

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 5, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-206
Petitioner	:	A.C. No. 03-01736-03505
v.	:	
	:	Docket No. CENT 94-213
GEMINI MINING COMPANY,	:	A.C. No. 03-01736-03507
Respondent	:	
	:	Docket No. CENT 94-235
	:	A.C. No. 03-01736-03508
	:	
	:	Wilkem No. 1 Mine

DECISION

Appearances: Robert A. Goldberg, Esq., Office of the
Solicitor, U.S. Department of Labor,
Dallas, Texas, for Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(c), seeking civil penalty assessments for nine (9) alleged violations of certain mandatory safety standards found in Parts 48 and 75, Title 30, Code of Federal Regulations. A hearing was conducted in Fort Smith, Arkansas, and the petitioner appeared, but the respondent did not.

Issues

The issues presented in these proceedings include the fact of violation, whether some of the violations were "significant and substantial," and the appropriate civil penalty assessments to be made for the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 39 U.S.C. ' 301, et seq.
2. Sections 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

Stipulations

The petitioner's counsel produced the following stipulations for the record, and he stated that he had not reviewed them with the respondent, but had no reason to believe that the respondent would object to them (Tr. 6-8):

1. The respondent is engaged in mining and selling minerals, and its mining operations affect commerce.
2. The respondent is the owner and operator of the Wilkem #1 Mine, Mine Identification Number 03-01736.
3. The respondent is an operator within the meaning of the Mine Act.
4. The respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. (Mine Act).
5. The Administrative Law Judge has jurisdiction over this matter.

6. The subject orders were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the respondent on the dates and places stated therein. Accordingly, the orders may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

7. The proposed penalties as amended by the parties in the course of their settlement negotiations will not affect the respondent's ability to continue in business.

Discussion

As previously noted, the petitioner entered an appearance at the hearing, but the respondent did not. The parties informed me of their proposed settlements, for the first time, shortly after my arrival in Fort Smith the day before the hearing. The respondent's representative advised me in the course of a telephone conference that he was unable to appear at the hearing, and that since he reached a settlement with the petitioner, he believed that his appearance was not necessary. I accepted the respondent's excuse for not appearing pursuant to notice and advised him that I would not hold him in default pursuant to Commission Rule 2700.66, 29 C.F.R. ' 2700.66, particularly since he was acting pro se and agreed to a settlement with the petitioner in good faith, and did not dispute the violations except for the proposed penalty assessments.

The citations, initial assessments, and the proposed settlement dispositions for the violations in these cases are as follows:

CENT 94-206

<u>Order No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3589714	12/13/93	75.370(a)	\$3,800	\$1,000
3589716	12/13/93	48.6(a)	\$ 600	\$ 600
<u>CENT 94-213</u>				

<u>Order No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
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3589703	12/07/93	75.370(a)(1)	\$1,800	\$1,000
3589707	12/08/93	75.1714(b)	\$2,300	\$1,000
3589712	12/08/93	75.306(b)	\$2,500	\$1,000
3591472	12/13/93	75.503	\$2,400	\$1,000
3589723	1/03/94	75.360(a)	\$4,500	\$1,400
3589724	1/03/94	75.220(a)(1)	\$2,800	\$1,000

CENT 94-235

<u>Order No.</u>	<u>Date</u>	<u>Statutory Section</u>	<u>Assessment</u>	<u>Settlement</u>
3589728	1/12/94	104(d)(2) of the Act	\$4,800	Vacated

The petitioner's counsel presented arguments in support of the proposed settlement. Counsel stated that the respondent acquired the mine and began developing it on September 30, 1993, and that the inspection which resulted in the violations was the first MSHA AAA inspection for the respondent. MSHA Inspector Lester Coleman, who was present in the courtroom, confirmed that this was the case.

Petitioner's counsel confirmed that in the course of the settlement negotiations, the respondent did not dispute the fact of violations, and took issue only with the amount of the proposed penalty assessments which it believe were unreasonable and excessive. Counsel stated that the mine is no longer in operation and that it has been closed down by MSHA by virtue of an outstanding section 104(d)(2) order issued in June, 1994. Inspector Coleman confirmed that this was the case (Tr. 22-24).

Inspector Coleman stated that when the mine was in operation, it employed six miners and an on-site engineer, and produced 3,496 tons of coal annually. I conclude and find that the respondent is a small mine operator, and that it is no longer actively mining the subject mine where these violations occurred (Tr. 27-28).

The record reflects that all of the violations that are the subject of these proceedings were terminated after the respondent corrected and abated the cited conditions. Petitioner's counsel and Inspector Coleman confirmed that the respondent took corrective action after it was served with the violations.

With respect to section 104(a) non-"S&S" Citation No. 3589728, January 12, 1994 (Docket No. CENT 94-235), the petitioner's counsel moved to withdraw the proposed civil penalty assessment and to vacate the citation on the ground

that it is duplicative of a violation cited in section 104(d)(2) Order No. 3589724, issued on January 3, 1994, in Docket No. CENT 94-213. The motion was granted from the bench, and my ruling in this regard is re-affirmed (Tr. 9-10, 20).

Conclusion

After careful review and consideration of the pleadings, and the arguments in support of the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. I take note of the fact that all of the violations were abated, and there is no evidence of any accidents or injuries resulting from the cited conditions or practices. I have also considered the fact that the respondent is a small mine operator and that the subject mine is closed and not presently producing coal. Under all of these circumstances, and pursuant to Commission Rule 31, 29 C.F.R. ' 2700.31, the settlements agreed to by the parties **ARE APPROVED.**

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. Section 104(a) non-"S&S" Citation No. 3589728, issued on January 12, 1994, and alleging a failure by the respondent to comply with a previously issued section 104(d)(2) order **IS VACATED**, and the petitioner's civil penalty proposed **IS DISMISSED.**

2. The respondent **IS ORDERED** to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the enumerated citations for each of the cases. The petitioner has confirmed that the respondent has paid \$2,000 in partial payment of the total settlement amount in these cases. The remaining payments are to be made to MSHA in accordance with the following schedule:

<u>Date Due</u>	<u>Payment Due</u>
May 20, 1995	\$1,000
June 20, 1995	\$1,000
July 20, 1995	\$1,000
August 20, 1995	\$1,000
September 20, 1995	\$1,000
October 20, 1995	\$1,000

Payments shall be made by certified or cashier's check made payable to "The U.S. Department of Labor, MSHA," and mailed to Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. Each payment instrument shall include the relevant docket numbers and assessment control numbers, **CENT 94-206, A.C. No. 03-01736; CENT 94-213, A.C. No. 03-01736-03507; and CENT 94-235, A.C. No. 03-01736-03508.** Compliance with this payment schedule requires the respondent to have his monthly payments deposited in the U.S. Mail by the dates listed above.

These decisions will not become final until such time as full payment of the \$6,000 balance due is made by the respondent to MSHA, and I retain jurisdiction in these proceedings until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the cases. In the event the respondent fails to timely remit its monthly payments, the remaining balances will become due and immediately payable to MSHA. Upon receipt of all payments, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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