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SOL (MSHA) V. U.S.STEEL  
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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

v.

U.S. STEEL MINING COMPANY, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 82-29  
A.C. No. 36-00970-03111

Maple Creek No. 1 Mine

DECISION AND ORDER OF DISMISSAL

Appearances: David Bush, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner  
Louise Q. Symons, Esq., Pittsburgh, Penn-  
sylvania, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", in which the Secretary has proposed a penalty for an alleged violation on September 17, 1981, of a mandatory safety standard. The Secretary's petition was filed on January 6, 1982, and was answered by the U.S. Steel Mining Company, Inc., (U.S. Steel) on January 18, 1982. Notice was issued on February 24, 1982, scheduling hearings to commence on May 3, 1982. An amended notice was issued on April 6, 1982, rescheduling the hearings for May 4, 1982.

The Secretary's case-in-chief was purportedly to be presented at hearing through the testimony of an MSHA inspector. The inspector proceeded to testify, however, about a citation unrelated to the case at bar (Citation No. 1145239 issued March 31, 1982). After discovering his error, the inspector conceded that he was unable to recall the facts relating to the citation at issue in this case. Counsel for the Secretary explained that the two citations charged violations of the same standard and the factual allegations in each were similar. He further proffered that, inexplicably, the citations became mixed up during prehearing preparations.

Under the circumstances, I granted a recess to permit the inspector to contact his office to locate his notes for the purpose of refreshing his recollection about the citation at issue. Although it was made clear that at least an

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hour's recess would be granted for this purpose, it appears that no effort was made to search for the notes and no explanation given except that "it would be impossible [to locate the notes] unless [the inspector himself] was present." Counsel for the Secretary thereupon conceded that he was unable to present any evidence to support his case and requested a further continuance for an unspecified time.

In deciding that no further continuance was warranted, I considered: (1) that more than 60 days notice of hearing was provided the Secretary, giving him ample opportunity to prepare his case, (2) that the Secretary was particularly negligent in the preparation of this case, since the citation about which the inspector was prepared to testify had not even been issued at the time the hearing was scheduled and had been issued only shortly before the actual hearing, (3) that once his error was known, the Secretary showed a lack of good faith in failing to conduct a search for the inspector's notes (to refresh the inspector's recollection of the citation at issue) during a continuance granted specifically for that purpose, (4) that significant expenditures in time and money had been incurred as a result of the scheduled hearing and that additional such expenditures would be incurred by any further continuance of the proceedings, (5) that there were no assurances that even after a further continuance, the Secretary would be any better prepared to present his case, and (6) that the operator was prepared for hearing with two staff attorneys and six witnesses present.

The bench decision denying the Secretary's request for an additional continuance and dismissing the case for lack of evidence is affirmed at this time. Accordingly, Citation No. 1050294 is VACATED and this case is DISMISSED.

Gary Melick  
Assistant Chief Administrative Law Judge