolved the stay in the A &W cases and ordered counsels for the Secretary, Kyber and A &W to confer regarding (1) all disputed issues of fact and law, (2) matters that could be the subject of stipulation, (3) the amount of the proposed penalties, and (4) possible settlement. In addition, I scheduled a prehearing conference of record for April 18, 2000, in order for counsels to report regarding their discussions and their preparations for trial.

Immediately prior to the start of the prehearing conference, counsel for the Secretary advised me that a settlement offer had been presented to counsels for Kyber and A & W (Tr. 9). Later that morning counsels advised me that a settlement had been agreed to for all of the violations, citations, and orders involved in the cases and that counsels were prepared to present the settlement on the record. I opened the record and counsel for the Secretary stated the terms of the settlement as well as bases for approving the settlement (Tr. 11-14). Counsels for Kyber and A & W stated that they concurred (Tr. 14-16). Counsel for the Secretary agreed to submit a written motion setting forth the terms of the settlement (Tr. 15-16). In addition, counsel for Kyber agreed that Kyber would withdraw its notices of contest and that the Secretary would make this representation in the settlement motion (Tr. 14-15). At the close of the conference, I advised the parties that I would approve the settlement, and that I would issue a decision approving the settlement upon receipt of the written settlement motion.

On May 10, 2000, the Secretary filed the written motion¹. The proposed settlement is as follows:

Kyber Coal Company
Docket No. KENT 95-776

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
4010541	03/24/94	75.370(a)(1)	\$50,000	\$5,500
4010542	03/22/94	75.360(b)(1)	\$40,000	\$5,500
4010543	03/24/94	75.1702-1	\$50,000	\$5,500
4010544	03/22/94	75.403	\$30,000	\$3,500
4010545	03/24/94	75.321	\$50,000	\$5,500
4010546	03/22/94	75.360(b)(1)	\$40,000	\$5,500
4010547	03/24/94	75.364(b)(2)	\$40,000	\$4,000
4010582	03/22/94	75.364(a)(1)	\$20,000	\$2,500
4010583	03/24/94	75.442(a)(4)	\$20,000	\$2,500

A A & W Coal Company

¹ The written settlement motion is slightly different than the motion presented on the record. The parties orally advise that the written settlement represents their final agreement.

KENT 95-740

4010541	03/24/94	75.370(a)(1)	\$50,000	\$10,000
4010542	03/22/94	75.360(b)(1)	\$40,000	\$10,000
4010543	03/24/94	75.1702-1	\$50,000	\$10,000
4010544	03/22/94	75.403	\$30,000	\$7,500
4010545	03/24/94	75.321	\$50,000	\$10,000
				0
4010546	03/22/94	75.360(b)(1)	\$40,000	\$10,000
4010547	03/24/94	75.364(b)(2)	\$40,000	\$7,500
4010582	03/22/94	75.364(a)(1)	\$20,000	\$5,000
4010583	03/24/94	75.442(a)(4)	\$20,000	\$5,000

With regard to the above-listed citations and orders which were issued in conjunction with an accident where a miner was fatally injured, the Secretary represents that reductions are warranted for Kyber Coal Company because Kyber was a small operator and has left the mining business. In addition, Kyber had no history of prior violation, and its contract mine operator, A A & W, had a good history of prior violations.

With respect to A A & W, the Secretary states that A A & W has suffered substantial adverse business losses when its mine was closed as a result of the accident that triggered the subject citations and orders and that A A & W's size is very small with only 20 miners employed at the mine. Finally, the Secretary states that A & W's negligence was less than originally thought.

With regard to the remaining violations for Kyber contained in Docket Nos. KENT 95-272, KENT 95-276, KENT 95-280, KENT 95-284, KENT 95-288, KENT 95-689, KENT 95-692, KENT 95-697, KENT 95-701, KENT 95-707, KENT 95-713, KENT 95-715, and for A A & W contained in Docket Nos. KENT 95-242, KENT 95-243, KENT 95-244, KENT 95-245, KENT 95-246, KENT 95-651, KENT 95-652, KENT 95-653, KENT 95-654, KENT 95-655, KENT 95-656, KENT 95-657, the Secretary advises that she is exercising her prosecutorial discretion by agreeing to vacate these violations and to withdraw the penalty petitions. The violations involved in these matters were issued and did not contribute to the fatality that resulted from the accident.

Finally, the Secretary states that the Kyber agrees to withdraw all of its notices of contest of citations and orders that it filed and which are contained in Docket Nos. KENT 94-574-R through KENT 94-797-R and KENT 94-862-R.

After review and consideration of the pleadings, arguments and submission in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Kyber Coal Company **IS ORDERED** to pay a civil penalty of \$40,000 in satisfaction of the violations contained in Docket No. KENT 95-776. Payment is to be made to MSHA within 45 days of the date of this proceeding. Also, within the same 45 days the Secretary **IS ORDERED** to vacate all the citations and orders contained in Docket Nos. KENT 95-272, KENT 95-276, KENT 95-280, KENT 95-284, KENT 95-288, KENT 95-689, KENT 95-692, KENT 95-697, KENT 95-701, KENT 95-707, KENT 95-713, KENT 95-715. Upon receipt of full payment and vacation of the citations and orders, these proceedings are **DISMISSED**.

A A & W Coals, Inc., **IS ORDERED** to pay a civil penalty of \$75,000 in satisfaction of the violations contained in Docket No. KENT 95-740. Payment is to be made in three installments of \$25,000 each on June 1, 2000, June 1, 2001 and June 1, 2002. Also, within 45 days the Secretary **IS ORDERED** to vacate all the citations and orders contained in Docket Nos. KENT 95-242, KENT 95-243, KENT 95-244, KENT 95-245, KENT 95-246, KENT 95-651, KENT 95-652, KENT 95-653, KENT 95-654, KENT 95-655, KENT 95-656, KENT 95-657. Upon receipt of full payment and vacation of the citations and orders, these proceedings are **DISMISSED**.

It is further **ORDERED** that the Kyber's motion to withdraw its notices of contest filed in Docket Nos. KENT 94-574-R through KENT 94-797-R and KENT 94-862-R is **GRANTED** and that these cases are **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

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