CCASE:
MSHA V. INVERNESS MINING
DDATE:
19830805
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
August 5, 1983

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

v. Docket No. LAKE 81-45-M

INVERNESS MINING COMPANY

DECISION

This civil penalty case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981), presents the question of whether a Commission administrative law judge appropriately approved the parties' settlement motion. 1/ The operator, Inverness Mining Company, filed a petition for discretionary review complaining of various statements in the judge's decision. For the reasons that follow, we affirm the judge's settlement approval as herein after modified.

Inverness operates an underground fluorspar mine in Illinois. On August 4, 1980, a non-fatal roof fall accident occurred towards the end of the second shift at the mine. A miner received injuries when a slab of shale fell from the back or face of the drift in which he was working. It appears that during the preceding shift, the back and ribs of the drift had been scaled or barred down--that is, loose shale had been scraped away. The back was bolted up to the working face. It is not clear whether the miners on the second shift engaged in any testing, barring, or scaling in the drift, although they did visually examine ground conditions. Conflicting pretrial statements were submitted concerning the condition of the back and the face during the second shift.

The day following the accident, an inspector from the Department

of Labor's Mine Safety and Health Administration (MSHA) arrived to conduct an accident investigation. At the conclusion of his investigation, the MSHA inspector issued to Inverness a section 104(a) citation, alleging a violation of 30 C.F.R. 57.3-22, a ground control standard, in

_____

1/ The judge's decision is reported at 3 FMSHRC 2576 (November 1981) (ALJ).

connection with the accident. 2/ The citation states in part, "The back of the drift was not tested before the beginning of the work shift or any time during the work shift." During his investigation the inspector obtained oral statements from the victim, his co-worker, and the second shift foreman. The gist of these statements was that no barring or scaling had been done during the second shift, that the shale looked pretty good, but that it was always hard to tell whether shale was in fact as good as it looked.

During the close-out conference at the conclusion of the investigation, the inspector informed Inverness management officials of his intention to issue a citation for failure to test the back during the second shift. According to the inspector's field notes memorandum, the mine manager and the mine superintendent exchanged words with the inspector concerning the citation. The inspector's memorandum states in part:

> At the close out confer[e]nce ... [the mine manager] said that I was out of line and that he was going to take this to court and that he was going to call my superviso[r]. I told him that it was all right with me if he took the citation to court. He ask[ed] me if I had ever worked around shale. I told him that I had worked around shale a lot and that [is] why I knew that you can not tell if the top is good just by looking at it. [The mine superintendent] said that the roof was checked by the foreman before the shift started. I told him that the foreman by his own statement said that he checked the roof by looking at it, not testing it. [The superintendent] said that he did not think it was right for me to give them a citation and looked and sounded mad....

The inspector's subsequent formal accident report notes, however, that the "cooperation of company officials and employees during this investigation is gratefully acknowledged."

On January 5, 1981, MSHA filed with the Commission its proposal for a penalty, seeking a penalty of 2,500 for the alleged violation. The narrative findings for a special assessment, attached to the proposal, allege that the gravity of the violation was serious and that the violation resulted from the operator's negligence. Inverness filed an answer, denying that it had violated the standard.

2/ Section 57.3-22 provides:

> Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

On February 6, 1981, the Commission administrative law judge issued a notice of hearing and pretrial order which required the parties to make extensive submissions of information relevant to the case. In its first response, Inverness contended that the back, ribs, and face of the drift had been examined, tested, and scaled down prior to the accident. The operator submitted a number of signed and notarized statements from its employees obtained by Inverness' safety director.

In his statement, the victim claimed that there "was no loose stuff on the walls whatsoever," that he and a co-worker made "a visual inspection of everything" when they started work, and that "you could tell definitely that [the area] had been scaled down, and there was no loose shale or rock hanging anywhere ... that you could see." A statement from the foreman on the preceding shift indicated that during that shift, scaling and barring were done in the drift. In his statement, the second shift foreman stated he "inspect[ed]" the drift at the start of his shift, that the drift "was bolted right up to the working face," and that there "was no loose material hanging anywhere." Finally, Inverness submitted the daily work inspection log, which includes notations that preshift and onshift inspections were made in the drift in question.

On October 13, 1981, following the various submissions summarized above, the parties filed a jointly signed motion to dismiss and approve settlement. The motion proposed an "agreed penalty" of 1,000. The parties also stipulated that respondent demonstrated "ordinary or low negligence." The parties made the following representations:

> The company inspected the mine on a preshift inspection and on a shift inspection as evidenced by the company records presented in response to the Court's pretrial order. This page was copied from the Work Inspection Log of Inverness....
>
> The statements ascertained by both [MSHA] and Inverness ... are replete with contradictions. The Accident Investigative Report concludes the cause of the accident was the failure of the miners to examine and test the back and face of the drift and the failure of the operator to insure that this was done. A reading of the transcriptions of the tapes [of oral statements] indicates that the face looked "pretty good, and the injury occurred when [the victim's co-worker] scratched

the rock in one of the holes."

Every statement submitted by respondent conflicts with the original statements made at the time of or near the day of the accident. Each statement received from the employees indicates that the drift had been scaled down with the heading roofbolted ... up to the working face which is contradictory to the citation itself which states that the back of the drift was not tested before the beginning of the work shift.

After the judge received the parties' motion, he engaged in telephone conversations with counsel for Inverness. In those conversations, he indicated that he would not approve a 1,000 penalty and suggested a 1,500 penalty instead. On October 31, 1981, Inverness' counsel sent the judge a letter in which he stated:

> Pursuant to our previous telephone conversation, I am hereby confirming that the Inverness Mining Company agrees to settle this matter by payment of a 1,500 penalty rather than the 1,000 mentioned in the Motion to Dismiss....

The judge granted the settlement motion, approved a 1,500 penalty, and dismissed the case. In the course of granting the relief sought and agreed to by the parties, the judge expressed certain opinions that are the subject of Inverness' petition for review. First, the judge attributed the accident mainly to managerial production pressure and a lax attitude towards safety:

> The accident investigation established that at the beginning and throughout the shift the miners and their supervisor were at all times aware of the fact that there was questionable shale at the back of the drift, but that due to the pressure to catch up with production the miners and their supervisor decided to take a chance that it could be worked without testing. That this was in accord with the policy of top management was established by the angry reaction of the plant manager and the superintendent that leads to so many fatal and disabling accidents.... Here experienced miners were encouraged to ignore sound safety practices because the top management of a new operation was pushing for production.

3 FMSHRC at 2576.

Second, the judge accused the operator of questionable litigation tactics:

> Top management's attitude alone justified the penalty of 2,500 originally proposed. Because of the effort made to muddy the waters, MSHA proposed a settlement of 1,000 or 40% of the amount initially proposed. The trial judge rejected this and suggested 1,500.

This proposal was accepted by counsel for the operator on October 31, 1981.

... [I]t is my opinion that this operation bears close scrutiny and that unless top management's attitude changes serious violations will continue to occur. I will expect that the next time around the Solicitor will recognize that miners who are induced to contradict their contemporaneous statements are still

> reliable witnesses of what actually transpired and that little weight is to be accorded self-serving afterthought statements elicited under pressure from the operator.

3 FMSHRC at 2576-77.

Inverness ultimately asks the Commission on review "to set aside the decision and order entered by the [judge] insofar as his conclusions are inconsistent with the motion to dismiss and approve settlement." Petition at 9 (emphasis added). Inverness does not request the Commission to reduce or to vacate the 1,500 penalty. 3/

We have examined the record, the salient portions of which are summarized above, and fail to find evidentiary support for the judge's critical comments. No statement lends support to his observation that this particular operator had a "take a chance" attitude towards safety out of its desire or policy to increase production. The "angry" reaction of company officials to the citation seems nothing more than the exchange of disagreements to be expected at many close-out conferences. Certainly, operators have the right to take MSHA "to court." The inspector himself in his accident report expressly thanked Inverness officials for their cooperation with his investigation. Similarly, there is nothing in the record that indicates Inverness' employees were "pressured" to change their statements in an effort "to muddy the waters." The statements do conflict, but only trial and cross-examination have revealed the credibility of the employee and the veracity of their various statements. Accordingly, we disapprove and strike, for lack of record foundation, the judge's criticisms of the operator's safety attitudes and litigation tactics contained in the passages from the three paragraphs of his decision quoted above.

3/ The operator states that "it is interesting to note the circumstances under which [the] 1,500 [penalty] was arrived at." Petition at 2. Inverness points to its request that the hearing be held in Indiana, and then refers to the judge's telephone calls on the subject of settlement. The operator alleges that the judge "suggested" a 1,500 penalty "or else a prehearing conference would be held in Washington, D.C., and thereafter a hearing would be held in Washington, D.C. The Inverness Mining Company, recognizing the economics of the 'choice' that [the judge] 'suggested,' reluctantly consented to a 1,500 settlement figure." Petition at 2-3. After review was granted, the judge filed with the Commission his own affidavit, in which he denied pressuring Inverness to settle.

Inverness does not present any due process argument in connection with this incident. While we need not address this matter in detail, it illustrates the risk of possible misunderstandings, conflicting interpretations, and differing recollections, resulting from a judge's telephonic communications on such matters with one party off the formal record. Such a practice is not condoned or approved by this Commission. See generally Knox County Stone Co., Inc., 3 FMSHRC 2478 (November 1981).

No party objects to the remainder of the judge's decision, and it is supported by the record. The parties agreed to a 1,500 penalty and, among other things, stipulated to the operator's negligence. The mine did not have a significant prior history of violations. Based on our review of the record, we conclude that the penalty is consistent with the six statutory penalty criteria. 30 U.S.C. 820(i)(Supp. V 1981). Therefore, we affirm the judge's settlement approval on the narrow grounds on which it actually rests.

For the foregoing reasons, we affirm the judge's approval of the 1,500 penalty in settlement of this case as modified.

~1390
Distribution

Linda Leasure
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Gordon E. Maag, Esq.
Walker and Williams
4343 West Main Street
Belleville, Illinois 62223

John McClurg, President
Seaforth Mineral & Ore Co., Inc.
P.0. Box 22290
Cleveland, Ohio 44122

Administrative Law Judge Joseph Kennedy
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041