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SOL (MSHA) V. CREOLE MINING
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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. WEST 81-338-M
A.C. No. 42-01708-05002

v.

Little Joe Mine

CREOLE MINING, INC.,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Petitioner;
No appearance for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was filed by the Secretary of Labor (Secretary) against Creole Mining, Inc., respondent, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for three alleged violations of mandatory safety standards. Respondent failed to timely answer the Secretary's petition for proposal for a penalty in this case. However, following the issuance of an order to show cause why it should not be placed in default, respondent replied by letter which was accepted as its answer. In that letter, Mark Truman related he was replying for his father Karl I. Truman, owner, under a power of attorney, as his father was on a L.D.S. Mission overseas.

A notice of hearing was mailed to the parties on January 31, 1984, setting the hearing for April 3, 1984, in Salt Lake City, Utah. The undersigned was notified that a settlement agreement had been reached between the parties and the hearing was cancelled. On April 23, 1984, counsel for the Secretary, mailed a stipulation and motion to approve the settlement agreement along with an order to Mark Truman for the respondent and requested he sign the necessary papers and forward them for approval. On May 21, 1984, a letter was sent to Mark Truman requesting he either sign the stipulation and forward it, or indicate his reason for not doing so. Also, if he did not wish to sign, the case would be reset for hearing.

Respondent failed to answer either the Secretary's letter or that of the undersigned. On July 16, 1984, a notice of hearing was mailed to the respondent rescheduling the hearing for July 31, 1984, in Salt Lake City, Utah. Counsel for the Secretary appeared at the hearing with his witness on that date ready to proceed. Respondent's representative failed to appear. After waiting for a period of time, counsel for the Secretary advised the undersigned that he had a witness present and wished to proceed with the hearing and present evidence. This motion was granted.

On August 2, 1984, an order was issued and sent to the respondent to show cause why he should not be held in default for failure to appear at the hearing and have penalties assessed against him. Karl I. Truman replied by letter dated August 13, 1984 wherein he stated he had originally paid a fine of \$1,000.00, that he was contacted again and after several telephone calls, filled out some papers, paid a fee and considered the matter of the Little Joe Mine resolved.

ISSUES

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, (2) whether respondent defaulted in its failure to appear at the hearing set for July 31, 1984; and if so, (3) the appropriate civil penalty that should be assessed against respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

At the hearing, James H. Barkley, counsel for the Secretary, stated that prior to the hearing, he had attempted to contact Karl Truman on several occasions regarding returning the proposed settlement agreement. Messages were taken on Truman's telephone which was located at either his business or residence which appeared to be one and the same. Truman never returned Mr. Barkley's telephone calls. Then when the hearing was re-scheduled, Mr. Barkley called again and left the message that the hearing was being set because he did not return the settlement papers and that if he would sign the papers and send them back it was assumed the Court would entertain a motion for a continuance. Mr. Barkley believed the telephone conversation was with Mr. Truman's wife. There was no reply from Mr. Truman (Tr. at pages 4, 5).

Based upon the above representations by counsel for the Secretary, failure on the part of respondent to communicate with the undersigned, and failure to receive any document other than

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the letter of August 13, 1984 from Karl I. Truman in answer to the Order to Show Cause, I find the respondent has failed to show good cause for his failure to appear at the rescheduled hearing and is in default as to the three citations and the penalties proposed for each.

The evidence shows that on October 23, 1980, an accident occurred in the Little Joe Mine located approximately 50 miles West of Green River, Utah. An explosion occurred in the mine following a misfire resulting in a serious eye injury to a miner. Two citations were issued by the Secretary for operator's violation of mandatory safety standards in allowing men to return to misfired holes in the heading in less than 30 minutes (Tr. at 14). Respondent paid penalty assessments of \$500.00 each for a total of \$1,000.00.

As a result of the above accident, respondent was issued three additional citations during an accident investigation on November 5, 1980. These three citations were termed technical violations by the issuing inspector Kenneth Joslin. Citation No. 576609 issued as section 104(a) type violation of 30 C.F.R. 41.11 alleged that the operator of the Little Joe Mine failed to file a Form 2000-7 with the Mine Safety and Health Administration. Citation No. 576610 issued as type 104(a) violation of 30 C.F.R. 57.26-1 alleged the operator failed to notify the nearest Sub-district office of Mine Safety and Health Administration about the opening of the Little Joe Mine. Citation No. 576612 issued as type 104(a) violation of 30 C.F.R. 50.10 alleged that the operator did not immediately notify the Mine Safety and Health Administration of a blasting accident occurring on October 23, 1980 at the Little Joe Mine.

Inspector Kenneth Joslin testified that on November 5, 1980, he performed an investigation at the Little Joe Mine of the blasting accident. In a conversation with Eldred M. Garrick, operator's geologist, he determined that a misfire occurred in the mine on October 23, 1980 as a result of the primer going off but the ammonium nitrate in the hole not firing. As a result, a miner was injured when he approached the face and the prior round detonated (Tr. at 7, 8). Based on the evidence of record, Mine Safety and Health Administration was not notified of the accident immediately thereafter. Also, the operator of the Little Joe Mine had failed to notify the MSHA Sub-district office at Moab, Utah, and also failed to file the required Form 2000-7 (Tr. at 11). I find that failure of the operator to perform the above three acts are violations of mandatory safety standards of the Act.

PENALTIES

The Secretary has proposed a penalty of \$36.00 be assessed for each of the three violations in this case. Respondent originally contested these violations in his letter (Answer)

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dated November 24, 1981. However, the operator has failed to appear at the rescheduled hearing set for July 31, 1984, and therefore is found in default. Further, I find no evidence that these citations were "taken care of" as alleged in the letter signed by Karl I. Truman and dated August 31, 1984. Therefore, I find that the proposed penalty of \$36.00 for each violation in this case or a total sum of \$108.00 is reasonable and appropriate.

ORDER

The respondent is ORDERED to pay civil penalties in the total amount of \$108.00 within 40 days of the date of this decision and order, and upon receipt, this case is dismissed.

Virgil E. Vail
Administrative Law Judge