

CCASE:

SOL (MSHA) V. FIRE CREEK COAL COMPANY OF TENNESSEE

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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. BARB 79-264-P  
A.O. No. 40-01612-03008

v.

Fire Creek No. 1 Mine

FIRE CREEK COAL COMPANY  
OF TENNESSEE,  
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor,  
Nashville, Tennessee, for the petitioner

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on January 31, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, charging the respondent with one alleged violation of the provisions of 30 CFR 70.212, as set forth in Citation No. 140948 issued pursuant to section 104(a) of the Act by MSHA inspector Arthur A. Grant on June 9, 1978.

Respondent filed an answer to the petition and a hearing was convened at Knoxville, Tennessee on May 24, 1979. Petitioner appeared by and through counsel, but respondent did not. Respondent's intention not to appear personally at the hearing was communicated to me shortly before the hearing convened by petitioner's counsel who indicated that respondent wished to incorporate by reference the previous documentary evidence submitted in a prior proceedings involving the same parties. Under the circumstances, respondent's failure to appear was treated as a waiver of its right to a hearing as provided for by Commission rule 29 CFR 2700.49 and petitioner presented evidence in support of its petition. At the conclusion of the hearing, I rendered a bench decision in the matter and my findings and conclusions are incorporated herein and served on the parties as required by 29 CFR 2700.54.

## Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

### Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. 29 CFR 2700, the applicable rules and procedures concerning mine health and safety hearings.

### Findings and Conclusions

#### Fact of Violation

Citation 140948, June 9, 1978, charges a violation of 30 CFR 70.212, and reads as follows: "The concentration of the intake air samples submitted by the operator for 001 section was 06.3 milligrams per cubic meter of air. Management shall submit additional intake air samples to determine if the working section is in compliance with the applicable respirable dust limit."

Respondent did not contest the citation as issued and MSHA Inspector Arthur C. Grant testified that during his inspection of the mine on June 9, 1978, he issued the citation in question and served it on the mine superintendent. The citation concerned a violation of the respirable dust standards in that the intake air sample submitted by the respondent indicated a heavy concentration of dust on the section cited. He fixed three weeks for abatement and the condition was abated timely. He identified his "inspector's statement" which he

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filled out at the time of the citation and stated that the respondent was not negligent because he had no way of weighing the dust samples submitted and did not know what the dust concentration was on the section. He also indicated that the mine in question is a small operation, and that five or six men were exposed to the high dust concentration (Tr. 6-13, Exhs. P-1 through P-4).

In view of the foregoing, I find that petitioner has established a violation of 30 CFR 70.212, as stated in the citation in question.

#### Negligence

On the basis of the inspector's testimony, I find that the respondent was not negligent.

#### Size of Business and Effect of Penalties assessed on Respondent's Ability to Continue in Business

On April 5, 1979, I issued a decision in MSHA v. Fire Creek Coal Company, Docket Nos. BARB 79-3-P, BARB 79-4-P, BARB 79-57-P, BARB 79-58-P, and BARB 79-59-P, in which I found that the imposition of the initial civil penalty assessments recommended by the petitioner would in the aggregate effectively put respondent out of business. I also concluded that the documentary evidence adduced by the respondent in those proceedings supported its assertion that the imposition of the recommended penalties would adversely affect respondent's ability to remain in business.

In the instant proceeding, respondent requested that I consider the prior documentary evidence introduced in the prior proceedings with respect to the adverse financial and economic condition of the respondent as set forth in its answer of March 22, 1979. Since the citation in this case was issued on June 9, 1978, some 2 or 3 months from the issuance of the citations in the prior proceedings, respondent requested that I adopt my previous findings on this issue as my finding in the instant proceeding. During the course of the hearing, petitioner interposed no objection to the adoption of my previous findings concerning the adverse effect of substantial civil penalties on the respondent's ability to remain in business as my finding in this proceeding. Accordingly, my previous findings and conclusions are therefore incorporated by reference and adopted as my finding in this case.

My previous finding that respondent is a very small mine operator is herein incorporated by reference and adopted as my finding in this regard in the instant proceeding and that fact is reflected in the civil penalty assessment made by me with respect to the citation.

#### History of Previous Violations

My previous finding made in the prior proceedings as set forth

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in my decision of April 5, 1979, that respondent has a moderate history of prior violations is adopted and incorporated by reference as my finding on this issue in the instant proceeding.

#### Gravity

The dust concentration for the section cited was in excess of the required limits and four or five men were exposed to said concentrations while working in the section. In the circumstances, I find that the condition cited was serious.

#### Good faith compliance

I find that the evidence adduced by the petitioner supports a finding that the condition cited was abated within the time fixed by the inspector and this constitutes normal good faith compliance.

#### Conclusion and Order

In view of the foregoing findings and conclusions, I believe that a \$25 civil penalty is appropriate for the citation in question and respondent is ordered to pay that amount within thirty (30) days of the date of this decision.

George A. Koutras  
Administrative Law Judge