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MSHA AND UMWA V. BIRCHFIELD MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 21, 1989

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

and

UNITED MINE WORKERS OF AMERICA Docket No. WEVA 87-272

v.

BIRCHFIELD MINING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER
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" or "Act"), counsels for petitioner Secretary of Labor and respondent Birchfield Mining Company ("Birchfield") have filed a Joint Motion for Approval of Settlement. The motion states that counsel for the United Mine Workers of America ("UMWA") has no objection to the proposed settlement. For the following reasons, the parties' settlement is approved and this matter is dismissed.

In January 1989, acting on Birchfield's petition for discretionary review, we affirmed the decision of Commission Administrative Law Judge Gary Melick (9 FMSHRC 2209 (December 1987)(ALJ)), which found that Birchfield had violated 30 C.F.R. 75.303(a) and that the violation resulted from Birchfield's unwarrantable failure to comply with that mandatory standard. 11 FMSHRC 31 (January 1989). A majority of the Commission reversed Judge Melick's finding that the violation was of a significant and substantial nature; a minority of the Commissioners

dissented on that point. Birchfield had also contended that the judge had erred in assessing a \$400 civil penalty for the violation. In view of its determination that the violation was not significant and substantial, the majority remanded the case to the judge for reconsideration of the appropriate civil penalty.

Judge Melick issued a decision on February 2, 1989, assessing a revised penalty of \$300. 11 FMSHRC 198 (February 1989)(ALJ). The Secretary filed a petition for discretionary review, arguing, in essence, for reconsideration of the Commission's prior determination with respect to the significant and substantial issue. The UMWA, which had not previously

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participated in this Proceeding as a party, intervenor, or amicus also filed a petition for review similarly seeking reconsideration of the significant and substantial issue. By order issued March 14, 1989, we granted both petitions and again directed review. In the meantime, on March 10, 1989, Birchfield had paid to the Secretary the civil penalty of \$300 assessed by the judge, which payment the Secretary subsequently accepted.

Following the Commission's Direction for Review, the National Coal Association ("NCA") and Bituminous Coal Operators Association ("BCOA") jointly and the American Mining Congress ("AMC") individually filed motions to intervene. Concurrently with their motion, the NCA and BCOA, joined by Birchfield, filed a motion to dismiss the Secretary's and the UMWA's review petitions. The AMC, also joined by Birchfield, filed a similar motion to dismiss. In turn, the Secretary and the UMWA opposed both motions to intervene and both sections to dismiss.

On June 22, 1989, Birchfield filed a Renewed Motion to Dismiss and Offer of Judgment. Birchfield asserted that the case was moot due to its payment of the \$300 civil penalty. Birchfield further stated that it "d[id] not wish to incur further litigation expenses...." Pursuant to Fed. R. Civ. P. 68, Birchfield also "offer[ed] to have a judgment entered against it and in favor of the Secretary of Labor for \$400 ..., raising the total payment by Birchfield to the amount of the original penalty proposal." Following the filing of this motion, settlement discussions ensued among the parties.

On July 17, 1989, the Secretary and Birchfield filed a Joint Motion for Approval of Settlement. Noting the Commission's prior divided opinion with respect to the significant and substantial issue, the parties state that they "recognize that final resolution of the [significant and substantial] issue ... is a matter that is not free from doubt...." The parties further "recognize that extensive resources have been expended in the litigation to date and that additional resources will be expended in further pursuit of the litigation should it continue." The motion asserts that "[i]n light of the above considerations, the operator has determined that it no longer wishes to contest the [underlying] citation, its significant and substantial or unwarrantable failure findings, or the assessment of civil penalty."

As part of the settlement, Birchfield agrees to pay a penalty of \$400, the amount originally proposed by the Secretary and first assessed by Judge Melick, Birchfield also agrees to withdraw its previous petition for discretionary review that was the subject of our prior decision. In turn, the Secretary agrees to withdraw her present petition for review.

The parties request the Commission to vacate its initial direction for review of Birchfield's petition, its January 1989 decision, its subsequent direction for review of the Secretary's and UMWA's petitions, the judge's original December 1987 decision, and the judge's February 1989 decision on remand. The motion indicates that counsel for the UMWA has authorized counsel for the Secretary to state that the UMWA "does not object to the settlement" and that, upon Commission approval of the stated settlement terms, "agrees to vacation" of the Commission's direction for review of the UMWA's review petition. Birchfield's earlier Offer of Judgment represented that the NCA and BCOA

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had no objection to the relief sought and, subsequent to the filing of the joint settlement motion, the AMC submitted a statement of non-objection to the settlement motion.

Oversight of proposed settlements of contested cases is an important aspect of the Commission's adjudicative responsibilities under the Mine Act (30 U.S.C. 820(k)), and is, in general, committed to the Commission's sound discretion. See, e.g., *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-675 (May 1986). As we have observed, "our 'responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act.'" *Southern Ohio Coal Co.*, 10 FMSHRC 1669, 1670 (December 1988) ("SOCCO"), quoting, *Youghioghney & Ohio Coal Co.*, 7 FMSHRC 200, 203 (February 1985). The Commission has granted motions to vacate citations and orders and to dismiss review proceedings if "adequate reasons" to do so are present. E.g., *SOCCO*, *supra*, and authorities cited. Here, the real parties in interest, the Secretary and Birchfield, have stated their mutual desire to terminate a course of litigation that has become expensive and onerous to them. The operator has agreed to pay in full the civil penalty originally proposed by the Secretary. None of the parties who have filed petitions for review or motions to intervene have raised any objection to the proposed settlement.

In the past, the Commission has vacated enforcement actions and directions for review in granting dismissal motions on review. We conclude that the nature of the relief sought here is not inconsistent with the Commission's inherent powers as an adjudicative body under section 113(d) of the Act, 30 U.S.C. 823(d), and lies within its zone of discretion in this legal area. We further conclude that, in light of the unique circumstances of this proceeding, adequate cause exists to grant the parties: joint dismissal motion.

Therefore, upon consideration of the motion, it is granted. Our two directions for review in this proceeding are vacated and the underlying petitions for review are dismissed. Our prior decision and the judge's decisions are also vacated. In view of this action, all other pending motions are dismissed as moot.

Richard V. Backley, Commissioner

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Distribution

Anthony J. Cicconi, Esq.
Shaffer & Shaffer
330 State Street
P.O. Box 38
Madison, West Virginia 25130

William D. Stover, Esq.
MAE Services
40 Eagles Road
Beckley, West Virginia 25801

Henry Chajet, Esq.
Doyle & Savit
919 18th Street, N.W.
Suite 1000
Washington, D.C. 20006

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

William E. Hynan, Esq.
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036

Michael T. Heenan, Esq.
Smith, Heenan & Althen
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005

Mark Ellis, Esq.
American Mining Congress
1920 N Street, N.W. #300
Washington, D.C. 20036

Administrative Law Judge Gary Melick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041