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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding
Docket No. DENV 79-330-PM
A.C. No. 45-00365-05001

v.

DAY MINES, INCORPORATED,
RESPONDENT

Republic Unit Mine

RULING ON MOTION
AND
ORDER OF DISMISSAL

This is a civil penalty proceeding brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). On February 12, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of a civil penalty against Respondent alleging a violation of 30 CFR 57.5-50(b), which concerns employee exposure to excess noise. Thereafter, Respondent filed its answer contesting the alleged violation. In due course, a prehearing order was issued and the parties were given notice that the hearing for these matters was scheduled for the week of June 12, 1979. (Footnote 1) Both parties filed their responses to the prehearing order on May 21, 1979. Thereafter, on May 29, 1979, Petitioner filed its first motion to dismiss this case stating "[f]urther investigation has revealed that there is insufficient evidence to sustain a showing of a violation of the standard in question."

On June 4, 1979, Petitioner filed a motion requesting permission to withdraw this motion to dismiss asserting therein that "further investigation has revealed that evidence is available to support the allegations in Citation No. 0034644, dated July 26, 1978." No statement in opposition or other response was filed by Respondent with respect to either motion.

Thus, on June 29, 1979, well beyond the 10-day period for filing a statement in opposition, an order was issued granting Petitioner's motion to withdraw its earlier motion to dismiss. The parties were

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also advised that the case would proceed to hearing in late August as previously scheduled. Thereafter, an order was issued on July 23, 1979, scheduling the hearing date for August 28, 1979, in Spokane, Washington. (Footnote 2)

On August 23, 1979, 5 days before the scheduled hearing date, Petitioner filed its second motion to dismiss this case. As grounds for the motion, counsel asserts:

MSHA, through its undersigned attorneys, hereby states that additional review of the above-entitled case has indicated that there is insufficient evidence to sustain the validity of the citation issued on July 26, 1978. Accordingly, MSHA hereby moves to dismiss the petition for the assessment of civil penalty filed on February 12, 1979.

Respondent filed no objection to the proposed dismissal.

On September 5, 1979, Respondent filed a motion requesting: (1) an order for an offset against further penalties which may be assessed against it for alleged violations of the Act to the extent of costs and expenses incurred in preparing to defend this action, and, (2) an order prohibiting the Department of Labor from filing further charges involving noise violations "until it [the Department of Labor] can specify and prove the feasibility of some engineering or administrative controls which would do as effective a job of employee protection as present personal protection devices and at comparable cost." Respondent has supported its motion by a memorandum and an affidavit of Kenneth Schmick, Assistant Comptroller of Day Mines, Inc., concerning the expenditures which Respondent asserts it incurred in its defense against the citation which is the subject of this proceeding. These expenditures are broken down in the following way:

Legal Cost Incurred	\$2,443.94
W. C. Cohen Time	1,908.00
Benefits	397.47
Typing, Xeroxing and Telephone Charges	150.00
	\$4,899.41

The affidavit further asserts that \$3,229.13 of the above figure was incurred between June 1, 1979, and August 20, 1979. These dates approximately cover the time period between when Petitioner's two motions to dismiss were filed.

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On October 5, 1979, Petitioner filed a memorandum in opposition to Respondent's motion. Thereafter, Respondent made a further filing in response to Petitioner's memorandum.

After considering the arguments and reviewing the legal precedents cited by both parties, I conclude that Respondent's motion should be denied. The present procedural posture of this case, along with numerous factual differences, removes this matter from the narrow sphere of cases in which the former Board of Mine Operations Appeals allowed or considered offsets under the 1969 Act. (Footnote 3) The main thrust of Respondent's argument is that facts exist in this case which support a conclusion that Petitioner continued to prosecute under conditions which constitute bad faith. Although it is somewhat of a puzzle as to why Petitioner filed and then retracted its first motion to dismiss, there is absolutely nothing on the record, as it presently exists, to lead me to believe that bad faith was involved. There is also no indication of wrongdoing or that this proceeding was deliberately prolonged. Because of factual differences, I do not believe that my decision in Climax Molybdenum Company (Applications for Review, DENV 79-102-M through DENV 79-105-M, August 14, 1979), is precedent for the requests Respondent has made. (Footnote 4)

Under these circumstances, I hereby DENY Respondent's requests for an offset and for an order against the Department of Labor prohibiting it from filing further charges on noise violations except as it can prove some feasibility of engineering or administrative controls.

ORDER

It is hereby ORDERED that this proceeding be DISMISSED.

Franklin P. Michels
Administrative Law Judge

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1 This scheduled hearing was later continued to another date.

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2 The record indicates that from May 17 through approximately August 17 the parties pursued discovery through requests for admissions and interrogatories.

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3 See, generally, North American Coal, 3 IBMA 93 (April 17, 1974); Zeigler Coal Company, 3 IBMA 366 (September 26, 1974);

North American Coal Corporation, 3 IBMA 515 (December 30, 1974);
and Zeigler Coal Company, 5 IBMA 356 (December 19, 1975).

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4 This decision is currently before the Commission for review. Therein, I recommended to the Commission that in the particular circumstances of that case some offset be granted against possible future penalties for violations.