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MSHA V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
January 22, 1980

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

v. Docket No. VINC 77-132-P
IBMA 78-3
CONSOLIDATION COAL COMPANY

DECISION

This case involves a civil penalty proceeding under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, and contested within the administrative procedures then provided by the Department of the Interior. Those regulations required the Department's Office of Assessments to prepare and serve on the mine operator an initial order of assessment; they further provided that the operator could decline to pay the proposed assessment and request a hearing before an administrative law judge. In this case the mine operator had requested such a hearing. Thereafter, but before hearing, the operator offered to pay in full the penalty originally proposed by the Office of Assessments. The principal question presented here is whether the judge's denial of the operator's motion to adopt the original assessment of penalty as his own constituted legal error. We hold that it did not and affirm the judge's decision.

This case arises because of a fatal accident which occurred at a surface coal mine site operated by Consolidation Coal Company. A slide of material from a spoil bank at the mine site resulted in fatal injuries to a foreman-in-training. Following an accident investigation by the Mining Enforcement and Safety Administration (MESA), a notice of violation was issued charging a violation of 30 CFR 77.1006. Subsection (a) of that regulation requires that men other than those necessary to correct unsafe conditions shall not work near or under dangerous high walls or banks. The notice specifically

charged that, at the time of the accident, an assistant superintendent at the mine and the foreman were performing their duties in an area between a stripping shovel and an unstable spoil bank.

In accordance with regulations then in effect, MESA's Office of Assessments issued an order assessing a penalty of $1,300 for the violation. The assessment was discussed without resolution at a conference between

representatives of the mine operator and the Office of Assessments. Consolidation then requested that the matter be referred for an evidentiary hearing before an administrative law judge.

A Petition for Assessment of Civil Penalty was filed by the Office of Solicitor, Department of Interior on July 11, 1977, and sought a penalty for the alleged violation. The petition made no reference to the earlier assessment of the Office of Assessments, nor did it propose any specific dollar amount for the penalty. A copy of the petition was sent to the mine operator with an accompanying letter signed by MESA's attorney. In that letter Consolidation was advised that it could dispose of the matter "at this time" by paying the $1,300 assessment in full.

On August 4, 1977, Consolidation filed an answer denying that a violation took place and the case was assigned to an administrative law judge. During subsequent settlement negotiations, the MESA attorney apparently advised Consolidation's attorney that he would not accept payment of $1,300 as a means of disposing of the proceeding. A prehearing conference was held before the judge on September 9, 1977, at which time the attorney for Consolidation moved that the judge adopt the findings of MESA's Office of Assessments and issue a final order of the Secretary assessing a penalty of $1,300. In opposing the motion, the Solicitor expressed the view that $1,300 was an insufficient penalty, on the grounds that the gravity of the violation and the negligence of the operator justified the maximum penalty of $10,000. By written order of September 14, 1977, the judge denied the motion and scheduled the case for a hearing on the merits. Consolidation's attempt to take an interlocutory appeal from the judge's order was denied by the Board on September 28, 1977.

The case then proceeded to hearing where the parties litigated the issues of whether a violation occurred and, if so, the appropriate penalty. In a written decision issued on January 21, 1978, the judge held that a violation of 30 CFR 77.1006 occurred and found that the evidence showed that the assistant superintendent's actions near the spoil bank immediately prior to the accident were "extremely negligent and reckless in every respect." The judge assessed a $10,000 penalty.

Consolidation appealed to the Board, arguing that the judge erred in denying its motion to adopt the Office of Assessments' original assessment prior to hearing. The operator contends that its willingness to pay the original assessment of $1,300 eliminated any triable issue, rendering a hearing unnecessary. It contends that, in such circumstances, the Board's decision in Zeigler Coal Company,

7 IBMA 312 (1977), requires that the original assessment be adopted by the judge. We reject Consolidation's argument.

In Zeigler, the operator had requested a hearing on all 295 alleged violations for which MESA had sought a penalty. Thereafter, but before the hearing, the operator had offered to pay the full amount assessed by the Office of Assessments for 97 of the violations. The judge found

that MESA would have accepted payment of each penalty in the original assessed amount if assessments for all of the 295 violations were voluntarily paid. Thus, in Zeigler, the Solicitor had not claimed that there was a triable issue of fact regarding the 97 violations, but rather took an "all or nothing" approach in the settlement negotiations. In those circumstances, the Board held that there was no triable issue and that the Office of Assessments' findings may be adopted by the judge if found to be appropriate. In that case the judge affirmatively adopted those findings. Here, the judge held, and we agree, that the Solicitor's request for a $10,000 penalty raised a triable issue, namely, the appropriate amount of penalty in light of the criteria for assessment of penalties set forth in section 109(a)(3) of the 1969 Act.

Furthermore, regulations of both the Office of Assessments, 30 CFR 100.7(d), and the Department's Office of Hearing and Appeals, 43 CFR 4.545(c), specified that if an evidentiary hearing were requested, the judge would determine the amount of civil penalty, if any, on a de novo basis. 1/ Thus, Consolidation was on notice of this Departmental policy at the time it requested the hearing, yet did not make its offer to pay the $1,300 until after the issues had been joined before the judge.

Accordingly, we conclude that the judge's action in denying Consolidation's motion was consistent with both the case law of the Board and the pertinent Departmental regulations that were then in effect. The decision is affirmed.

1/ 30 CFR 100.7(d) provided:

> (d) In assessing a penalty, the Office of Hearing and Appeals may determine de novo the fact of violation and the amount of the civil penalty, taking into consideration the six criteria specified in section 109(a)(3) of the Act.

43 CFR 4.545(c) provided:

> (c) In determining the amount of civil penalty warranted the administrative law judge and the Board of Mine Operations Appeals shall not be bound by a recommended penalty of the Mining Enforcement and Safety Administration or by any offer of settlement made by either party.

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