

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 29 1981

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 80-663
Petitioner : A.O. No. 46-02208-03046
 :
v. : Docket No. WEVA 80-624
 : A.O. No. 46-02208-03044
DAVIS COAL COMPANY, :
Respondent : Docket No. WEVA 80-635
 : A.O. No. 46-02208-03045V
 :
 : Docket No. WEVA 80-589
 : A.O. No. 46-02208-03040
 :
 : Marie No. 1 Mine

DECISION AND ORDER

Relying heavily on the Commission's prior approval of settlements that permitted a 90% reduction in penalties, 1/ the parties initially proposed settlement of three of the captioned matters at a 25% reduction. This was rejected on the ground that the operator's history of prior violations shows token penalties are no deterrent to serious violations by this operator 2/ and because Commissioner Lawson, Judge **Melick** and this trial judge found Davis' claims of financial impairment unpersuasive. See, Order Denying Settlement, issued November 12, 1980. Compare, Davis Coal Company, 2 PMSHRC 3053, 3067-68 (**Melick**, J. 1980); Davis Coal Company, 2 **FMSHRC** 18 (Kennedy, J. 1980); Davis Coal Company, 2 PMSHRC 619, 620 (Dissenting Opinion of Lawson, Commissioner).

The matter is before me now on the operator's unopposed request to reconsider my order denying the motion to approve settlement together with renewed motion to approve settlement of the 21 violations charged in all four of the captioned matters at 90% of the amounts initially assessed.

1/ Davis Coal Company, 2 PMSHRC 619 (1980).

2/ As I have noted, "While the Act requires that adverse business impact be 'considered', it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing in business only those mining operations that promote mine safety." Davis Coal Company, supra, 2 PMSHRC 18, n. 1.

As the record shows, prior to 1980 Davis Coal Company enjoyed what amounted to a prescriptive right to violate the Act with impunity. This was based on its ability to persuade MSHA that a small operator who exploits his mineral leases through the cover of a proprietary, non-profit corporation is per se a candidate for a substantial (usually 90%) remission of the penalties assessed. And this, despite the fact that the proprietors (Mr. and Mrs. Davis) paid themselves handsome salaries and provided, tax free and at the expense of the corporation, all the prerequisites and amenities usually associated with the truly rich. This is not to suggest there is anything improper or illegal about the Davis operation. Only that an uncritical acceptance of Davis' plea of poverty has served to continue in business and to encourage what is clearly a marginally safe operation. In this connection, Mr. Davis has furnished for the record his personal pledge to give immediate attention to correction of the many conditions and practices in his operation that result in serious safety violations and "to significantly reduce future MSHA violations". This statement will be made a part of the record in this proceeding and will be available as a measure of Mr. Davis' good faith efforts to achieve compliance in future proceedings.

Based on an independent evaluation and de novo review of the circumstances, including an evaluation of **the operator's** solvency, and his personal pledge to improve compliance, I find the settlement proposed is in accord with the purposes and policy of the Act. To have brought Davis to, the point where he is willing to settle on the basis of payment of 90% instead of a reduction of 90% reflects a commendable improvement in attitude on his part and a victory for more effective enforcement on the Commission's part. Davis still has a long way to go, but at least for the purpose of this settlement, I am persuaded he is sincere and intends to improve significantly his record of compliance.

A final word is warranted with respect to the financial data furnished. A careful examination of the operator's comparative statement of assets and liabilities for 1979 and 1980 as well as its comparative statement of income and expenses for the same period dramatically demonstrates the fallacy of the claim that the absence of profit or taxable income is a reliable indicator of a small operator's inability to pay substantial penalties and still continue in business. Davis has successfully operated without showing a profit since 1976. The fact that the company apparently walks on water is explained by its ability to finance its high debt load with a healthy cash flow and an extended line of credit from the Bank of Pikeville, its silent partner.

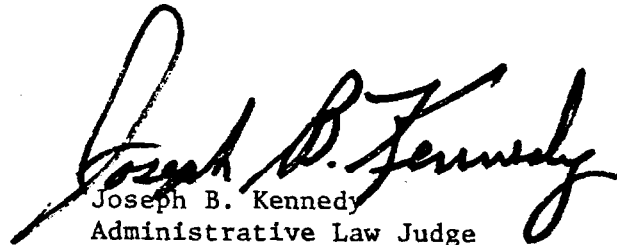
Thus, the comparative statements and tax returns both corporate and individual show the principal stockholder and his wife paid themselves salaries in 1980 totalling \$75,000, have outstanding non-interest bearing loans totalling almost \$250,000 and own stock in another closely held corporation worth almost \$140,000. The profits or earnings retained by the corporation to avoid the tax on dividends increased from \$563,761 in 1979 to \$867,499 in 1980. This resulted in almost doubling the net

worth of the corporation which as of December 31, 1980 was \$842,498. A measure of the success of the technique of using the proprietary corporation as an individual tax shelter is shown by the fact that the Davis' joint federal tax return shows they took no individual deductions against a taxable income of \$71,261 in 1979.

The comparative statements also show the operator has a cash flow of almost **\$3,000,000** a year, that **its long** term liabilities are only \$260,533 and that the book value of its fixed assets are \$940,168. Finally a comparison of Davis' cash flow to its total debt shows a favorable ratio of 1.5 to 1. 3/

I conclude, therefore, that the Davis Coal Company is a highly solvent and profitable operation for its owners and the Bank and merits no more or less consideration in the assessment of penalties than any of its highly profitable publicly held competitors.

The premises considered, it is, ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is **FURTHER** ORDERED that the penalties be allocated on the basis of 90% of the amounts initially assessed and that the operator pay the total amount of the settlement agreed upon, \$3,720, within forty-five (45) days of the date of issuance of this order. Finally, it is ORDERED that, subject to payment, the captioned matters be DISMISSED,


Joseph B. Kennedy
Administrative Law Judge

3/ Accounting research shows this is one of the most reliable predictors of financial success or failure. Beaver, "Financial Ratios As Predictors of Failure", Supp. to Vol. 4, Journal of Accounting Research, pp. 71-127 (1966).

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