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SOL (MSHA) V. U.S.FUEL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

U.S. FUEL COMPANY,  
RESPONDENT

Civil Penalty Proceeding

Docket No. DENV 78-414-P  
A/O No. 42-00098-02025V

King Mine

DECISION APPROVING SETTLEMENT AND  
ORDERING PAYMENT OF CIVIL PENALTY;  
ORDER DENYING MOTION TO AMEND  
CAPTION AND ORDER GRANTING MOTION  
TO AMEND TITLE OF JOINT  
MOTION AND STIPULATION

Appearances: James Abrams, Esq., Office of the Solicitor, U.S.  
Department of Labor, for Petitioner;  
Richard H. Nebeker, Esq., Callister, Greene & Nebeker,  
Salt Lake City, Utah, for Respondent

Before: Judge Cook

I. Procedural Background

On May 5, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against U.S. Fuel Company (Respondent) in the above-captioned proceeding. The petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (Act), alleged violations of 30 CFR 75.200 and 75.400. The Respondent filed its answer on June 7, 1978.

A notice of hearing was issued on July 10, 1978, setting a hearing date of September 12, 1978. Such date was later changed as a result of a motion for continuance. On November 6, 1978, an order was issued canceling the hearing and continuing the proceeding indefinitely in response to a communication indicating that a settlement had been reached.

On January 24, 1979, MSHA filed a "motion to approve settlement and to dismiss." This motion was denied by an order issued on January 31, 1979. Notices were issued setting May 10, 1979, as the hearing date.

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On April 30, 1979, the Secretary of Labor moved to amend the caption, and the parties filed a "stipulation and joint motion to withdraw petition for assessment of civil penalty and for dismissal." On May 2, 1979, a telephone conference was held during which the undersigned Administrative Law Judge and counsel for the parties participated. The parties agreed to obtain certain further information to supplement the April 30, 1979, stipulation and motion to approve settlement. Accordingly, an order was issued on May 10, 1979, continuing the proceeding indefinitely.

The supplemental information was submitted in the form of a stipulation and joint motion on August 14, 1979, in conjunction with a "motion to amend title of joint motion and stipulation." Rulings on the three pending motions are contained herein.

## II. Motion to Amend Caption

In support of his motion to amend the caption, the Secretary of Labor states the following: "Secretary of Labor moves to amend the caption of the pleadings in this case to reflect that Ray Marshall, Secretary of Labor, United States Department of Labor, is the petitioner, rather than Secretary of Labor, Mine Safety and Health Administration."

On April 18, 1978, it was determined by the Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (Commission) that the captions in civil penalty proceedings before this Commission would be in the format as set forth in the present caption to this proceeding.

Accordingly, the motion to amend the caption will be denied.

## III. Motion to Amend Title of Joint Motion and Stipulation

The motion states, in part, as follows:

Petitioner moves, by and through his attorney, pursuant to 29 C.F.R. 2700.13 to amend a pleading entitled "Stipulation and Joint Motion to Withdraw Petition For Assessment of Civil Penalty and for Dismissal" attached hereto as Exhibit A to "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

In support of his motion, petitioner states this is necessary to properly describe: (1) the actions of the parties, and (2) the instrument upon which relief may be properly granted by the Commission.

Petitioner has been authorized by counsel for respondent to state this motion will not be opposed.

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Accordingly, the motion will be granted, and the above-noted motion, filed on April 30, 1979, will be amended to read "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

IV. Approval of Settlement

As relates to the proposed settlement, information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The settlement figure for the alleged violations is \$1,500. The assessment for the alleged violations was \$3,600.

The alleged violations and the settlement are identified as follows:

Order No.	Date	30 CFR Standard	Assessment	Settlement
7-0107 (1 LJG)	04/18/77	75.400	\$1,800	\$ 300
7-0108 (2 LJG)	04/18/77	75.200	1,800	1,200

As justifications for the proposed settlement, the parties state, in part, as follows:

1. Section 104(c)(1) Order No. 1 LJG (sic), 4/18/77, 30 CFR 75.400 originally assessed for \$1,800.00 to be settled for \$300.00.

Gravity, Negligence and Good Faith.

In this case float coal dust was allowed to accumulate on rock dusted surfaces in the 7 North Section for approximately 368 feet. Also, wet loose coal and coal dust were allowed to accumulate from the loading point inby the entries and crosscuts of the 7 North Section for a distance of approximately 2,650 feet and these accumulations ranged in depth from approximately 4 to 18 inches.

While loose coal could burn if ignited or float coal could propagate an explosion if one were to begin, moisture in the area decreased the likelihood of such an occurrence and so its gravity.

Roadways were wet and there were several areas where water had been pumped out the day prior to the citation, thereby significantly reducing probability of a mishap.

Additionally, methane gas has not been detected in the King Mine by the Secretary's duly authorized representative. There has not been an explosion or fire caused by methane gas in this mine. On April 18, 1977, the day the citation was issued, the section was not working. Marion Bingham, the construction foreman, had been sent to the 7 North Section with the large rock duster to rock dust the section.

Although the float coal dust and the accumulations behind the line curtain in the first left entry were dry (see Exhibit "A"), that entry constituted only 90 feet of the total accumulations. The rest of the accumulations of loose coal and fines contained moisture. This fact diminished the probability of a fire. Further, the probability of an explosion which could be propagated by the accumulations of float coal dust was diminished by the fact that no accumulation of methane was measured.

On April 18, 1977, the inspector did not cite any conditions and/or violations which could serve as a potential ignition source; similarly, no electrical defects were cited. Although the possible consequences of the violation could be serious, the probability of those consequences occurring (i.e., a fire and/or an explosion) was measurably reduced by the above conditions.

The accumulations had been observed, and the construction foreman was preparing the rock duster for operation in the section when the violation was cited. It is stated that the citation was the result of the operator's ordinary negligence.

The operator rapidly undertook the process of rock dusting the section and abated the violation by rock dusting the float coal dust and by loading out the loose coal and coal fines and then rock dusting the cleaned areas. It is stated that the operator exhibited good faith in attempting to rapidly correct the violation.

The original assessed penalty was amended to \$300.00 by the Office of Assessments as per Exhibit "D" attached hereto.

Previous History.

During the 24 months prior to the subject violation, 388 violations were assessed at the King Mine (see Exhibit "B"). From the inception of the Federal Coal Mine Health and Safety Act of 1969 to the date of the

subject violation, the operator's total history of previous paid violations was 872 (see Exhibit "C"). This is an average of approximately 116 violations per year up to the date of the subject violation. Of these violations 72 or approximately 8.3% were violations of 30 CFR 75.400. This does not indicate an habitual disregard for the mandates of the standard on the operator's part.

2. Section 104(c)(1) Order No. 2 LJG (sic), 4/18/77, 30 CFR 75.200 originally assessed for \$1,800.00 to be settled for \$1,200.00.

Gravity, Negligence and Good Faith.

On April 18, 1977, an MSHA inspector found that the roof at four locations in 7 North Section was loose and it had not been taken down or supported. The areas involved were three crosscuts between actively used entries and a proposed intake entry. Miners could have accessed the area in question and been exposed to serious injury or death. The area was not being actively worked. However, a warning sign of the danger was posted. A fall had occurred in the proposed intake entry (Exhibit "A").

The poor roof condition had been entered in the preshift books on April 7, eleven days before the subject violation was cited evidencing operator negligence. The only corrective action which had been taken was to post signs warning of the "Bad Top" (see the Order and Exhibit "B").

The violation was abated through the installation of roof bolts in the four areas. It is stated that the operator exhibited good faith in attempting to rapidly correct the violation.

Previous History.

During the 24 months prior to the subject violation, 388 violations were assessed at the King Mine (see Exhibit "B"). From the inception of the Federal Coal Mine Health and Safety Act of 1969 to the date of the subject violation, the operator's total history of paid violations was 872 (see Exhibit "C"). This is an average of approximately 116 violations per year. Of these violations, 24 or approximately 2.7% were violations of 30 CFR 75.2000. This is not such an amount to indicate an habitual disregard for the mandates of the standard on the operator's part.

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Size.

Unites States Fuel Company operates two mines: King Mine (I.D. No. 42-00098) and King No. 5 Mine (I.D. No. 42-01389). During 1976 and 1977, the King Mine produced approximately 614,941 and 882,455 tons of bituminous coal, respectively. During those same years, the King No. 5 Mine produced no coal and 5,000 tons (see Exhibit "E").

The King Mine has four active sections and employs approximately 227 miners. Three production shifts are worked during a 24-hour period (see Exhibit "F").

#### Settlement Amounts.

With reference to Order No. 1 LJJ, 4/18/77, 30 CFR 75.400, there was a low probability of an actual fire and/or explosion occurring as a result of the violation due to the lack of a probable ignition source, the wet nature of a majority of the coal and coal fines accumulations and the fact that no methane was determined by measurement.

The settlement of \$300.00 represents the second highest amount the operator will have paid for a violation of 30 CFR 75.400 cited prior to April 18, 1977, the highest being for a violation of 30 CFR 75.400 cited in conjunction with an imminent danger order (see Exhibit "C").

With reference to Order No. 2 LJJ, 4/18/77, 30 CFR 75.200, the proposed payment is almost five times as much as any payment made for a violation of 30 CFR 75.200. There was a lack of due diligence on the operator's part in correcting the poor roof conditions, and the chance of severe injury or death existed even though the area was posted with signs warning of the bad top. A deficiency inherent in the Order has also commenced a penalty reduction, namely the failure to describe with particularity the nature of the violative condition.

The above amounts will not affect the operator's ability to continue in business.

The Stipulation of Settlement and Joint Motion to approve Settlement Agreement was signed by the President of Local 6363, UMWA District 22 as representative of employees as well as the attorneys for both parties.

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Exhibit "D" submitted on August 14, 1979, consists of a letter dated June 22, 1979, from Madison McCulloch, MSHA Director of Assessments, to James L. Abrams, Esq., counsel for MSHA. The letter states, in part, as follows:

This is to advise that on or about January 12, 1978, the captioned case was reviewed by the assessment office. Because it would have been difficult to establish a valid 104(c)(1) (now 104(d)(1)) notice to uphold the unwarrantable chain, a recommendation was made by this office to accept \$300 and \$1,200 respectively for violations in issue.

In view of the reasons given above by counsel for the parties for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

Of particular significance to the approval of the settlement, is the above-noted letter from the MSHA Director of Assessments.

ORDER

Accordingly, IT IS ORDERED that the Secretary of Labor's motion to amend the caption be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the Petitioner's motion to amend the title of the joint motion and stipulation be, and hereby is, GRANTED. IT IS THEREFORE ORDERED that such joint motion be, and hereby is, AMENDED to read "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

IT IS FURTHER ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED. IT IS THEREFORE ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$1,500 assessed in this proceeding.

John F. Cook  
Administrative Law Judge