

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

June 3, 1996

SOUTHERN MINERALS, INC., : CONTEST PROCEEDINGS  
TRUE ENERGY COAL SALES, INC., : Docket Nos. WEVA 92-15-R  
and FIRE CREEK, INC. : through WEVA 92-116-R  
Contestants :  
v. : Fire Creek No. 1 Mine  
: Mine ID 46-07512  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
Respondent :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket Nos. WEVA 92-786  
Petitioner : through WEVA 92-791  
v. :  
: Fire Creek No. 1 Mine  
SOUTHERN MINERALS, INC., :  
TRUE ENERGY COAL SALES, INC., :  
and FIRE CREEK, INC., :  
Respondents :

## ORDER DENYING MOTION IN LIMINE

The Respondent's motion to limit application of the penalty assessment criteria published in 30 C.F.R. Part 100, is **DENIED**. At trial the issue of the amount of any civil penalty assessed is de novo before the judge, and the judge is not bound by the Secretary's interpretation of Part 100 and the civil penalty criteria as set for in Part 100 (Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-679 (1987); Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd 737 F.2d 1147 (7R Cir. 1984)). Consequently, I will admit any evidence relevant to the statutory civil penalty criteria and hear the parties' arguments regarding the proper interpretation and application of such evidence to the criteria.

David F. Barbour  
Administrative Law Judge  
**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

June 3, 1996

SOUTHERN MINERALS, INC.,	:	CONTEST PROCEEDINGS
TRUE ENERGY COAL SALES, INC.,	:	Docket Nos. WEVA 92-15-R
and FIRE CREEK, INC.	:	through WEVA 92-116-R
Contestants	:	
v.	:	Fire Creek No. 1 Mine
	:	Mine ID 46-07512
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 92-786
Petitioner	:	through WEVA 92-791
v.	:	
	:	Fire Creek No. 1 Mine
SOUTHERN MINERALS, INC.,	:	
TRUE ENERGY COAL SALES, INC.,	:	
FIRE CREEK, INC.,	:	
Respondents	:	

ORDER DENYING SECRETARY-S AND RESPONDENTS=  
MOTIONS FOR CONTINUANCE

A hearing in these proceedings is scheduled to commence on July 15, 1996. The Secretary's counsel has moved for a continuance. She has a previously scheduled hearing commencing on the same date. Counsel for the Respondents likewise has moved for a continuance. Counsel notes that the matter of Berwind Natural Resources, Corp., et al., 18 FMSHRC 202 (February 1996), presents many of the same issues regarding operator liability that are attendant in these proceedings, albeit in a slightly different context.

In partial decision issued on December 15, 1996, I ruled that True Energy Coal Sales, Inc., was not an operator and I

dismissed the proceedings with respect to True Energy (17 FMSHRC 2191, 2217). I held further that Southern Minerals, Inc., was

an operator, and I ordered the parties to proceed to hearing on the merits of the cases with respect to Southern Minerals (17 FMSHRC at 2217-2218). The Commission declined to review the partial decision. The Respondents assert that if these proceedings are tried before the Commission decides Berwind, the parties will be burdened by expending significant time and money trying these cases against a legal standard for determining operator status that the Commission may change; or, that the Berwind decision may obviate the need for trying the cases at all. By continuing the cases to allow the law to clarify, the burden and expense to the parties will be lessened.

I am sympathetic to the Respondents' desire to lessen the burden and expense of trial. These proceedings involve aggregate proposed civil penalties of more than one half million dollars and the contests of 102 citations and orders. In another motion, counsel for the Secretary estimates that a trial will last at least four weeks, and I conclude that in each and every alleged violation is contested, that estimate may be correct.

However, putting the trial off until the Commission issues a decision at some indefinite future time -- a decision that ultimately may be appealed to a United States Court of Appeals only delays what may well be inevitable. Without prejudging the matter, I believe that it is more likely the Berwind decision will warrant going forward with a trial on the merits than that it will obviate the need for a trial. If I am correct, a continuance at this time will make the allegations, which are already among the oldest on the Commission's docket, more stale and less susceptible to proof when the hearings finally are reconvened.

Balancing these factors, I conclude that the hearings on these proceedings should go forward as soon as possible. **ACCORDINGLY**, I decline to continue these matters pending the Commission's Berwind decision. Given counsel for the Secretary's scheduling conflict, I am prepared to reschedule the proceedings to commence either on July 30, 1996, or August 6, 1996 but no later. I request counsel to advise me at the June 6, 1996, prehearing conference which date is preferable.

David F. Barbour  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

June 3, 1996

SOUTHERN MINERALS, INC.,	:	CONTEST PROCEEDINGS
TRUE ENERGY COAL SALES, INC.,	:	Docket Nos. WEVA 92-15-R
and FIRE CREEK, INC.	:	through WEVA 92-116-R
Contestants	:	
v.	:	Fire Creek No. 1 Mine
	:	Mine ID 46-07512
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 92-786
Petitioner	:	through WEVA 92-791
v.	:	
	:	Fire Creek No. 1 Mine
SOUTHERN MINERALS, INC.,	:	
TRUE ENERGY COAL SALES, INC.,	:	
and FIRE CREEK, INC.,	:	
Respondents	:	

**ORDER DENYING**

**THE SECRETARY-S MOTION TO REVISE ORDER,**  
**DISMISSING TRUE ENERGY COAL SALES, INC.**

In a partial decision issued on December 15, 1995, I ruled that True Energy Coal Sales, Inc. (ATrue Energy@) was not an operator, and I dismissed the proceedings with respect to True Energy (17 FMSHRC 2191, 2217). I held further that Southern Minerals, Inc. (ASouthern Minerals@) was an operator, and I

ordered the parties to proceed to a hearing on the merits of the cases with respect to Southern Minerals (17 FMSHRC at 2217-2218).

On January 22, 1996, the Commission declined review of the partial decision because I did not expressly direct that the dismissal **A**be entered as a final decision@ (18 FMSHRC 1) (quoting Federal Rule of Civil Procedure 54(b)).

The Secretary has moved for the entry of an order revising the partial decision of December 15, 1996, by deleting the dismissal of True Energy and thus allowing True Energy to participate in the forthcoming hearing. According to the Secretary, if the partial decision is not revised, the Commission eventually may determine True Energy is an operator and the Secretary may be required to relitigate these proceedings against True Energy, a use of his resources that the Secretary asserts would be wasteful. The Respondents oppose the motion, noting that True Energy already has been dismissed as a party.

While I agree with the Secretary that the present posture of these proceedings permits me to revise the order dismissing True Energy, I decline to do so. If the cases go forward in their current posture, the merits of the alleged violations will be decided. Thus, if True Energy ultimately is found to be an operator, the Secretary will not have to relitigate whether the violations occurred, but rather will have to litigate only the civil penalty aspects of the violations with regard to True Energy.

On the other hand, if I grant the Secretary's motion, and True Energy ultimately is found by the Commission not to be an operator, the civil penalty aspects of the proceedings regarding True Energy will have been tried for naught. Thus, I must balance whether to try the civil penalty aspects regarding True Energy now, or possibly later, or possibly not at all.

It bears remembering that these cases involve more than one half million dollars in proposed penalties, and the contests of 102 citations and orders. Simplification of the forthcoming hearing is desirable. The issue of True Energy's status as an operator has been tried and decided. True Energy has been removed as a participant and evidence regarding the civil penalty criteria and True Energy has been removed from consideration. I see little to be gained from revisiting the issue and enlarging an already extensive record. The motion is **DENIED**.

David F. Barbour  
Administrative Law Judge

