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MSHA V. BELCHER MINE
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FMSHRC-WDC
JUL 10, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. SE 84-4-M

v.

BELCHER MINE, INC.

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), Commission Administrative Law Judge Joseph B. Kennedy issued a decision approving a settlement agreed to by the parties. 6 FMSHRC 1052 (April 1984)(ALJ). We granted the Secretary of Labor's petition for discretionary review of that decision. The Secretary asserts that the judge's decision contains unsupported and unwarranted allegations of perjury and subornation of perjury, and unsubstantiated defamatory remarks beyond the proper scope of a settlement approval. We agree.

Belcher Mine, Inc. ("Belcher") operates an open-pit limestone quarry located in Aripeka, Florida. On August 1, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") Alonzo Weaver, observed a bulldozer operator positioning a mobile crusher unit by means of a draw bar attached to the bed of the crusher. The crusher's draw bar was beneath a structural steel boom that extended some 70 feet from the unit. The boom was supported by steel girders anchored to the crusher's bed and a wire rope suspension cable. The inspector observed the operator of the crusher beneath the

boom.

The inspector questioned Belcher's foreman, Floyd Miles, about the crusher, which he believed to be a different unit from that which he had observed during an earlier inspection. The inspector observed, upon detailed examination, that the anchor points that held the crusher's suspension frame in place were damaged. The right anchor had worn through and the left anchor exhibited a break in a previous repair weld. As a result, the inspector issued a combined imminent danger withdrawal order under section 107(a) of the Mine Act, 30 U.S.C. $ 817(a), and a citation under section 104(a) of the Act, 30 U.S.C. $ 814(a), alleging a violation of 30 C.F.R. $ 56.14-26. 1/

Subsequently, the Secretary of Labor proposed a civil penalty for the alleged violation. Belcher contested the penalty, and the jurisdiction of this independent agency attached. Judge Kennedy was the administrative law judge assigned by the Commission to hear the matter. At the hearing, the inspector testified that the bulldozer positioning the crusher appeared to have a faulty clutch, causing it to lurch. The inspector stated that this jolting action could have caused the crusher's already weakened suspension frame to break free of its anchors. If the anchors failed, the frame supporting the boom could have collapsed and anyone below the boom would have been injured. According to the inspector, the anchors had been broken for some time, as rust had developed on the surface of the breaks in the anchor points.

During Inspector Weaver's direct testimony, Judge Kennedy asked him whether Belcher's foreman, Mr. Miles, had known about the condition of the anchor before the inspection, and the inspector replied that he believed so. On cross-examination by Belcher's president, Warren Hunt, the inspector again opined that Miles or the company superintendent, Robert King, knew that the structural support was broken prior to his issuance of the order and citation. Mr. Hunt also asked Inspector Weaver whether he had found the same crusher in acceptable condition during his previous inspection. The inspector responded that the crusher that he had previously inspected was a different unit. Mr. Hunt elicited testimony on the number of crushers at the mine. The inspector maintained that there were three crushers; Mr. Hunt insisted that there were two.

To determine how many crushers were at the mine, Judge Kennedy directed the Secretary's counsel, Kenneth Welsch, to furnish for the record a copy of the inspector's contemporaneous notes from his August 1 inspection. The judge stated that he wanted further clarification of this question following the lunch-hour recess. When the hearing reconvened, Mr. Welsch was unable to explain the

discrepancy between the assertions of the inspector and Mr. Hunt as to the number of crushers at the mine.

1/ 30 C.F.R. $ 56.14-26 provides:

> Mandatory. Unsafe equipment or machinery shall be removed from service immediately.

He stated that he was willing, for purposes of this case, to have the judge assume that the crusher inspected on August 1 was the same crusher examined during the earlier inspection. The judge commented to the effect that this concession ended the controversy. However, he marked the inspector's contemporaneous notes for identification and received them into evidence.

Judge Kennedy questioned the inspector about an entry in his notes concerning employee comments about the alleged violation. The comments read: "Been that way for a week or more. Scared to get near it." Exh. Px-5. When Judge Kennedy asked the inspector, "Who told you that?" Mr. Welsch objected based upon the informer's privilege. The judge overruled the objection and continued to seek to determine the identity of the employee who had made the comments. Mr. Welsch resisted the judge's inquiry into this area and informed the judge that an assurance of confidentiality had been extended to the employee. Judge Kennedy nevertheless asked the inspector whether the employee was present in the courtroom. Mr. Welsch instructed the inspector to answer the judge's question. The inspector responded that the employee was present.

Belcher's representative, Mr. Hunt, then informed the judge that he had just learned that an individual (either his foreman or superintendent) had known about the condition of the crusher prior to the issuance of the withdrawal order. This fact apparently conflicted with what Mr. Hunt had previously been told. After a recess suggested by the judge, Mr. Hunt advised the judge that Foreman Miles had known about the cracked support for at least a week prior to the August 1 inspection. Mr. Hunt then proceeded to offer to pay a civil penalty for the violation.

Judge Kennedy stated that he considered the violation to warrant a $750 penalty and that, if the parties wished to enter into a settlement agreement to that effect, he would approve it. Mr. Hunt agreed and Mr. Welsch moved for a $750 penalty assessment. In a bench decision, Judge Kennedy ordered the settlement approved. The judge subsequently issued a written decision confirming the bench decision. 6 FMSHRC at 1052.

In his written decision Judge Kennedy found, inter alia, that "Pursuant to [Department of Labor] policy ... the inspector repeatedly evaded my questions about what [Foreman] Miles said about the hazardous condition [of the anchors] 6 FMSHRC at 1053. His decision purported to contain quotations of the inspector's testimony including the following statement: "I don't recall whether he said anything

about how long it had been there." 6 FMSHRC at 1053-54. The judge concluded that this testimony was false and that the Secretary's counsel, Mr. Welsch, "made no attempt to correct the false testimony." 6 FMSHRC at 1054. Judge Kennedy also stated that at the time Mr. Welsch offered to furnish the inspector's contemporaneous notes of the August 1 inspection, Mr. Welsch knew that the notes contained a statement by an employee of the operator that the anchors had "been that way for a week or more." Id. The judge opined that "the only employee the inspector had talked to on August 1 about the anchor was Mr. Miles." Id. Judge Kennedy concluded, "But again the [S]olicitor made no attempt to correct the inspector's false testimony." Id.

As part f his discussion of the informer's privilege issue raised by Mr. Welsch, Judge Kennedy stated that he found "it hard to accept that the Solicitor is so legally obtuse and ethically confused as to believe a grant of confidentiality to an informer takes precedence over a witness's solemn oath to tell the truth. Or that the informer privilege justifies palming off perjured testimony in an adjudicatory proceeding." 6 FMSHRC at 1055. The judge stated that he made these observations and findings "because I am disturbed, as I believe the Commission will be disturbed, to learn of the extremes to which the Solicitor may go in turning a deaf ear to false and misleading testimony." Id. Judge Kennedy went on to "condemn in the strongest terms possible the subornation that occurred and serve warning that if it happens again I shall feel compelled to refer the matter to the Commission and the criminal division for such disciplinary action as they deem appropriate." 6 FMSHRC at 1056. Throughout his decision, Judge Kennedy also made a number of comments critical of what he labelled "the administration's policy" of "cooperative enforcement."

We turn first to Judge Kennedy's allegations of criminal conduct. Upon careful review of the record, we conclude that Judge Kennedy's accusations of perjury and subornation are not supported by the record and were inappropriately made in his decision.

Any accusation of criminal conduct is a grave matter, not to be undertaken lightly, especially by a jurist schooled in the law and aware of the requirements of due process. Under the United States Code, perjury and subornation of perjury are felonies, punishable by fines of up to $2,000 and imprisonment of up to five years. 18 U.S.C. $$ 1621, 1622 (1982). Essential elements of the crime of perjury include a statement on a material matter, willfully made, which the witness does not believe to be true. Bronston v. United States, 409 U.S. 352, 357 (1973). The essential elements of the crime of subornation of perjury include proof that perjury was committed, and that the suborner knowingly and willfully induced or procured the witness to give false testimony. See e.g., United States v. Brumley, 560 F.2d 1268, 1275-77 (5th Cir. 1977).

An examination of the portion of the transcript containing the allegedly perjured testimony indicates that the judge was questioning Inspector Weaver about Foreman Miles' reaction to the issuance of the withdrawal order, what Foreman Miles knew about the damaged condition of

the anchors, and when such knowledge was gained. 2/ An examination of the inspector's answers reveals that he was attempting to respond to the judge's questions without revealing the identity of the employee who had informed him of the unsafe condition. On review, the Secretary concedes this fact. Petition for Review at 11. Answers by a witness that are

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2/ The colloquy between Judge Kennedy and Inspector Weaver follows:

JUDGE KENNEDY: Well, Mr. Miles was with you when you--

THE WITNESS: He was with me that day -- [August 1, 1984]

JUDGE KENNEDY: What did he say?

THE WITNESS: Whether or not he was aware of it or not? He was aware of it. He saw it -- he was right there with me.

JUDGE KENNEDY: Is that the first t+.= he saw it?

THE WITNESS: No, sir. I don,t think so. I don't think it was the first time.

JUDGE KENNEDY: What did he say, if anything? If he didn't say anything, just tell me; or if he did, tell me to the best of your recollection what he said.

THE WITNESS: (Pauses.)

JUDGE KENNEDY: You both walked up and you both looked at this condition?

THE WITNESS: I don't recall whether I asked him specifically how long it had been there --

JUDGE KENNEDY: I am not asking you that -- I am just asking you --I assume he looked at it and you made a decision right then that you were going to issue a closure order; correct?

THE WITNESS: Yes, I said, "This is a hazard. I am going to have to pull the people out of this operation until -it is repaired ["] --

JUDGE KENNEDY: And I assume -- I assume that -- that came as a bit of a shock to him or was he perfectly bland about it?

THE WITNESS: No, sir. He was --

(footnote 2 continued)

merely unresponsive to questions, however, will not support a finding of perjury. Cf Bronston v. United States, 409 U.S. at 357-62. Furthermore, questions that are susceptible to different interpretations by a witness will also not support such a finding. Cf. United States v. Bell, 623 F.2d 1132, 1135-37 (5th Cir. 1980). We find that Judge Kennedy's questions themselves are not without ambiguity. Had Judge Kennedy explicitly asked Inspector Weaver whether he had ever discussed with Foreman Miles when the latter first learned of the condition of the anchors, and had the inspector untruthfully denied any such discussion, the matter might stand in a different light. The questions, however, are susceptible of different interpretations and on this record the literal truthfulness of the inspector's testimony can not be discounted. Thus, we find that the judge's conclusion that the inspector perjured himself is not supported by this record. Further, the record is silent concerning any attempt by Mr. Welsch to induce Inspector Weaver to testify falsely. Thus, we conclude that the judge's charge of subornation is likewise unfounded.

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Footnote 2 end.

> JUDGE KENNEDY: (Interrupting) You are going to shut his full operation down here and he is the foreman.
>
> THE WITNESS: No sir. No sir. I told him, I said, "I will give you time to get hold of Mr. King here if you would like ["] --
> JUDGE KENNEDY: Right.
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> THE WITNESS: (Continuing) -- and he said, "No," -- the way I recall it, he said, "No, that won't be necessary. I will go ahead and shut it down. And contact Mr. King." Whether or not he did, I don't know.
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> JUDGE KENNEDY: That was all he said, then?
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> THE WITNESS: That was all he said.
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> JUDGE KENNEDY: He wouldn't say anything about whether he -
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> THE WITNESS: (Interrupting) I don't recall if -he did.
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> JUDGE KENNEDY: All right. So then you shut him down right at 9 o'clock.

Tr. 39-41 (emphasis added).

The Secretary also points out that Judge Kennedy supported his allegation of perjury by misquoting record testimony. A comparison of the relevant portion of the judge's decision with the corresponding section of the transcript indicates that Judge Kennedy did misquote Inspector Weaver. The judge states:

> Weaver finally testified that "all Miles said was that he would shut the crusher down and contact Mr. King. That was all he said. I don't recall whether he said anything about how long it had been there." This was not true.

6 FMSHRC at 1053-54. No testimony identical to the purported quotation appears in the transcript. Needless to say, Judge Kennedy's attribution of misquoted testimony to a witness being accused of perjury is inexcusable.

The Secretary further argues that the judge's abuse of authority in making unsupported allegations of criminal conduct is rendered even more egregious by the fact that the accusations were made in a public written decision, without prior notice, thereby denying the accused an opportunity to respond to the charges. We agree that Judge Kennedy's methods violated the due process rights of the accused individuals and applicable Commission procedural rules.

In a recent decision, the U.S. Court of Appeals for the Eighth Circuit addressed the propriety of similar judicial accusations of personal misconduct. Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180 (1984). In Robins a U.S. District Court judge attacked the personal reputations and honor of persons involved in pending litigation. The court of appeals held that the judge's comments implicated the constitutionally protected liberty interests of those attacked, and that the accused were entitled to adequate notice and an opportunity to be heard by an impartial tribunal. 747 F.2d at 1190-94. Here, Judge Kennedy's decision not only attacked the personal reputations of Inspector Weaver and Mr. Welsch, but also accused them of felonious criminal activity. In this regard, Judge Kennedy assumed the conflicting roles of grand jury, prosecutor, jury, and presiding judge in issuing his pronouncements. Jurisdiction over federal criminal matters resides with the United States Department of Justice and the federal criminal justice system. If Judge Kennedy had reason to believe that crimes had been committed, he should have referred the matter to the appropriate authorities at the Department of Justice. Cf Pontiki Coal Corp., 6 FMSHRC 1131 (May 1984).

Furthermore, if Judge Kennedy was of the opinion that Mr. Welsch,

as an attorney practicing before the Commission, had engaged in conduct warranting disciplinary action, the judge is particularly aware that he should have referred the matter to the Commission pursuant to Commission Procedural Rule 80. 29 C.F.R. $ 2700.80. Commission Rule 80 provides the necessary due process protections of adequate notice and opportunity to be heard denied Mr. Welsch by the judge. Recently, we found it

necessary to disapprove of Judge Kennedy's continued failure to abide by Rule 80. See T.P. Mining, Inc., 7 FMSHRC ___ (FMSHRC Docket No. LAKE 83-97-D, July 2, 1985). There we stated:

> Judge Kennedy's comments with regard to [an attorney who appeared before him] contain assertions of unethical and unprofessional conduct which, had they been well-founded, would have been grounds for a disciplinary proceeding. We have previously cautioned Judge Kennedy that such allegations made in the course of a proceeding, without the required disciplinary referral, deprive the accused of elementary procedural safeguards. Canterbury Coal Co , 1 FMSHRC 335, 336 (May 1979). By now, Judge Kennedy should know how to make a disciplinary referral. Canterbury Coal Co., 1 FMSHRC at 336; James Oliver and Wayne Seal, 1 FMSHRC 23, (March 27, 1979); In re Kale, 1 BNA MSHC 1699 (FMSHRC Docket No. D-78-1, November 15, 1978). In this case, Judge Kennedy's demonstrated insensitivity to the legitimate interests and rights of those appearing before the Commission, and his disregard of the Commission's rules and our prior warnings on this subject, warrant our gravest concern.

T.P. Mining, supra, slip op. at 5.

The Secretary also maintains that the judge's decision focused on matters far beyond the scope of a settlement approval. The Secretary contends that the judge made defamatory remarks in his decision concerning Mr. Welsch's assertion of the informer's privilege, MSHA's allegedly lax enforcement of the Mine Act, and the personal reputations of Inspector Weaver and Mr. Welsch.

It is clear from the record that Mr. Welsch advanced a proper reason for assertion of the privilege, namely, to preserve the anonymity of one of Belcher's employees who had furnished information to Inspector Weaver under an assurance of confidentiality. Tr. 95-101. We recently outlined the basic principles governing the application of the informer's privilege to Mine Act proceedings. Secretary of Labor on behalf of Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520 (November 1984):

> The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials. Roviaro v. United States, 353 U.S. 53, 59 (1957). See generally Annot., 8 ALR Fed. 6

(1971). The purpose of the privilege

> is to protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation. Roviaro, 353 U.S. at 59; Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, (5th Cir. 1972). The privilege is qualified, however, and where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 60-61.

6 FMSHRC at 2522-23. We also detailed the procedures that an administrative law judge should follow in order to determine the existence of the privilege while balancing the competing interests of confidentiality and disclosure:

> The judge should order the Secretary to turn over the ... material withheld for an in camera inspection. In evaluating this material, the judge should first determine whether the information sought by the respondents is relevant and, therefore, discoverable. If he concludes that the material is discoverable, he should then determine whether the information is privileged. Application of the informer's privilege should be based upon the definition of "informer" adopted above.

Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of this case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or

> harassment, and whether the information is available from sources other than the government.

6 FMSHRC at 2525=26.

In the instant proceeding, the issue of the informer's privilege arose at the time of the hearing and its invocation obligated the judge to consider it in a fair and judicious manner. Here the judge made no attempt to conduct an in camera inspection of material offered

to support

the existence of the privilege. Instead, he conducted his inquiry into the applicability of the privilege in a hostile manner during an open hearing with the operator and prospective witnesses present. Tr. 95-101. Although the events in this case preceded our decision in Bright Coal, supra, the approach adopted by the judge nonetheless violated the requirement in Commission Procedural Rule 59 that "A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 C.F.R. $ 2700.59 (emphasis added).

The judge's active pursuit of testimony concerning the statements made by an employee of Belcher to Inspector Weaver blinded him to his responsibilities under Commission Rule 59. The judge pressed Mr. Welsch for an indication of the identity of the informant and Mr. Welsch resisted that inquiry. Tr. 96-98. Then, after narrowing the choice of potential informants in his own mind down to one of two prospective witnesses for Belcher, the judge asked Inspector Weaver whether the employee referred to in his notes was in the courtroom. Tr. 100. Mr. Welsch again appropriately objected to the question. Upon being overruled he advised Inspector Weaver that he must answer the judge and the inspector responded in the affirmative. Tr. 100-01.

The judge intimated at the hearing that, since section 105(c)(1) of the Mine Act prohibits discrimination against miners who testify or are about to testify in Mine Act proceedings, the claim of informer's privilege was unnecessary. He stated: "I mean, what more protection could a man have?" Tr. 99. This observation, if made in good faith, is at best naive. We would expect the judge to recognize that "the possibility of deterrence arising from post hoc disciplinary action is no substitute for a prophylactic rule that prevents the harm...." NLRB v. Robbin Tire and Rubber Co., 437 U.S. 214, 239-40 (1978). Our Rule 59 is such a rule, and is intended to prevent the disclosure of the identity of a miner-informant to the operator or his agent. Only in "extraordinary circumstances" is such a disclosure justified. The judge made no attempt, either at the hearing or in his written decision, to set forth the "extraordinary circumstances" necessary to justify his actions. In fact, he failed on each occasion to even mention Rule 59. The procedures adopted by Judge Kennedy at the hearing did serious violence to Rule 59. 3/

The record reveals that Mr. Welsch objected strenuously to the judge's line of questioning and was resolute in his assertion of the informer's privilege. This earned him a personalized, unsupported,

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3/ It is important to stress that proof as to the existence of the violation would not in any way have been affected by counsel for the Secretary's attempted reliance upon the informer's privilege. Here, the inspector testified that he believed the violative condition (i.e., the defective anchors) had existed for "several weeks" because of the presence of rust on the surface of the breaks. Tr. 37; see also Tr. 33-36. Accordingly, the Secretary placed into the record evidence relevant to negligence.

defamatory thrashing in the judge's decision. The judge used such phrases as "legally obtuse," "ethically confused," and "ethical astigmatism."

There is no justification for these comments. 4/ As stated in T.P. Mining, supra:

> [T]he judge's criticism of counsel was unnecessary and the language used was intemperate. Words such as "incompetence," "unprofessional," "ineptitude," "ethically improper," "reprehensible," and "irresponsible," when published without support and broadcast to the public, not only wound the advocate personally--they damage professionally. In unjustly maligning one who appears before him, a judge not only demeans himself, but dishonors this Commission. Such unwarranted rebukes can only lessen public confidence in this independent agency's ability to serve its statutory role as a temperate and even-handed decision maker.

Slip op. at 5.

Finally, Judge Kennedy's decision contains certain passages expressing his opinion that MSHA was not vigorously enforcing the Mine Act. The Secretary argues that there is no evidence in this record to support the judge's charges of lax enforcement on the part of the agency. He contends that the judge's remarks are merely an attempt to broadcast his personal perception of enforcement policies, and in no way relate to s proper order approving settlement in this case.

In evaluating Judge Kennedy's comments it is important to consider separately the actions of Inspector Weaver and the government agency as s whole. Inspector Weaver did not agree with the Belcher superintendent s assessment that the cited condition was not hazardous because the bulldozer operator was protected by roll bars. The judge noted that Inspector Weaver, despite this disagreement, reduced the gravity and seriousness of the violation. The reason offered by the inspector for this "incorrect" assessment was, "I would tend to be more lenient with the operator than possibly I should, but I, I feel like that certainly that I don't want to hurt him bad enough to put him out of business." Tr. 54. Given the

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4/ Standard 3(a)(3) of the Code of Judicial Conduct provides:

A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

inspector's issuance of an imminent danger order, his action in reducing his gravity findings, so as not to "hurt" the operator, was erroneous and ill-founded. However, this mistake was conceded by the inspector at trial, and the existence of a greater degree of gravity was argued to the judge by the Secretary's counsel. In any event, we find no evidence in the record to suggest that the reduction in the gravity of the violation made by the inspector was attributable to what the judge averred was "the administration's 'spirit of cooperation'" and "policy of appeasement." Thus, Judge Kennedy's comments are unsupported.

Absent record support, we can only assume that Judge Kennedy's remarks were an attempt to disseminate his personal perceptions of MSHA's enforcement policies. Judicial decisions issued by the Commission and its judges are not appropriate forums for such personal forays.

Based on the foregoing discussion, all remarks in the judge's decision discussed above and found to be unsupported by the record are hereby stricken. No party disputes on review the appropriateness of the civil penalty proposed in the settlement. The $750 penalty was agreed to by the parties and approved by the judge. We find it appropriate and supported by the record. Therefore, we affirm the judge's settlement approval on the narrow grounds on which it should have rested in the first place. Cf. Inverness Mining Co., 5 FMSHRC 1384, 1388-1389 (August 1983) (striking offensive statements from a settlement approval decision issued by Judge Kennedy). 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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Distribution

Anna L. Wolgast, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Warren C. Hunt, President
Belcher Mine, Inc.
P.0. Box 86
Aripeka, Florida 33502

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