

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 23, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-648
Petitioner	:	A.C. No. 11-02636-03871
v.	:	
	:	Docket No. LAKE 94-680
BRUSHY CREEK COAL CO., INC.,	:	A.C. No. 11-02636-03872
Respondent	:	
	:	Brushy Creek Mine

DECISIONS

Appearances: Christine M. Kassak, Esq., Office of the
 Solicitor, U.S. Department of Labor, Chicago,
 Illinois, for the Petitioner;
 Karl F. Anuta, Esq., Boulder, Colorado, for the
 Respondent.

Before: Judge Koutras

Statement of the Proceedings

These cases concern civil penalty proceedings filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '820(a), seeking civil penalty assessments for two (2) alleged violations of certain mandatory safety standards found in Parts 70 and 75, Title 30, Code of Federal Regulations.

The respondent filed timely answers contesting and denying the alleged violations and the cases were part of a group of cases involving these same parties heard in Evansville, Indiana, during the hearing term January 18-19, 1995.

Issues

The issues presented in these proceedings include the fact of violation, whether one of the violations was "significant

and substantial," whether one of the violations constituted an "unwarrantable failure," and the appropriate civil penalty assessments to be made for the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 301, et seq.
2. Sections 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

The parties stipulated to jurisdiction, the admissibility of copies of the citations and exhibits, and the fact that the citations were properly served on the respondent by duly authorized representatives of the Secretary of Labor. They also agreed to the annual company and mine coal production tonnage for the 1993 calendar year, the respondent's good faith abatement, the assessed violations' history for the two-year period prior to March 29, 1994, and that the proposed penalties will not affect respondent's ability to continue in business (Joint Exhibit 1).

Discussion

Docket No. LAKE 94-648

This proceeding concerns a proposed civil penalty assessment of \$6,500 for an alleged violation of mandatory health standard 30 C.F.R. 70.100(a), as stated in section 104(d)(2) "S & S" Order No. 9941891, issued on April 11, 1994, and subsequently modified to a section 104(d)(1) "S & S" citation on May 11, 1994. The cited condition or practice states as follows:

The results of five (5) respirable dust samples collected by the operator as shown by computer message No. 001, dated April 5, 1994, indicates the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit No. 001-0 (036) was 2.3 mg/m³ which exceeded the applicable limit of 2.0 mg/m³. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five (5) valid samples are taken.

Docket No. LAKE 94-680

This proceeding concerns a proposed civil penalty assessment of \$2,072, for an alleged violation of mandatory safety standard 30 C.F.R. 75.1101-1(b), as stated in section 104(a) non-"S & S" Citation No. 4267432, issued on July 6, 1994. The cited condition or practice states as follows:

The nozzles in the branch line on deluge type fire suppression system were not directed at the upper surface of the top belt.

The inspector fixed the abatement time as 5:00 p.m., July 6, 1994. At the hearing, the petitioner's counsel produced a copy of section 104(b) Order No. 4267436, issued at 10:15 a.m., July 7, 1994, for the failure of the respondent to totally abate the citation. The order reflects that four of the eight cited nozzles were directed at the upper surface of the top belt, and the inspector concluded that "no effort was being made to direct the remaining nozzles at the upper surface of the top belt." This order was not included with the initial pleadings and proposed penalty assessment filed by the petitioner in this case, and counsel filed it with me in the course of the hearings. Further, the section 104(b) order is not in issue in this case and the proposed penalty assessment relates only to the section 104(a) citation.

Prior to the taking of any testimony or evidence in these matters, the parties informed me that they reached a proposed settlement of both cases, and pursuant to Commission Rule 31, 29 C.F.R. 2700.31, they were afforded an opportunity to present arguments on the record in support of the settlement disposition of the cases (Tr. 18-31).

With regard to section 104(a) non-"S & S" Citation No. 4267432, the petitioner's counsel stated that taking into consideration the respondent's attempts to comply with the requirements of the cited regulation, and only one prior violation in 1993, the parties have agreed that a civil penalty assessment of \$1,036, in settlement of the violation is reasonable, and that the citation will stand as issued (Tr. 21).

In addition to the arguments advanced by the petitioner in support of the settlement, I take note of the low gravity level associated with the violation. (non-"S & S"). The proposed settlement was approved by me from the bench (Tr. 23), and my decision in this regard **IS REAFFIRMED**.

With regard to section 104(d)(1) "S & S" Citation No. 9941891, the petitioner's counsel asserted that the parties agreed to settle the matter by a civil penalty assessment of \$3,250, and that the citation would stand as issued (Tr. 23). The respondent's counsel agreed with the settlement, and presented mitigating arguments in support of the agreement (Tr. 28, 31). The proposed settlement was approved by me from the bench (Tr. 30), and my decision in this regard **IS REAFFIRMED**.

Conclusion

Upon further review of the arguments advanced in support of the settlements, and taking into account the six statutory civil penalty criteria found in section 110(i) of the Act, I conclude and find that the proposed settlements are reasonable and in the public interest. Accordingly, as previously indicated, they are **APPROVED**.

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. The respondent shall pay a civil penalty assessment of \$1,036, in satisfaction of section 104(a) non-"S & S" Citation No. 4267432, July 6, 1994, 30 C.F.R. 75.1101-1(b).

2. The respondent shall pay a civil penalty assessment of \$3,250, in satisfaction of section 104(d)(1) "S & S" Citation No. 9941891, April 11, 1994, 30 C.F.R. 70.100(a).

3. Payment of the aforesaid civil penalty assessments shall be made to MSHA within thirty (3) days of the date of these decisions and order, and upon receipt of payment, these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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