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MSHA V. AMAX LEAD COMPANY OF MISSOURI
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 1, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. CENT 81-63-M

AMAX LEAD COMPANY
OF MISSOURI

DECISION

This case is before the Commission on interlocutory review. The issue presented is whether the administrative law judge properly disapproved the parties' proposed settlement agreement on the ground that the settlement contained exculpatory language inconsistent with the general enforcement scheme of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979). For the reasons that follow, we hold that the judge was correct in rejecting the parties' proposed settlement.

On April 23, 1980, Amax Lead Company of Missouri was issued two citations alleging violations of 30 C.F.R. $ 57.5-5, a mandatory health standard regulating miner exposure to airborne contaminants. Thereafter, on January 5, 1981, the Secretary filed a petition for assessment of a penalty with the Commission. On April 6, 1981, the Secretary and Amax filed with the judge a joint motion to approve settlement. 29 C.F.R. $ 2700.30(a). 1/ In an order issued on April 9, 1981, the judge rejected the proposed settlement agreement because of language contained in the following paragraph:

> The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. The parties further agree that any factual admissions made by [Amax] in this settlement agreement are for the purposes of settlement only and shall not be deemed to be an admission by [Amax] for the purposes of any subsequent proceeding brought in any judicial or administrative forum by the United States

Government or by any other party.

1/ 29 C.F.R. $ 2700.30(a) is based upon 30 U.S.C. $ 820(k)(text quoted infra). Commission Rule 30(a) provides:

> General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding.

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The judge found this paragraph objectionable because the exculpatory language made uncertain the existence of the alleged violations." In his order denying approval of the settlement, the judge concluded that the exculpatory language impeded the Commission's ability to determine the operator's history of violations for purposes of assessing future penalties. 30 U.S.C. $ 820(i). The judge also concluded that the exculpatory language could possibly preclude the Secretary in future enforcement actions from using the violations alleged here to establish a pattern of violations under sections 104(e) and 108(a)(2) of the Mine Act. The judge stated, however, that he would approve a settlement containing the following or similar exculpatory language:

> Nothing contained herein shall be deemed an admission by [Amax] of the violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto in any action other than an action or proceeding under the Federal Mine Safety and Health Act.

Following the judge's rejection of the parties' proposed settlement, Amax submitted amendatory settlement language to the Secretary for approval. That proposed amendatory language changed the paragraph of the settlement agreement objected to by the judge to read as follows:

> The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. Nothing contained herein shall be deemed an admission by [Amax] of a violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto, in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.

(Amendatory language emphasized.)
The Secretary rejected the proposed amendment.
Amax then submitted a second revised amendment to the Secretary for approval. As further amended, the paragraph of the settlement agreement objected to by the judge read:
The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. The parties
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agree that these two citations cannot be used against [Amax] in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.
(Amendatory language emphasized.)
The Secretary rejected this proposed amendatory language also. Thereafter, Amax filed a motion with the judge seeking the judge's reconsideration of his order disapproving the parties' original proposed settlement. Amax also alternatively sought either the judge's approval of the amendatory language that the Secretary had rejected and an order enforcing the settlement as amended, or the judge's certification to the Commission of his order denying the requested relief. Amax' motion was opposed by the Secretary. 2/
The judge issued an order denying the motion insofar as it sought reconsideration of his order disapproving the settlement and an order enforcing the settlement in the proposed amended form. The judge, however, granted the motion in part and certified to the Commission for review his interlocutory order denying the relief requested by Amax. We subsequently granted the judge's certification of his interlocutory ruling, as well as a petition for interlocutory review filed by Amax. 29 C.F.R. $ 2700.74(a).
Preliminary to our discussion of the judge's ruling, we emphasize the Commission's authority to review settlements entered into between the parties in contested penalty proceedings. The source of our authority is section 110(k) of the Mine Act. 30 U.S.C. $ 820(k). Section 110(k) in part provides, "No proposed penalty which has been contested before the Commission under Section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission." Accordingly, it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or to reject settlements in contested penalty proceedings. As we observed

in Co-op Mining Company, 2 FMSHRC 3475, 3475-3476 (1980), "[S]ection 11O(k) of the Mine Act places an affirmative duty upon us to oversee settlements."

With respect to the facts of this case, we conclude that the judge was correct in disapproving the parties' joint proposed settlement. We hold that parties are free to admit or to deny the fact of a violation in settlement agreements. Inherent in the concept of settlement is that the parties find and agree upon a mutually acceptable

2/ The Secretary altered his initial position and submitted as he does on review, that the judge correctly rejected the parties' proposed settlement. The Secretary also submitted that he was not bound to the amendatory settlement language proposed by Amax because he did not agree to the changes.

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position that resolves the dispute and that obviates the need for further proceedings. Whether that mutual position involves an admission or denial of a violation under the Mine Act will normally be left to the parties. The Commission's only task in the event of a proposed settlement is to determine whether approval of the parties' agreement is in the public interest. Here, however, the joint settlement of the parties contained exculpatory language that was inconsistent with the enforcement scheme of the Act.

The language proposed by the Secretary and Amax could have prevented any consideration of the alleged violations involved here in future proceedings arising under the Mine Act. Amax conceivably could attempt to use the settlement as a shield in future litigation to avoid certain key enforcement provisions contained in the Act. For example, if such language were approved settled violations could not then serve to establish the operator's history of previous violations as contemplated by section 110(i) or as a basis for a pattern of violations under section 104(e) or 108(a)(2) of the Mine Act. 3/ Such exculpatory language as originally proposed by these parties could prevent some of the Mine Act's strongest compliance incentives from coming into operation. The result could well be a considerable weakening of the agency's enforcement capabilities and, as a result, could jeopardize the health and safety of miners. Although the effect of the parties' settlement could be determined in a future case in which that settlement is relied upon, we do not find that persuasive or a reason for approving the settlement at this time. To do so could allow the Secretary to disregard concessions he had previously agreed to which the Commission had approved. For these reasons, we affirm the judge's order rejecting the settlement submitted to him by the parties. 4/

Amax additionally requests approval of one of the amended

settlements proposed by the operator. We disagree with the judge's statement, in his order denying enforcement of the amended settlement, that "the retention of the sentence preceding the exculpatory phrase is inconsistent with the amendatory language" and that the phrase creates an ambiguity as to the validity of the involved citations. We do not see such an ambiguity. Although Amax refused to admit that a violation occurred, it has quite clearly conceded that, for purposes of any

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3/ Also, were this a case in which the involved violations were the result of the operator's unwarrantable failure to comply with the cited standard, approval of the exculpatory language could prevent the settled violations from being used to establish an unwarrantable failure chain of violations under sections 104(d)(1) and 104(d)(2) of the Act.

4/ As did the judge, we find no difficulty with the exculpatory language as it relates to proceedings arising outside the scope of the Mine Act's coverage. In our view, the effect of such exculpatory language is properly left to the appropriate forum.

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proceedings under the Mine Act, the violations were to be treated as if established. 5/ There is no ambiguity as to the future effect under the Mine Act to be given to the violations. The violations could serve as a basis for implementing the entire enforcement and compliance scheme of the Act noted above. Therefore, we believe that the proposed amendatory language is consistent with the enforcement scheme of the Mine Act. 6/

However, we cannot approve such an "amended settlement" because the parties have reached no mutual agreement concerning it. Because the Secretary did not agree to the amendatory language, he cannot be bound to the terms of the settlement as unilaterally amended by Amax. Thus, the only settlement agreement that was before the judge, and that is now before us on review, is the settlement submitted to the judge for approval on the parties' joint motion.

Finally, we note that approval of the amendatory settlement language is consistent with our decision in Co-op Mining Company, supra. There, in reversing a judge's order approving settlement on the ground that the parties' stipulation showed that the alleged violation did not occur, we stated:

5/ Amax' first proposed amendment in part read:

Nothing contained herein shall be deemed an admission by [Amax] of a violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto,in any judicial or administrative forum, by the

U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.
(Emphasis added.)
Amax' second proposed amendment similarly in part read:
The parties agree that these two citations cannot be used against [Amax] in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.
(Emphasis added.)
6/ The proposed amendatory language is also consistent with our authority under section 110(i) of the Mine Act "to assess all civil penalties" provided for in the Act. In that regard, section 110(a) of the Mine Act in part provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary." Because Amax would have been admitting a violation for purposes of Mine Act proceedings, had the amendatory settlement language been agreed to by both parties and approved by the judge, the assessment of a penalty would have been within the scope of our statutory authority despite Amax' general denial of a violation.
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The legislative history of the [Mine Act] states, 'The purpose of a civil.penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.' [Fn. omitted.] To assure this purpose is served section 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements. Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred.
2 FMSHRC at 3475-76.
As the above passage indicates, our holding in Co-op Mining Company was based upon our concern with promoting operator compliance with the Mine Act. Because the settlement agreement in that case established that the alleged violation did not take place, approving the settlement would not have promoted the operator's future compliance with the Act. In this case, however, with respect to the amendatory language under discussion we are not presented with a settlement that establishes that no violation occurred. Rather, a violation is established even though the operator makes no "admission" to that effect.
Accordingly, the judge's order denying approval of the settlement

agreement proposed by both parties is affirmed and the case is remanded for further proceedings including, of course, the opportunity for both parties to proceed with an appropriate settlement in light of this decision.

Rosemary M. Collyer, Chairman
Richard V. Backley, Commissioner
Frank F. Jestrab, Commissioner

Commissioner Lawson, concurring in part and dissenting in part:

Contrary to the majority, I agree with the judge and the Secretary that the amendatory language creates an ambiguity as to the validity of the involved citations. One cannot deny the existence of a violation and at the same time agree to the payment of a penalty therefor, since all penalties must be predicated upon the existence of a violation. Section 110(a); Co-op Mining Company, supra. However, since any further settlement which is proposed containing exculpatory language must be agreed to by all parties to the proceeding, the Secretary has the power to reject any such language which he believes to be contrary to the Act or the public interest.

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