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SOL (MSHA) V. SOLAR 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

Civil Penalty Proceeding

Docket No. PITT 79-200-P  
A/O No. 36-02617-03003

v.

Solar No. 5 Mine

SOLAR FUEL COMPANY,  
RESPONDENT

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor,  
U.S. Department of Labor, for Petitioner  
Eugene E. Fike II, Esq., Somerset, Pennsylvania,  
for Respondent

Before: Judge Cook

I. Procedural Background

On May 2, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Solar Fuel Company (Respondent) in the above-captioned proceeding. This petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act), alleged two violations of the Code of Federal Regulations. The Respondent filed its answer on May 11, 1979.

On August 27, 1979, the Petitioner filed a motion to amend the petition for assessment of civil penalty as relates to Citation No. 4230, issued on November 8, 1978, to allege a violation of 30 CFR 75.1712-3(a). The petition, as filed, had alleged a violation of 30 CFR 71.402(a). The Petitioner's motion was granted by an order issued on September 12, 1979.

Pursuant to notices issued on October 1, 1979, and October 10, 1979, the hearing was conducted on October 31, 1979, in Somerset, Pennsylvania. Representatives of both parties were present and participated.

At the beginning of the hearing, counsel for the Petitioner moved to dismiss the petition for assessment of civil penalty as relates to

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Citation No. 9903735, November 15, 1978, 30 CFR 70.250. This motion was granted. (Tr. 4)(FOOTNOTE 1)

The record was left open for the filing of exhibits by the Petitioner as relates to the size of the operator's business and history of prior violations. Additionally, the Respondent was accorded time to file objections and supplemental exhibits. The Petitioner filed these exhibits (Exhs. M-6, M-6A) on December 17, 1979. The Respondent did not file objections or supplemental exhibits. Exhibits M-6 and M-6A were received in evidence by an order dated January 15, 1980.

The parties waived the filing of briefs. Accordingly, no briefs were filed.(FOOTNOTE 2)

## II. Violations Charged

The petition for assessment of civil penalty, as amended, charges the following violations of provisions of the Code of Federal Regulations:

Citation No.	Date	30 CFR Standard
4230	11/8/78	75.1712-3(a)
9903735	11/15/78	70.250

## III. Evidence Contained in the Record

### A. Stipulations

During the course of the hearing, the parties entered into various stipulations which are set forth in the findings of fact, *infra*.

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## B. Witnesses

The Petitioner called as its witness Theodore R. Dues, an MSHA inspector.

The Respondent called as its witnesses James L. Custer, the Respondent's manager of safety and health; and William R. Hutchinson, an employee of the Respondent.

## C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 4230, issued on November 8, 1978, originally issued alleging a violation of 30 CFR 71.402(a)

M-2 is a copy of the termination of M-1.

M-4 is a copy of the inspector's statement pertaining to M-1.

M-5 is a copy of a modification of M-1 to reflect a violation of 30 CFR 75.1712-3(a).

M-5A is a modification of M-5.

M-6 is a computer printout compiled by the Office of Assessments listing the history of prior violations for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978.

M-6A is a copy of a controller information report.

2. The Respondent introduced the following exhibit in evidence:

O-16 is a document styled "Record of River and Climatological Observations."

## IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. Solar Fuel Company owns and operates the Solar No. 5 Mine and both are subject to the jurisdiction of the 1977 Mine Act (Tr. 4).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 5).
3. Inspector Theodore R. Dues, who issued the subject Citation, was a duly authorized representative of the Secretary of Labor at all times relevant to the proceeding (Tr. 5).
4. The Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).
5. Solar Fuel Company mines an average of 243,000 tons per year (Tr. 5).
6. The assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5).

B. Occurrence of Violation

MSHA inspector Theodore R. Dues conducted a regular health and safety quarterly inspection of the Respondent's Solar No. 5 Mine on November 8, 1978 (Tr. 13, Exh M-1). After leaving the mine office, the inspector obtained his boots and coveralls from his car and proceeded to the change room (Tr. 14). The change room was located in a trailer approximately 300 feet from where the men go to work (Exh. M-1, Tr. 26, 48). The evidence reveals that the change room facility was located in close proximity to a belt used to haul coal from the mine (Tr. 78-79).

The inspector observed that the change room was not clean and orderly (Tr. 14). He thereupon issued the subject citation at 9:15 a.m., describing the conditions observed as follows:

The bathing facilities, change room and sanitary flush toilet facilities that were located in a trailer mobile home on the surface was not being maintained in a clean and sanitary condition in that coal dust, spit on the wall, flush toilet not clean and an odors ÔsicÊ in the shower and toilet facilities.

The petition for assessment of civil penalty, as amended, alleges that the cited condition constitutes a violation of mandatory standard 30 CFR 75.1712-3(a), which provides that:

All bathing facilities, change rooms, and sanitary toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and such facilities shall be maintained in a clean and sanitary condition.

According to the inspector, coal dust was on the sink, bathroom facilities, bench, floor and lockers (Tr. 14-15). The best available evidence reveals that the coal dust on the floor was mixed with water. Some of it was partially dry (Tr. 30, 34, 44,). The inspector observed a sufficient accumulation of coal dust on the bathroom sink to permit a person to write his name in it (Tr. 15, 31-33). The inspector further testified that tobacco or snuff spit was present at numerous locations on the wall near the benches (Tr. 14-15, 27-28). In addition, he testified that he detected the odor of urine in the toilet area (Tr. 15, 22).

The Respondent's witnesses, Messrs. Custer and Hutchinson, recalled observing several spots, described as discolorations, on the wall above the trash receptacle. Although neither witness could positively identify the composition of the spots, Mr. Hutchinson described their physical appearance as "splatters" (Tr. 46, 81). Inspector Dues, during his rebuttal testimony, reasserted that the material was spit (Tr. 90-91). In light of the inspector's positive identification, I find that spit was present on the wall as described in his testimony during the Petitioner's case-in-chief.

The Respondent's witnesses attempted to establish the odor detected by the inspector as emanating from the water supply and the soiled mine clothing. According to the Respondent's witnesses, the water supply at the mine contains sulphur, imparting to it a slight odor similar to that of rotten eggs (Tr. 61-63, 80). In addition, Mr. Custer testified that any odors present would be accentuated by the heat in the trailer (Tr. 63). The inspector's rebuttal testimony convincingly establishes a urine odor in the cited area. He was aware of the problem posed by the mineral content of the water and did not cite the Respondent for the stains on the toilet and bathing facilities caused by the sulphur. He reasserted that he detected the odor of urine and testified that he did not detect the "rotten egg smell" described by the Respondent's witnesses (Tr. 89-91).

Accordingly, I find that the conditions cited by the inspector constituted a violation of 30 CFR 75.1712-3(a). (FOOTNOTE 3)

#### C. Gravity of the Violation

The inspector classified the violation as serious because of the health hazard posed (Tr. 22-23), while Mr. Custer, a former MSHA inspector (Tr. 63), did not believe the cited area to be in an unsanitary condition (Tr. 64). However, it is significant to note, in assessing Mr. Custer's testimony on this point, that he was unable to identify the composition of the material on the wall and that he did not testify to detecting the odor of urine.

The best available evidence indicates that no miners were in the cited area when the inspector observed the condition, but that approximately 10 miners had been in the area shortly prior to his arrival (Tr. 16, 26-27, 47). No evidence was presented as to the probability of an occurrence.

Accordingly, I conclude that a slight amount of gravity was associated with the violation.

#### D. Negligence of the Operator

The inspector's opinion that the condition had existed for over a week (Tr. 16) was rebutted in part by the testimony of Mr. Hutchinson. Mr. Hutchinson testified that he cleaned the cited area between 7 and 8 p.m. on November 7, 1978, in accordance with his customary practice (Tr. 77-78). The cleaning consisted of mopping, sweeping and wiping (Tr. 77). In addition, he testified that he cleaned the sink, bathing and toilet facilities. However, there is evidence indicating that the cleaning job was less than thorough (Tr. 78, 85). Specifically, he testified that he did not remove the splatter marks observed by him from the wall (Tr. 85).

However, above and beyond this consideration, the record clearly reveals that substantial coal dust accumulations were a recurrent problem in the area, and that this state of affairs should have been known by the Respondent. According to Mr. Hutchinson, coal dust accumulates quickly in the cited area due to its proximity to a belt leading from the mine to a bin (Tr. 78-79). He further testified that an appreciable amount of coal dust could have accumulated over a 6- to 12-hour period because "I could clean it like tonight and tomorrow morning you could go in and write your name in dust" (Tr. 81). The fact that the facility was used by one section foreman on each shift (Tr. 47) indicates that the Respondent should have known of this recurrent problem.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

#### E. Good Faith in Attempting Rapid Abatement

Abatement was accomplished in the time allotted by the inspector (Exhs. M-1, M-2, M-5A). Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Solar No. 5 Mine for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978, is summarized as follows:

	Year 1	Year 2	Total
30 CFR Standard	11/9/76 - 11/8/77	11/9/77 - 11/8/78	
All Sections	9	10	19
75.1712-3(a)	0	0	0

(Exh. M-6).

G. Appropriateness of the Penalty to the Size of the Operator's Business

Gulf and Western Industries, Inc. (Gulf and Western), is the controller of Solar Fuel Company (Exh. M-6A). Exhibit M-6A reveals that all of Gulf and Western's coal production in 1978 and 1979 was attributable to Solar Fuel Company. The parties stipulated that Solar Fuel Company mines an average of 243,00 tons of coal annually, and that the Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).

H. Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I. D. 668, 1971-1973 OSHD par. 15, 380 (1972). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Solar Fuel Company and its Solar No. 5 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

3. MSHA inspector Theodore R. Dues was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.



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4. The conditions set forth in Citation No. 4230, issued on November 8, 1978, are found to have occurred and to have constituted a violation of 30 CFR 75.1712-3(a).

5. The oral determination at the hearing granting the Petitioner's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250 is AFFIRMED.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

#### VII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
4230	11/8/78	75.1712-3(a)	\$40

#### ORDER

Respondent is ORDERED to pay the civil penalty in the amount of \$40 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250.

John F. Cook  
Administrative Law Judge

#### ~FOOTNOTE 1

Counsel for the Petitioner advanced the following reasons in support of the motion to dismiss:

"The Secretary has agreed to vacate the Citation No. 9,903,735 citing violation 30 CFR 70.250A, I think it is--.250. Basically this case involves what we originally thought was a failure to submit valid dust samples. The facts of this appear to have been that Operator's sample have been sent ōsicÊ in time with the regular mine cycle as required in 70.250. However, in submitting the data cards he inadvertently placed the same Social Security number for two different men. At this point, after discussions between the parties, we determined those factors do not constitute a violation 70.250 ōsicÊ but would perhaps constitute a violation of 70.260 which is the transmission of sample section as opposed to the section requiring individual samples once every nine days which were cited. For those reasons the Secretary has decided, after that knowledge, the Petition will be dismissed" (Tr. 4).

~FOOTNOTE 2

In spite of the waiver, the parties were afforded 2 weeks in which to reconsider their position (Tr. 93).

~FOOTNOTE 3

The testimony establishing the presence of cigarette butts in the cited area (Tr. 14-15) is not deemed material to the issue of whether a violation occurred since they are not alleged in the petition for assessment of civil penalty.