

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 4, 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 :

DECISION

Appearances: Pamela S. Silverman, Esq., Ronald Gurka, Esq.,
Mark Malecki, Esq., U. S. Department of Labor,
Arlington, Virginia, for the Secretary;
Robert I. Cusick, Esq., Marco M. Rajkovich, Jr., Esq.,
Mindy G. Barfield, Esq., Jean Bird, Esq., Wyatt,
Tarrant & Combs, Lexington, Kentucky,
For Contestants/Respondents.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq.). They involve 102 contests of citations and orders. They also involve 101 alleged violations of mandatory safety standards for underground coal mines for which aggregate civil penalties of \$576,681 have been proposed.

The cases are the result of a fatal explosion that occurred

at Fire Creek, Inc.'s (Fire Creek) No. 1 Mine. The mine is located on land leased by Southern Minerals, Inc. (Southern Minerals). Fire Creek, through a contract with Southern Minerals, was the production contractor responsible for mining coal at the mine. True Energy Coal Sales, Inc. (True Energy) provided various administrative services to Fire Creek.

Following an investigation of the accident, the Secretary of Labor, (Secretary) through his Mine Safety and Health Administration (MSHA), issued the subject citations and orders to Fire Creek, Southern Minerals, and True Energy. The Secretary contended that the Companies were jointly and severally liable as operators of the mine. Southern Minerals and True Energy (Contestants) denied they were operators and asserted that they were not liable under the Act. Fire Creek did not dispute jurisdiction.

Counsels entered appearances on the record subject to a duly noticed proceeding and expressed their positions regarding how best to try the cases (see Tr. I). As a result, the proceedings were bifurcated so that the jurisdictional status of Southern Minerals and True Energy could be resolved, prior to addressing the individual merits of the citations, orders, and alleged violations. After extensive discovery, the Secretary, Southern Minerals, and True Energy filed cross motions for summary decision. I denied the motions (Southern Minerals, Inc., 17 FMSHRC 465 (March 1995)), and conducted a hearing of record regarding the issue of operator status (See Tr. II).

Following the hearing, I issued a Partial Decision in which I concluded that Southern Minerals was an operator of the mine within the meaning of the Act and that True Energy was not (Southern Minerals, Inc., 17 FMSHRC 2191, 2217 (December 1995)). I dismissed the proceedings with regard to True Energy and scheduled for hearing the contest and civil penalty aspects of the cases as they related to Fire Creek and Southern Minerals (17 FMSRHC at 2218).

The resulting hearing was rescheduled at counsels' request, and counsels again appeared before me and expressed their positions regarding how the trial should proceed (see Tr. III). At the request of counsels, the hearing was postponed to accommodate the parties need for further discovery and to provide the opportunity to explore fully the possibility of settlement.

Shortly before the hearing was to convene, counsels advised me orally that the parties had agreed in principle to settle all of the cases. Counsels orally and in writing explained the broad outline of the proposed settlement, and they requested a further delay while they negotiated the details of the settlement.

Relying upon counsels assurance that their agreement to settle was irrevocable, I continued the proceedings. I ordered counsels to inform me on a periodic basis of their progress in finalizing the settlement (See Orders of July 31, 1996; September 18, 1996).

THE SETTLEMENT

On November 1, 1996, the parties jointly moved to approve the settlement and to dismiss the proceedings. The parties attached to their motion lists of the specific citations and orders issued to Southern Minerals, True Energy, and Fire Creek and indicated the specific penalty proposed for each violation (See Attachment A).

It is fair to describe the proposed settlement as comprehensive. It is also fair to state that it may serve as a landmark in effective enforcement. While the parties have unresolved differences regarding the status of the Contestants as operators under the Act and the negligence, if any, of the companies in creating the allegedly violative conditions (Motion 3), through mutual trust, diligence, and the persistence of counsels, they have put aside these differences in favor of an innovative, multifaceted agreement. It is an agreement whose purpose is to raise the level of safety not only in the Contestants' production contractor operated mines, but in all such small mines in southern West Virginia.

Under the settlement the parties have created obligations and mechanisms that go beyond the requirements of the Act, while remaining true to its spirit and overall goals. The parties and their counsels are to be commended.

The terms of the settlement are:

1. Southern Minerals will pay civil penalties totaling \$50,000 to be apportioned among the violations pro rata.

2. Southern Minerals through a cooperative agreement with MSHA will institute a Production Contractor Safety Promotion Program (Program) at all

current and prospective mines of Southern Minerals operated by production contractors (See Attachment B). (The program creates incentives beyond those imposed by the Act for Southern Minerals' production contractors to create and maintain a safety culture at the mines they operate or that they will operate.)

3. The Program contains specific provisions the parties believe will create an environment to prevent the recurrence of the violative conditions and practices found at the mine during MSHA's investigation. It provides for an evaluation of each prospective contract production operator's ability to comply with the Act, requires periodic audits by Southern Minerals to determine the overall safety performance at each production contractor operated mine, and establishes procedures for effective communication of safety and health concerns among MSHA, Southern Minerals, and the contract production operators. Southern Minerals' participation in these specific activities exceeds the duties and obligations imposed by the Act and its regulations. Southern Minerals will spend \$200,000 over a period of 5 years to meet the costs of the Program.

4. Southern Minerals will expeditiously enter into a contract, the terms of which will be approved by the Secretary, with the West Virginia Small-Mines Assistance Center ("Center") to develop mechanisms for the delivery of safety and health expertise, training programs, and other technical assistance tailored to small mine operators. (The Center was established on July 1, 1994, with a grant from the West Virginia Board of Coal Mine Health and Safety and is comprised of Marshall University, West Virginia University and other colleges and schools throughout West Virginia.) Under the contract between Southern Minerals and the Center, Southern Minerals will pay to the Center \$40,000 in 1996, and will make a payment of an additional \$40,000 during each succeeding year through calendar year 2000, for a total payment of \$200,000.

5. The contract between Southern Minerals and the Center, as supported by the annual payments, will assist Southern Minerals in complying with the Program. The contract will result in Southern Minerals contract production operators receiving assistance in the areas of technology transfer, specialization of training

materials, employee assistance programs, training in conducting and recording preshift, onshift, and other required examinations, community outreach, programs addressing smoking materials in the mining environment, the development of safety audit standards and procedures, ventilation, and mine-specific safety workplace practices. (The parties state that "[d]eficiencies in these areas directly contributed to the occurrence of the explosion" at the mine (Motion 5). They also state that the nature and scope of assistance to contract production operators under the contract exceed that available under the Act and its regulations and that the contract between Southern Minerals and the Center is a "substantial inducement" to the Secretary to enter into the proposed settlement (Id. 5-6).)

6. Programs developed by the Center pursuant to the contact will be made available to similar small coal mines in southern West Virginia.

7. Except for proceedings under the Mine Act, none of the settlement agreements and actions taken by the Contestants and Fire Creek is an admission of a violation of the Act or an admission of the allegations contained in the citations or orders or the proposals for penalty. The findings and actions taken under the settlement are solely for the purpose of compromising and settling amicably the subject administrative matters, and may not be used in any judicial or administrative forum for any other purpose, except for proceedings under the Act. Moreover, the parties understand that the settlement is not intended to and does not constitute an admission of civil liability or responsibility for any civil personal injury or wrongful death action. Indeed, Contestants and Fire Creek specifically deny such civil liability or responsibility (Motion 2-7).

APPROVAL OF THE SETTLEMENT

The parties state, and I agree that "the settlement ... reflects due consideration for the purposes of the Act" (Motion 7). Indeed, it does more. It provides ongoing obligations and mechanisms that specifically address the chronic problem of enhancing safety at small, contractor operated mines. In so doing, it addresses both the immediate concerns raised by the particular accident that triggered the settlement and the general, more pervasive, concerns that all too often have been

endemic in facilities mined by some production contractors. The settlement reflects the mutual recognition of the parties that when it comes to such operators, more is needed from both industry and government to meet the first and foremost priority of the Act – “the health and safety of [the mining industry’s] most precious resource – the miner” (30 U.S.C. § 801(a)).

The foregoing having been considered, the parties’ motion to approve the settlement is GRANTED.

ORDER

It is ORDERED that:

1. Within 30 days of the date of this Decision and Order, Southern Minerals will pay civil penalties of \$50,000 for the violations alleged in these matters. The sum will be apportioned among the violations alleged on a pro rata basis and as shown on Attachment A, which is incorporated by reference.

2. Southern Minerals and the Secretary will implement the Program, Attachment B, which is incorporated by reference.

3. Southern Minerals will provided the Secretary’s designated representatives with documentation demonstrating the expenditure of at least \$40,000 for costs directly related to implementation of the Program during the 12 months following the date of this Decision and Order.

4. Southern Minerals will provide the Secretary’s designated representatives with documentation demonstrating the expenditure of at least \$40,000 per year for costs directly related to the implementation of the Program during each succeeding 12 months for a period of 5 years or until a total expenditure of \$200,000 is documented.

5. Southern Minerals will enter into a contract, the terms of which are subject to the approval of the Secretary, with the Center to develop mechanisms for the delivery of safety and health expertise, including assistance in the areas of technology transfer, specialization of training materials, employee assistance programs, training in conducting and recording preshift, onshift and other required examinations, community outreach, programs addressing smoking materials in the mining environment, the development of audit standards and procedures, ventilation, mine-specific workplace practices, and other technical assistance tailored to the safety and health needs of small coal mine operators such as Southern Minerals’ contract production operators.

6. Southern Minerals will pay \$40,000 to the Center in calendar year 1996 and will make a payment of \$40,000 during each succeeding year through calendar year 2000 until such payments total \$200,000.

Upon payment of the civil penalty of \$50,000, these proceedings are DISMISSED WITH PREJUDICE.

David F. Barbour
Administrative Law Judge

2 Attachments a/s

Distribution:

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