

CCASE:
SOL (MSHA) V. PYRO 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. KENT 83-212
A.C. No. 15-10339-03516

v.

No. 11 Mine

PYRO MINING COMPANY,
RESPONDENT

DECISION

Appearances: Carole M. Fernandez, Esq., Office of
the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner;
Steven P. Roby, Esq., Pyro Mining Company,
Providence, Kentucky, for Respondent

Before: Judge Fauver

This case was remanded by the Sixth Circuit Court of Appeals for reconsideration of the civil penalty assessments and for findings on the factors whether the penalties assessed would affect Pyro's ability to continue in business and whether Pyro demonstrated good faith in attempting promptly to abate the violations.

I find from the record that, with regard to each of the charges, Respondent abated the violative condition promptly after receiving notice from MSHA. Therefore, there was good faith in attempting to achieve prompt abatement of the violations; I considered this fact in my original assessments.

I also find from the record that Respondent is a large operator, a fact which I considered in my original assessments. At the time of the citations, the No. 11 mine employed 288 miners and had a daily production of 3,500 tons. Pyro No. 11 is one of many mines owned by Pyro Mining Company.

Financial hardship or an adverse business impact of civil penalties is an affirmative defense, but such was not raised by Respondent. Respondent made no claim or argument, nor was there any evidence or indication, that any penalties assessed would have an adverse effect upon Pyro's ability to continue in business. Indeed, Respondent acknowledges the absence of such defense in its brief on remand, by stating that it "will not be submitted that Pyro Mining Company will be unable to continue in business or that it must cut back its operation by paying either the \$7,000.00 originally proposed to be assessed or the \$12,000.00 actually assessed" (Resp.Br. p. 2).

In summary, I find that:

- (1) Good faith was demonstrated by Respondent in attempting to achieve prompt abatement of each relevant violation after notice of the violation by MSHA.
- (2) The civil penalties assessed in this case will not have an adverse effect on Respondent's ability to continue in business.

Both of the above facts are clear as a matter of record, and they were considered by me in reaching my original penalty assessments. The civil penalties assessed in my original decision as to the violations affirmed by the Sixth Circuit are therefore not changed in this decision on remand.

With respect to the remaining charge (Citation 2075924), for a violation of 30 C.F.R. 75.1725(a), the Court reversed my finding of gross negligence and indicated that no negligence could be found since I found that Respondent was not negligent before the accident occurred.

Lack of negligence does not preclude a finding of a violation under this statute. I find that Respondent violated the cited standard as charged because a defective transformer was used before and after the accident, up to the time MSHA notified Respondent of the violation. In compliance with the Court's decision, I find that this violation was not due to

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negligence by the operator. Inasmuch as negligence is one of the six statutory criteria for a civil penalty, the absence of negligence warrants a major reduction in my original penalty of \$5,000 for this violation. In full consideration of the other five statutory criteria, including my original finding of high gravity of this violation, which contributed to a fatality, I find that a penalty of \$1,000 is appropriate for this violation,

In summary, on remand I ASSESS Respondent the following civil penalties:

Citation	Civil Penalty
2075924	\$1,000
2075231	7,000
2075232	5,000
2075233	200
	\$13,200

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above-assessed civil penalties in the total amount of \$13,200 within 30 days of this Decision.

William Fauver
Administrative Law Judge