

CCASE:  
SOL (MSHA) V. UNITED STATES STEEL MINING  
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TTEXT:

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. PENN 84-49  
A.C. No. 36-00970-03537

v.

Maple Creek No. 1 Mine

UNITED STATES STEEL MINING  
COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Vicki J. ShteirÄDunn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia  
for Petitioner;  
Billy M. Tennant, Esq., United States Steel  
Corporation, Pittsburgh, Pennsylvania for Respondent,  
United States Steel Mining Company, Inc.

Before: Judge Merlin

On March 28, 1986 the Commission reversed my determination that the operator was negligent and remanded the case to me "for recomputation of an appropriate penalty". Pursuant to the Commission's decision I issued an order dated March 31, 1986 directing the parties to submit their recommendations regarding an appropriate penalty amount on or before April 28, 1986. They have now done so.

I originally assessed a penalty of \$7,500.

The operator recommends a penalty of \$150 on the ground there was no negligence.

The Solicitor recommends a penalty of \$7,500 which represents no change from what I assessed before the Commission overturned my ruling on negligence. In support of a \$7,500 penalty the Solicitor argues that the two decedents were negligent and that their negligence is attributable to the operator. The Solicitor acknowledges that the Commission specifically held that it could not consider this issue because it had not been raised at the trial level. Nevertheless, the Solicitor argues that the

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Commission's view of what it could consider was wrong and that I have "the opportunity to consider this issue." I reject the Solicitor's arguments as without merit and mischievous. I could not now assess a penalty on the basis of decedents' negligence (assuming there was such negligence and that it could be imputed to the operator), because the present record does not specifically address that issue and the operator has not had an opportunity to be heard on it. Even more importantly, the Commission's remand is very specific and limited, i.e., recomputation of an appropriate penalty in light of its decision. I am bound by the terms of the remand as laid down by the Commission. If the Solicitor believes the Commission's view of what it could consider was erroneous or if the Solicitor wants a broader remand, she should have requested reconsideration by the Commission. Presentation of these arguments at this stage constitutes nothing more than an invitation to ignore the terms of the Commission's remand and defy its mandate. This, of course, I cannot and will not do. My views on the merits of this case are set forth in my original decision. But the Commission has spoken and it has held differently. Whatever significance an issue in a particular case may have, the principle that a trial Judge is bound by the holdings of his appellate tribunal is of transcending importance.

The Solicitor's argues next for a penalty "only slightly lower" than \$7,500 on the basis that even if there was no negligence, the gravity of the violation justifies such an amount. I reject this because it wholly fails to take account of the fact that negligence was a crucial factor in my original assessment of \$7,500. As the record and the decisions at both the trial and Commission levels demonstrate, the issue of the foreman's negligence was the reason the operator sought a hearing. Again, the Solicitor invites me to thwart the Commission's will, an approach I most emphatically reject.

I also reject the operator's recommendation of a \$150 penalty because it does not adequately reflect the other five statutory criteria which must be considered in addition to negligence.

As I originally found, the violation was very serious.

At the hearing the parties stipulated as follows with respect to the other criteria (Tr. 5): (1) imposition of any penalties herein will not affect the operator's ability to continue in business; (2) the violation was abated (FOOTNOTE 1) in good faith; (3) the operator's history of prior violations is average; and (4) the operator's size is large.

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It is hereby ORDERED that a penalty of \$450 be assessed which the operator is ORDERED TO PAY within 30 days from the date of this decision.

Paul Merlin  
Chief Administrative Law Judge

1 The court reporter failed to correctly transcribe  
"abated".