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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.

EMERY MINING CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-84  
A.C. No. 42-00121-03598

Deer Creek Mine

DECISION

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C.A. 801 et seq., (the Act).

Prior to a hearing on the merits the parties submitted the case on stipulated facts.

The two citations involved here allege respondent violated 30 C.F.R. 75.200 which mandates roof control programs and plans.

Issues

The issues concern the appropriate civil penalties for the violations.

Stipulation

The parties stipulated as follows:

1. The citations at issue in this penalty proceeding were at issue in the contest cases docketed as WEST 86-35-R and WEST 86-36-R, which were fully tried on March 5, 1986. A decision in the cases was rendered on June 10, 1986.

(FOOTNOTE a1) 2. A full record was developed by the parties on the issues of violation and unwarrantable failure and the decision of the presiding judge on those issues was not reviewed by the Commission.

3. Having been decided in the contest proceedings, the issue of violation in this penalty proceeding is res judicata. Thus, the only issues in this penalty proceeding involve application of the six statutory factors required under 110(i) for determination of an appropriate civil penalty to be assessed against Emery for the violation.

4. The Secretary and Emery believe the record in WEST 86-35-R and WEST 86-36-R can be used by the presiding judge to evaluate the gravity and negligence connected with the violation and stipulate, without further argument, to the use of that record for such purpose.

5. The Secretary and Emery stipulate that the violations which were the subject of WEST 86-35-R and WEST 86-36-R were abated in good faith.

6. The Secretary and Emery further stipulate that Emery was a large mine operator and assessment of a penalty in this case will not affect its ability to continue in business.

7. To permit the presiding judge to evaluate Emery's history of violations, the Secretary has submitted a computer listing of violations issued at Emery's Deer Creek Mine for the two-year period terminating on October 21, 1985. Emery stipulates to the accuracy of such a list.

8. The parties request that the presiding judge render a decision assessing appropriate civil penalties in this case.

#### Discussion

The statutory mandate to assess civil penalties is contained in 110(i) of the Act, now codified at 30 U.S.C.A. | 820(i).

In considering the record I find that these violations occurred as a result of an inspection on October 22, 1985. The computer printout indicates that the operator was assessed 518 violations in the two-year period ending October 21, 1985. The evidence accordingly establishes that the operator has a high adverse prior history. However, the number of violations has decreased considerably from the 1210 violations that were assessed before October 22, 1983.

Inasmuch as Emery is a large operator, it appears that the penalty is appropriate in relation to the size of the company. In addition, the penalties will not affect the company's ability to continue in business.

In connection with WEST 86-35-R, the company should have known of the violative condition because supervisors traveled through the area where the deteriorated roof was located. Further, the violative condition existed for at least a week, possibly months. These factors establish the operator's negligence.

