

CCASE:  
SOL (MSHA) V. ASARCO  
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March 11, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-259-M
Petitioner	:	A. C. No. 24-01467-05565
	:	
v.	:	Troy Unit
ASARCO INCORPORATED,	:	
Respondent	:	

ORDER OF CONTINUANCE

The above-captioned case is a petition for assessment of a civil penalty filed by the Secretary of Labor against Asarco Inc.

The operator has now filed its answer. It has also filed a motion to consolidate this case with the corresponding notice of contest which is presently pending before the Commission in Docket No. WEST 92-624-RM.

Since the penalty aspect of this matter has not been heard or adjudicated at the trial level, consolidation with the contest now on appeal would not be appropriate. The Commission has consistently held that where, on appeal, it decides certain issues but the amount of penalty remains to be determined, the matter must be remanded to the administrative law judge for that purpose. Gatliff Coal Co., Inc., 14 FMSHRC 1982, 1989-90 (Dec. 1992); Mar-Land Industrial Contractor, Inc., 14 FMSHRC 754, 760 (May 1992); Mettiki Coal Corp., 13 FMSHRC 760, 773 (May 1991); Rochester & Pittsburgh Coal, 13 FMSHRC 189, 199 (Feb. 1991). Also, the Commission always has refused to consider on appeal issues that have not been raised at the trial level. Shamrock Coal Company, Inc., 14 FMSHRC 1300, 1302-1304 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306, 1312-1314 (August 1992); Beech Fork Processing Inc., 14 FMSHRC 1316, 1319-1321 (August 1992). Therefore, the operator's motion to consolidate here cannot be granted. The proper procedure is to put this case on stay pending the Commission's decision on the notice of contest.

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Accordingly, it is ORDERED that the operator's motion to consolidate be DENIED, that this case be STAYED until issuance of the Commission's decision in WEST 92-624-RM, and that the parties ADVISE the undersigned when the Commission's decision is issued.

Paul Merlin  
Chief Administrative Law Judge

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