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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 79-39-PM
A/O No. 05-03052-05001

v.

Last Chance #3

WILLIAMS, INC.,
AND/OR MR. W.R. WILLIAMS,
RESPONDENT

DECISION

Appearances: James Abrams, Attorney, Office of the Solicitor,
Department of Labor, Denver, Colorado, for Petitioner
Andrew Melechinsky, Enfield, Connecticut, for
Respondent

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty
against the Respondent and is governed by section 110(a) of the
Federal Mine Safety and Health Act of 1977 (1977 Act), P.L.
95-164 (November 9, 1977). Section 110(a) provides as follows:

The operator of a coal or other mine in which a
violation occurs of a mandatory health or safety
standard or who violates any other provision of this
Act, shall be assessed a civil penalty by the Secretary
which penalty shall not be more than \$10,000 for each
such violation. Each occurrence of a violation of a
mandatory health or safety standard may constitute a
separate offense.

Petition

On October 26, 1978, the Mine Safety and Health
Administration (MSHA), (FOOTNOTE 1) through its attorney, filed a
petition for an assessment of civil penalty charging one alleged
violation of the Act.

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Answer

On November 14, 1978, Respondent filed a detailed response to the allegation and requested a hearing thereon.

Tribunal

A hearing was held in Denver, Colorado, on June 12, 1979. MSHA was represented by counsel. Williams, Inc., was represented by "its Contingency President," and entered a special appearance only.

Preliminary Motion

The representative of the Respondent at the Commencement of the hearing offered a written motion entitled "Special Appearance for Challenging Jurisdiction of this Court" on Constitutional grounds. The motion was opposed by the Petitioner and denied by the Judge.

There is a strong presumption in favor of constitutionality of an Act of Congress, *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977). An administrative agency, as a general proposition, does not have power to rule on constitutional challenges to the organic statute of the agency, *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361 (1974). Thereafter, Respondent's representative participated fully in the hearing.

Charge

Order of Withdrawal	Date	30 CFR Standard
00326611	4/4/78	57.6-107

"Miner was drilling rib at right drift within 5 feet of misfire."

30 CFR 57.6-107 provides as follows: "Mandatory. Holes shall not be drilled where there is danger of intersecting a charged or misfired hole."

Issues

- (1) Has there been a violation of the standard?
- (2) If so, what civil penalty should be assessed?

Evidence

MSHA presented the testimony of Porfy Tafoya, a Federal Mine Inspector for the U.S. Department of Labor.

Respondent offered no evidence.

Findings of Fact

(1) Inspector Tafoya inspected the Last Chance #3 mine of the respondent on April 4, 1978 (Tr. 21).

(2) He has held his present position of mine inspector for 3 years and during that time has conducted over 400 inspections (Tr. 20).

(3) He had 22 years mining experience prior to working for MSHA (Tr. 20).

(4) During the inspection he observed holes drilled on the right hand drift (Tr. 21).

(5) The holes that had been drilled were found to be loaded and charged (Tr. 22).

(6) He observed one hole that had not exploded from the previous round and it was still in the face (Tr. 22).

(7) This hole would be categorized as misfired (Tr. 22).

(8) The holes that were drilled were within 4-1/2 to 5 feet of the hole that was misfired (Tr. 23).

(9) The misfired hole and the hole being drilled were in an area that was regularly being worked (Tr. 24).

(10) The hazard presented would be one of explosion (Tr. 24).

(11) If an explosion did occur an accident or injury to employees ranging from serious to fatal could result (Tr. 25).

(12) Inspector Tafoya issued an Order of Withdrawal on April 4, 1978, citing therein Section 57.6-107.

Conclusions of Law

(1) The Judge has jurisdiction over the subject matter and the parties in this proceeding.

(2) All procedural prerequisites established in the statutes and regulations cited above have been complied with.

(3) Respondent was the operator of a mine and is subject to the provisions of the Mine Safety and Health Act of 1977.

(4) An imminent danger existed at the Last Chance #3 mine on April 4, 1978.

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(5) Williams, Inc., has violated 30 CFR 57.6-107 as charged.

Penalty Criteria

Assessment of a civil penalty, upon the finding of a violation, is mandatory (See section 110(i) of the Act).

There is neither evidence concerning the operator's history of previous violations nor the size of his business. As to gravity, I find the violation to be serious and the result of negligence on his part. He did effect rapid compliance to abate the cited conditions. Although the operator is now out of business a reasonable civil penalty would be in order.

Based on the testimony heard at the hearing, I conclude that a penalty of \$225 is reasonable based upon the above criteria and particularly the fact that the operator is now out of business.

The decision made from the BENCH at the hearing is hereby AFFIRMED (Tr. 44).

ORDER

WHEREFORE IT IS ORDERED that Williams, Inc., pay the above-assessed civil penalty in the amount of \$225 within 30 days from the date of this decision.

Malcolm P. Littlefield
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE ONE

1 Successor-in-interest to the Mining Enforcement and Safety Administration (MSHA).