CCASE:
MSHA V. ISLAND CREEK COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
July 9, 1980

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

v. Docket No. BARB 76-297-P

ISLAND CREEK COAL COMPANY IBMA No. 77-27

DECISION

This is a civil penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976 & Supp. I 1977). The administrative law judge held that regulations adopted by the Department of Interior to implement the civil penalty program did not bind the government to an assessment settlement agreement where such agreement was entered into because of a mistaken assumption of fact on the part of the department's assessment personnel. The judge noted that the mistake and the repudiation of the agreement were called to the mine operator's attention before payment of the penalty. He concluded that the operator was not prejudiced and ordered the case to proceed to a full evidentiary hearing. The judge made de novo findings and assessed Island Creek $5,000. Appeal was timely filed. 1/ We affirm the judge's decision.

This case was initiated as the result of a fatal accident that occurred on January 10, 1975, at an underground coal mine operated by Island Creek in Hopkins County, Kentucky. A mechanic employed at the mine was fatally injured when the boom of a loading machine fell on him. Following an accident investigation, a notice of violation was issued by an inspector of the Mining Enforcement and Safety Administration (MESA) as authorized by 104(b) of the 1969 Coal Act, which charged Island Creek with a violation of 30 C.F.R. 75.1726(b) (1974). That subsection provides:

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

1/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals (Board) under the Coal Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 801 et seq.

The notice cited the following practice:

> Work was being performed under the conveyor boom in a raised position, on the loading machine in the four south panel entries No. 1 unit and was not blocked into position.

The inspector failed to indicate on the face of the notice that itwas being issued as the result of a fatality investigation. The regulations 2/ adopted by the Secretary to implement the civil penalty program required MESA's Office of Assessments to prepare and serve on the mine operator an initial order of assessment. Due to the omission on the face of the notice referred to above, the subject violation was assessed as a non-fatal infraction. By applying the point system provided in 30 C.F.R. 100.3(b) (1975), a penalty of $102 was assessed. The penalty was further reduced to $78 as the result of a settlement conference between a MESA assessment official and Island Creek. During the conference a formal assessment agreement was executed, in compliance with $100.6, by the representatives of the parties.

Two weeks later, the Office of Assessments discovered that the instant notice of violation involved a fatality and determined that the assessment agreement was based on a mistaken assumption of fact onits part. On August 14, 1975, before Island Creek had tendered payment, MESA wrote Island Creek a letter indicating the mistake and repudiated the agreement. Island Creek replied to MESA's letter stating that MESA was bound by the assessment agreement and could not unilaterally void the agreed penalty of $78. Island Creek then tendered payment of the $78, which amount was returned by MESA. MESA reassessed the violation on the theory that it contributed to the fatality and assessed a new penalty of $5,000. Island Creek refused to pay the second assessment and requested a hearing.

Before the judge,Island Creek moved that the proceeding be dismissed with prejudice on the basis that it had previously made payment of an amount agreed upon by MESA in full satisfaction of civilpenalty liability for the subject notice of violation. The judge denied the motion and the case proceeded to hearing.

In a written decision issued on March 24, 1977, the judge held thata violation as charged occurred, but found that there was no negligence on the part of the mine operator. After a lengthy discussion of the criteria provided in 109(a)(1) for the assessment of a penalty, the judge determined that a penalty of $5,000 was

appropriate.

Island Creek appealed to the Board contending that the judge erred in denying its motion to dismiss the proceeding. It further argued that imposition by the judge of a penalty of $5,000 was excessive and an abuse of discretion in light of the judge's finding that the mine operator was not in any way negligent or at fault with regard to the fatal accident.

2/ 30 C.F.R. Part 100 (1975).

With regard to the first issue, Island Creek argues that the record is devoid of any evidence which would support a finding that MESA entered into the agreement because of a good faith mistake. It further urges that MESA did not have a right to unilaterally void the assessment agreement and that the judge's decision nullifies the purpose of a key provision of the assessment regulations in 100.6(d). Under that provision, failure of the mine operator to tender payment of the agreed amount within 10 days resulted in the agreed amount being entered as the final order of the Secretary. It is Island Creek's position that once the assessment agreement for $78 was signed, MESA was precluded from further administrative action. We reject these arguments.

The record does not include testimony from the assessment official who signed the agreement regarding his state of mind during the negotiations. It does, however, provide substantial evidence that during the conference this official was operating under a mistake of fact. Documents of record indicate that, in agreeing to a reduced assessment of $78, he was unaware that the violation was considered by MESA to be the cause of the accident, in this case a fatality. The judge found, and we agree, that the regulations under Part 100 were designed to provide a mechanism by which an operator could settle penalties for alleged violations without the need for a hearing or a decision on the merits, but that these regulations were not intended to bind MESA to an assessment agreement which was entered into on the basis of a good faith mistake that became known to all parties prior to payment.

One of the six statutory criteria to be considered in assessing a civil penalty is "... the gravity of the violation ..." (Section 109(a)(1)). In this case that criterion was obviously not considered by the MESA assessment official in the context of the actual facts of this case. Nor was the inspector who issued the citation present at this meeting. If Island Creek was also unaware of all facts material is assessing the civil penalty, the agreement of the parties was predicated upon a mutual mistake of fact, a firmly established basis for relief and avoidance of an agreement. 3/ Further, if the operator's representative was aware of all such material facts underlying this citation, and also aware of MESA's lack of such knowledge, he had an equitable obligation to so inform the MESA assessment official, or take the risk that the agreement herein could be timely avoided. In either case, the resulting document could be and under these facts was properly repudiated.

3/ See 54 Am. Jur. 2d Mistake, Accident, or Surprise, 4 et seq.

(1971). See also Peabody Coal Company, 7 IBMA 318, 325 (1977).

Finally, we turn to the contention that the $5,000 penalty assessed by the judge was excessive and an abuse of discretion. In his decision, the judge fully considered all six statutory criteria, including the lack of negligence on the part of the mine operator, in making the assessment. Our independent review convinces us that the judge did not err in assessing the penalty. 4/

Accordingly, the judge's decision is affirmed.

4/ See Co-op Mining Co., 2 FMSHRC 784 (1980).

Distribution

William K. Bodell, II, Esq.
Island Creek Coal Company
2355 Harrodsburg Road
P.0. Box 11430
Lexington, KY 40575

Thomas A. Mascolino, Esq.
Edward Fitch, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Va. 22203

Administrative Law Judge William Fauver
FMSHRC
Skyline Center 2
5203 Leesburg Pike, lOth Floor
Falls Church, Va. 22041