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SOL (MSHA) V. WILLIAMS COAL  
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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. HOPE 77-238-P  
A.O. No. 46-01884-0004

v.

No. 9 Mine

WILLIAMS COAL CO.,  
RESPONDENT

DECISION

Appearances: John H. O'Donnell, Trial Attorney, U.S. Department  
of Labor, Arlington, Virginia, for the petitioner

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on April 27, 1977, pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, now the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

820(a), charging the respondent with three violations of certain mandatory health and safety standards. The case was delayed because of certain difficulties encountered by the petitioner in achieving service of the petition on the respondent. On June 20, 1978, service was made by leaving a copy at the residence of the respondent after personal service was refused. Subsequently, on August 8, 1978, Chief Judge Broderick issued a show-cause order requiring the respondent to state why the case should not be summarily disposed of because of the failure by the respondent to file an answer to the petition as required by the appropriate procedural regulations. On August 28, 1978, Mr. Cecil Williams, Point Pleasant, West Virginia, filed a response to Judge Broderick's order on behalf of the respondent wherein he states the following: "The Williams Coal Co. Inc., is no longer in business. The Corporation has been closed out and out of business since 1972. There is no assets and I am not personally going to pay the penaltys [sic]."

By notice issued by me on April 13, 1979, a hearing was scheduled in Charleston, West Virginia, for June 7, 1979. The certified letter mailed to the respondent was returned by the post office as

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"unclaimed." Subsequently, by notice dated May 9, 1979, the hearing site was changed to Arlington, Virginia, and the certified notice mailed to the respondent was also returned by the post office with a notation "out of business." A hearing was convened in Arlington on June 7, 1979, and petitioner appeared but respondent did not.

#### DISCUSSION

It seems obvious to me in this case that the respondent has no interest in pursuing the matter further and he has apparently taken the position that since the company is out of business further efforts on his part would be fruitless. In view of the failure of the respondent to appear at the hearing after several attempts to serve him with notice thereof I will treat this matter as a default proceeding to be disposed of in accordance with the Commission's summary disposition rules, which state in pertinent part as follows at 29 CFR 2700.26(c):

Where the respondent fails to appear at the hearing, the Judge shall have the authority to conclude that the respondent has waived its right to a hearing and contest of the proposed penalties and may find the respondent in default. Where the Judge determines to hold respondent in default, the Judge shall enter a summary order imposing the proposed penalties as final and directing that such penalties be paid.

#### Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations 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 Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

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2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission rules, 29 CFR 2700.1 et seq.

#### DISCUSSION

The citations issued in this proceeding were all issued by MSHA coal mine inspector George M. Pritt on July 29, 1971, and the conditions cited by the inspector are set forth in the following violations:

No. 1 GMP July 29, 1971, 30 CFR 70.272

This notice states that a required report and a report and certification concerning the conditions relative to dust control which exist in the active workings of the mine had not been received by MSHA's district office for the year 1971. Section 70.272 requires that such reports be initially submitted on or before June 30, 1970, and annually thereafter on the anniversary date of each initial report.

No. 2 GMP July 29, 1971, 30 CFR 75.1702-1

This notice charges that a program to insure that persons do not carry smoking materials, matches, or lighters underground had not been submitted for approval to the Bureau of Mines. However, it also states that "the program was submitted to an office in Pittsburgh by mistake." The section cited requires such programs to be submitted to the coal mine safety district manager on or before May 30, 1970.

No. 3 GMP July 29, 1971, 30 CFR 75.1713(c)

This notice charges that a report showing arrangements made to provide 24-hour emergency transportation and medical assistance for injured miners had not been submitted to the district manager. However, it also states that "due to a misunderstanding this report was sent to an office in Pittsburgh."

#### Findings and Conclusions

##### Fact of Violations

In support of its case, petitioner introduced copies of the notices of violations and the abatements served on the respondent during the course of the mine inspection (Tr. 6,7; Exhs. 2-7). I find that the petitioner has established the violations as alleged in the petition for assessment of civil penalties filed in this proceeding.

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#### Size of Business and Effect of Penalty Assessments on the Respondent's Ability to Remain in Business

Petitioner's Exhibit G-8 reflects that as of 1971 respondent's daily coal production was 300 tons and that the mine employed 18 non-union miners. I find that this supports a finding that respondent was a small mine operator. As for the penalty assessments made by me in this case, since it appears that respondent is no longer in the coal mining business, the penalties assessed have no effect on respondent's ability to remain in business and that issue is moot. From the information supplied by the petitioner during the course of the hearing, the former mine operator is now in the business of selling automobiles in the State of Ohio (Tr.5).

#### History of Prior Violations

Petitioner's Exhibit G-1, a computer printout of respondent's history of violations, reflects that for the period January 1, 1970, through July 29, 1971, respondent had a total of 25 paid violations for which it paid a total of \$1,275 in assessments. None of the prior violations were for the standards cited in this proceeding. In the circumstances, I conclude that respondent's prior history is insignificant and that fact is reflected in the penalties assessed by me in this matter.

#### Negligence

With regard to notice 1 GMP, citing a violation of 30 CFR 70.272, I conclude that respondent's failure to submit that report, absent any explanation, constitutes ordinary negligence. As for the remaining two violations concerning programs for smoking materials and emergency transportation arrangements, it would appear from the record that respondent had established such programs but simply filed the required reports with the wrong Government office through a mistake and misunderstanding (Tr. 10-11; Exhs. G-4, G-6). Under the circumstances, as to Notice Nos. 2 GMP and 3 GMP, I cannot conclude that respondent was negligent and find that he was not.

#### Good Faith Compliance

The record supports a finding that respondent abated the violations in good faith and petitioner agreed that this was the case (Tr. 8). I have taken this into account in assessing the penalties in this case. Gravity I cannot conclude that the conditions cited in the three violations constituted any real threat to the safety or health of the

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miners. The violations all concern reporting requirements for programs which the operator apparently had established but simply had not reported on.

#### Penalty Assessments

In view of the foregoing findings and conclusions, I believe that the following civil penalty assessments are appropriate:

Citation No.	Date	30 CFR Section	Assessment
1 GMP	7/29/71	70.272	\$ 25
2 GMP	7/29/71	75.1702-1	15
3 GMP	7/29/71	75.1713 (c)	15

#### ORDER

Respondent is ordered to pay the civil penalties assessed in this matter within thirty (30) days of the date of this decision and order.

George A. Koutras  
Administrative Law Judge