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SOL (MSHA) V. NBC ENERGY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. KENT 82-27 A/O No. 15-08906-03046
v.	
NBC ENERGY, INCORPORATED, RESPONDENT	No. 1 Mine

DECISION

Appearances: W. F. Taylor, Esq., Trial Attorney, Office of the Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee
Messrs Wayne W. Clark and Jack D. Bush, Co-Owners, NBC Energy, Inc., Prestonburg, Kentucky

Before: Judge Kennedy

Statement of the Case

This matter is before me on the Secretary's unopposed motion for summary disposition. The motion is supported by (1) affidavits of the federal mine inspectors responsible for the charges made, (2) answers to interrogatories by Mr. Clark on behalf of the corporate respondent, NBC Energy, Inc. (NBC), (3) depositions of the co-owners and principal officers of NBC, Messrs Clark and Bush, (4) the transcript, exhibits and decision of the trial judge in Secretary v. NBC Energy, Inc., 4 FMSHRC 1498 (August 2, 1982), and (5) financial statements and corporate and individual tax returns of the corporate respondent and its co-owners for the period July 1979 through May 1982.

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The principal issue presented is whether imposition of the penalties proposed, $1,680, for the ten violations charged, will adversely affect the ability of the corporate respondent and its co-owners to continue in business. After discovery, the Secretary invokes the alter ego or "single enterprise entity" doctrine to pierce the corporate veil of NBC and its affiliated corporation, C&B Coal Company (C&B), and thereby subject NBC, C&B, their successor corporations and their co-owners, Messrs Clark and Bush, to liability for the penalties proposed.

The Supreme Court has encouraged use of the "single enterprise entity" theory to penetrate schemes that employ corporate shells or proprietary corporations to circumvent enforcement of regulatory statutes and orders. NLRB v. Deena Artware, Inc., 361 U.S. 398, 403 (1960). (FOOTNOTE- 1)

Thus, in Deena Artware, supra, the Court held that a regulatory agency is entitled to show in an enforcement proceeding that a group of "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a "single enterprise"'. Id. at 402.

A subsidiary issue is whether the penalties proposed are excessive to the policy of deterrance and should, therefore, be reduced to more realistically reflect the seriousness of the violations charged.

Under the Commission's rules when a motion for summary decision is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary decision, if appropriate, will be entered against him.

Because the operator has the burden of proof on the issue of financial jeopardy and appears pro se, the trial judge has subjected the Secretary's motion and evidence to close scrutiny and made an independent audit and de novo evaluation of the propriety of granting the motion. Applying this standard, I find there is no triable issue of fact and that the Secretary is entitled to summary decision as a matter of law. (FOOTNOTE- 2)

Findings and Conclusions

The Capitalization of NBC

The corporate respondent, NBC Energy, Inc., a Kentucky corporation, began operating the No. 1 Mine, a non-union mine, near Coal Run, Pike County, Kentucky on or about July 23, 1979. The company ceased active operations at the mine on or about May 17, 1982, and was immediately succeeded by Wayne Clark, Inc., a Kentucky corporation owned by the same individual, Wayne Clark, who appears on respondent's behalf in this matter and who succeeded to sole ownership of NBC in February 1982. The ten violations charged occurred during the period April 1981 through September 1981 at a time when Wayne Clark and Jack Bush, who also appears on behalf of respondent in this proceeding, each owned 50% of NBC.

Wayne Clark, the president of NBC functioned as the outside man and managed business. Jack Bush, the vice president and secretary of NBC, functioned as the inside man and was in charge of producing coal. As Mr. Clark noted, they started the business on a "shoestring." Clark, Bush and a man named Stanley Neese each put up $1,000 for a total capitalization of only $3,000. (FOOTNOTE- 3) Neese dropped out in 1980 and thereafter Clark and Bush owned equal shares of NBC. The company operated on a fiscal year that ran from June 1 to May 31.

Operation of NBC and C&B

According to Bush, Clark worked only part time, about 20 hours a week, at managing NBC. Bush as mine superintendent and foreman worked more or less full time on the production end of the business. (FOOTNOTE- 4) NBC was incorporated May 29, 1979 and operated the mine under a lease from Kentucky Coal Company. Kentucky Coal paid NBC a royalty on the coal produced that averaged $16.00 a ton. In February 1982, Clark bought out Bush's interest in NBC and after May 1982 declared NBC insolvent and continued the business through Wayne Clark, Inc., another of Mr. Clark's proprietary corporations.

At the time it commenced operations, NBC owned $28,000 worth of mining equipment. (FOOTNOTE- 5) It leased equipment from Kentucky Coal for which

it paid an equipment rental of $61,571.61 during its first year of operations. It also leased equipment from C&B Coal Company, Inc. C&B was a non-operating company jointly owned by Clark and Bush. C&B became inoperative in September 1979, a few months after NBC began operations. C&B was shut down because it was subject to the collective bargaining agreement between the BCOA and the UMWA. Mr. Clark testified that C&B's mining equipment was not needed to operate the No. 1 Mine because the "Kentucky Coal Company had enough equipment at the NBC Energy Number One Mine to operate it." (FOOTNOTE- 6) Despite this, Clark and Bush leased C&B's equipment to NBC. The first year's rental on unneeded equipment that Clark valued at only $60,000, was $116,720.26. During its second year of operations, NBC paid C&B an additional equipment rental that totalled $61,112. (FOOTNOTE- 7) NBC apparently continued to pay an equipment rental to C&B until some time between February and May 1982 when NBC turned operation of the No. 1 Mine over to Wayne Clark, Inc. I find this leasing arrangement was not a bona fide arms-length transaction and was designed to cloak the true nature of the financial condition of the affiliated corporations and their co-owners. I also find (1) that as the controlling stockholders of NBC and C&B Clark and Bush were at all times relevant the beneficiaries and true parties in interest with respect to revenues and income received and disbursed

by NBC and C&B and (2) that the corporations were the mere alter egos of the two individuals and part of a single, integrated, economic entity.

Analysis of NBC and C&B's Financial Condition

An analysis of the financial condition of the single enterprise entity (NBC, C&B) as disclosed by unaudited data and the testimony of Clark and Bush discloses the following. For the period ending May 31, 1980, NBC had gross revenues of $1,061,591 but claimed a net loss of $108,860. Its itemized cost of production included the $116,720 paid C&B for equipment rental as well as $76,700 paid C&B for management fees. During the first year of operations, Clark and Bush took their salaries from the sums paid C&B for management fees and drew no salaries from NBC. Clark was paid a salary of $30,975 and Bush was paid $32,975. It is not clear what the remainder of this fee was used for. If the management fee is considered a wash, the revenue from the equipment rental still more than offset the claimed loss of $108,860 and resulted in a profit before taxes, and after handsome salaries, of almost $8,000, a four fold return on each individual's initial investment of $1,000.

Further analysis shows NBC's profit was even greater because Clark and Bush charged as a cost of production the unpaid civil penalties assessed against NBC by MSHA. For the first year of their operations this totalled $8,026 and for the second year $19,859. Penalties are, of course, a cost of doing business, but they are not tax deductible. (FOOTNOTE- 8)

Nor, in my view, is it proper to consider unpaid penalty assessments as contributing to an operator's financial impairment where the monies were actually used to fund operations.

Thus, instead of net losses for the first year of operations NBC, C&B and their owners had a return on investment during that time of something like 100% on equipment rental alone ($60,000, investment v. $117,000 rental). In fact, Mr. Clark admitted that the first year rental arrangement between C&B and NBC resulted in a profit to C&B of approximately $37,000. In addition, as we have seen, each individual took home a salary of over $30,000. (FOOTNOTE- 9)

For the second year, it appears the equipment rental was $61,112, most of which was sheltered by a $50,000 deduction for depreciation. NBC also paid C&B $13,650 for management fees during the second year. During the second year, Bush was paid a salary by NBC of $34,450 plus $6,825 in management fees by C&B for a total compensation of $41,275. Clark was paid a salary of $28,320 by NBC plus $6,825 in management

fees by C&B for a total compensation of $35,145. Clark, who worked at management only part time, curtailed his salary in the latter part of 1980 but still drew a salary from NBC of approximately $23,000 in 1980. The amount of Mr. Clark's unearned or investment income from C&B for the second year was not disclosed. It must have been substantial since C&B reported rental income for that year of $87,000.

Furthermore in the second year NBC's gross profit would have been $105,492 if the equipment rental siphoned off by C&B for the benefit of Clark and Bush had been available as operating or working capital for NBC. Even after paying management fees and administrative salaries to Clark and Bush of $76,420 this would have left NBC a net profit before taxes of approximately $16,000. Again, it was the diversion of working capital coupled with the initial undercapitalization that created the illusion of a losing operation that was, in fact, quite profitable. Even more profitable than appears from the face of the financial records because almost $20,000 in accrued but unpaid assessments were diverted and expended for purposes that apparently served the personal interests of Clark and Bush. Thus, NBC's profit before taxed during its second year may actually have been almost $36,000.

The unaudited records of NBC's third, and last year of operations, May 1981 to June 1982, shows NBC produced approximately 60,000 tons of coal at a gross revenue of approximately $975,000. Net earnings after all expenses for the first eight months totalled $16,900. Mr. Clark's salary for this period was at least $20,000 and Mr. Bush received approximately $30,000. Again neither individual's investment income was disclosed.

The Successor Corporations

After Messrs Clark and Bush dissolved their association in February 1982, Mr. Clark decided to declare NBC "insolvent," to rent NBC's equipment to his successor proprietary corporation, Wayne Clark, Inc., and to continue operation of the No. 1 Mine. (FOOTNOTE- 10) Mr. Bush, also, and without interruption, continued in the business as the J&L Coal Company, operating the No. 2 Mine in Pike County, Kentucky. There is no suggestion, let alone evidence, that payment of the modest penalties assessed for these ten violations would create any cash flow problem or otherwise have an adverse effect on the continued viability of either of the two successor corporations. (FOOTNOTE- 11)

I find that NBC, C&B, J&L and Wayne Clark, Inc. were and are the alter egos of their individual owners, Clark and Bush, and that to recognize them as separate corporate identities would merely further a scheme to circumvent effective enforcement of the Mine Safety Law. There is for application therefore the principle that:

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 442 (1934); Chicago M. & St. P.R. Co. v. Minneapolis Civic Assn., 247 U.S. 490, 501 (1918). In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form. Bangor Bunta Operations v. Bangor & A.R. Co., 417 U.S. 702, 713 (1974).

The precedents establish there where, as here, a closely held proprietary corporation is undercapitalized, and its financial resources drained off by the controlling stockholders the corporate form may be disregarded if its recognition as an entity separate and distinct from its ownership will enable the corporate shield to be used to defeat a regulatory statute. Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1945); Bruhn's Freezer Meats v. United States Dept. of Agr., 438 F.2d 1332, 1343 (8th Cir. 1971). See also 1 Fletcher, Corporations %5745 (Rev. Ed. 1974).

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Further, it is clear that where enforcement of a regulatory statute or order may be frustrated because a corporation has been inactivated, dissolved or rendered judgment proof while the individuals involved under the cloak of a new corporation continue to engage in proscribed activities the corporate fiction will not be permitted to "stand athwart" the regulatory purpose. Bruhn's Freezer, supra; Capital Telephone Company, Inc. v. FCC, 498 F.2d 734, 738 n. 10 (D.C. Cir. 1974). Under these and similar circumstances a federal regulatory agency is entitled to look through the corporate veil and to treat the individual owners and the separate entities as one for purposes of regulation. General Tel. Co. v. United States, 449 F.2d 846, 855 (5th Cir. 1971).

Indeed, the fiction of a corporate entity must be disregarded whenever it has been adopted or used to defeat a paramount public policy such as that designed for protection of a vital national resource--the nation's miners. This doctrine is firmly entrenched in our jurisprudence. See cases collected in footnotes 95, 107 of Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975); 1 Fletcher, Corporations %57%5741-46 (Rev. Ed. 1974).

Consequently, whenever recognition of the corporate device will frustrate the clear intendement of the law such as the ability of the Government to collect taxes or penalties, the courts have not hesitated to ignore the fiction of separateness and approve a piercing of the corporate veil. Valley Finance, Inc. v. United States, 629 F.2d 162, 171 (D.C. Cir. 1980); Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1322 (7th Cir. 1972).

Nor does application of the doctrine require allegation or proof of actual fraud; it suffices that the corporate fiction has actually been used to frustrate the statutory scheme. Addressing the contention that an intent to circumvent must be shown the court in Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965) held:

> Intention is not controlling when the fiction of corporate entity defeats a legislative purpose. The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law.

Nor in cases involving the frustration of a regulatory statute is the single enterprise entity or alter ego doctrine subject to the strict standards that govern application of the doctrine in tort or contract cases. Capital Telephone, supra, at 738. State law limitations on the alter ego theory are not controlling in determining the permitted scope of remedial orders under federal regulatory statutes. Sebastopol Meat Company v. Secretary of Agriculture, 440 F.2d 983, 958 (5th Cir. 1971). Even under the strictest of standards a controlling factor in denying stockholders the defense of limited liability is a showing of obvious inadequacy in the capitalization of a corporation. Anderson v. Abbott, 321 U.S. 349, 362 (1944).

For these reasons, I conclude that where, as here, the corporate device was manipulated to create an erroneous appearance of a failing corporate operator, it is my duty to look through form to substance and to fashion an order that will preclude evasion of either corporate or individual responsibility. Anderson v. Abbott, supra, at 362-363.

This conclusion is based on undisputed evidence which shows:

1. That if C&B's unneeded mining equipment had been contributed as part of the capital contribution of NBC, or

2. If the unnecessary leasing arrangement had not been used to create a dearth of working capital while funneling funds to Clark and Bush through C&B,

there would have been no deficit in NBC's operating account or balance sheet for the three years of its operation.

Turning now to the claim that the individual penalties assessed are excessive in the light of the negligence, gravity, and the operator's history or prior violations, I find that for the reasons detailed in the Secretary's motion as supported by the uncontradicted affidavits of the inspectors involved the penalties assessed for the violations charged are, with one exception, fully warranted and in accord with the statutory criteria. (FOOTNOTE- 12)

The exception is the charge that the operator was violating its approved roof control plan by driving two entries four to eight feet in excess of the 20 foot width specified. This violation was aggravated by the fact that (1) two scoop operators were required to work under unsupported roof; (2) that it was a violation which the operator knew or should have know existed; and (3) that during the previous 14 month

period there had been six roof control violations. (FOOTNOTE- 13) For these reasons, I find the amount of the penalty warranted for this violation (Citation 958072) should be increased from $295 to $500. (FOOTNOTE- 14)

Summary

In summary, during the three year period the No. 1 Mine was operated under the control of Clark and Bush through NBC they (1) compiled a record of some 200 violations (at the rate of 66 violations a month), (2) paid only $425 in civil penalties, (3) sold 83,000 tons of coal during the first year of operations at $16.00 a ton and produced a gross revenue of approximately $1,300,000; (4) sold 50,000 tons of coal a year the last two years of their operations that produced a gross revenue of approximately $1,600,000; (5) had gross revenues over the three year period of

approximately $2.9 million dollars; (6) diverted approximately $200,000 of NBC's working capital or revenues to themselves through unneeded equipment rentals paid C&B, (7) reaped a 7% return on sales; (8) almost doubled their assets; (9) persuaded the Secretary and one judge to approve settlements on 81 violations that reduced the penalties proposed by 80% on the ground NBC was a "small" operator in "dire financial condition"; (10) but, in May 1982, left another judge "unconvinced" of their claimed "dire" financial straits when, as the result of financial disclosure made pursuant to discovery orders, the answers to interrogatories, the depositions taken in April 1982, and the testimony adduced at the hearing in May 1982 a preponderance of the probative evidence showed conclusively that Clark and Bush had taken advantage of "opportunities for asset concealment and manipulation" through the use of "multiple corporations." Secretary v. NBC Energy, Inc., 4 FMSHRC supra, at 1501.

I conclude therefore that:

1. The undisputed evidence in the record considered as a whole shows there is no genuine issue of material fact.

2. That Clark and Bush operated NBC and C&B as a single integrated business profitably and successfully during the period July 1979 through May 1982, notwithstanding the failing company appearance reflected on the face of NBC's unaudited financial statements.

3. Applying the alter ego or single entity doctrine, Clark, Bush, NBC, C&B, J&L and Wayne Clark, Inc. are jointly and severally liable for payment of the penalties hereinafter assessed.

4. The Secretary is entitled to summary decision as a matter of law.

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Order

The premises considered, it is ORDERED:

1. That for the violations found the following penalties be, and hereby are, ASSESSED:

Citation 953508	$130.00
Citation 957626	98.00
Citation 958069	114.00
Citation 958070	140.00
Citation 958071	114.00
Citation 958072	500.00
Citation 957222	114.00
Citation 966468	225.00
Citation 966469	225.00
Citation 966470	225.00
Total	$1,885.00

2. That Wayne W. Clark, Jack D. Bush, NBC Energy, Inc., C&B Coal Company, Inc., J&L Coal Company and Wayne Clark, Inc., jointly or severally pay the amount of the penalties assessed, $1,885, on or before Friday, November 26, 1982, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 As explained by the Court:

". . . . the question [is] whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations . . . ." Id.

The seminal exposition of the theory is set forth in Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343 (1947). It is based on a recognition of the fact that, despite its long history of entity, a corporation or group of corporations are at bottom but an association of individuals united for a common purpose and permitted by law to use a common name. When the corporate fiction is disregarded, an actual underlying enterprise entity may be made to appear. According to Berle:

". . . . the underlying principle seems plain. Whenever corporate entity is challenged, the court looks at the

enterprise. Where the enterprise as such would be illegal or against public policy for individuals to conduct, that enterprise is equally illegal when carried on by a corporation, and the corporate form is not a protection. This is, in essence, not so much a "disregard of the corporate fiction' as it is a holding that the economic enterprise is illegal or criminal, or in violation of public policy, or fraudulent, or otherwise objectionable, as the case may be. The nature of the enterprise determines the result, negativing the corporate personality or any other form of organization of that enterprise.

"If it be shown that the enterprise is not reflected and comprehended by the corporate papers, books and operation, the court may reconstruct the actual enterprise, giving entity to it, based on the economic facts. Thus one corporation may be shown to be only an "instrumentality' of a larger enterprise, or to be so intermingled with the operations of such larger enterprise as to have lost its own identity. On such reconstruction of the true entity the court may assign the liabilities of the paper fragment to the economic whole. . . ." Id. at 354.

~FOOTNOTE_TWO

2 The parallel penalty proceeding cited above was heard and decided by another Commission judge in May 1982 on a record that embraced the same time frame, the same parties and the same claims and issues with respect to financial jeopardy. The final disposition issued in August was not appealed or docketed by the Commission for review. Because the decision did not specify the basis on which the judge chose to disregard the separate identities of NBC and C&B or why they should together with their co-owners, Clark and Bush, be considered part of a single integrated business entity, I have undertaken to make a de novo review of the evidence and the applicable law and precedents. The same lack of articulation in the earlier decision also leads me to conclude that application of the twin doctrines of res judicata and collateral estoppel would be inappropriate.

While the Secretary did not name Clark and Bush as individual respondents in either proceeding, both had notice and appeared pro se to defend on the ground of limited liability (corporate shield) and inability of their corporate instrumentality, NBC, to respond without allegedly jeopardizing their ability as individuals to continue in the business of mining coal. If, as the Secretary contends, therefore, NBC and the other corporate entities are the alter egos of Clark and Bush they have no right to any additional notice. Valley Finance, Inc. v. United States, 629 F.2d 162, 169 (D.C. Cir. 1980). On the other hand, if Clark and Bush prevail in their view that NBC and C&B and their successor corporations should be recognized as a shield against derivitive liability they obviously need no additional notice. Further, since the fact of violation is admitted and the only issue is the amount of the penalties warranted for the ten violations charged this is not a proceeding to determine responsibility for violating the law but only who shall pay for the violations admitted. Under these circumstances, the Court of Appeals for the Second Circuit has

held that the thrust of Deena Artware, supra, is that an already adjudicated or, as here, judicially admitted liability may be imposed on parties not themselves charged in the initial proceedings where, under the single enterprise theory, they are found to be derivatively liable as part of the single business enterprise involved in the violations admitted or adjudicated. NLRB v. C.C.C. Associated, Inc., 306 F.2d 534, 539 (2d Cir. 1962).

~FOOTNOTE_THREE
3 When Clark and Bush started the C&B Coal Company a few years earlier, they capitalized it at $25,000.

~FOOTNOTE_FOUR
4 The record shows that for the three years NBC was in business it produced approximately 185,000 tons of coal for which it received an average price of $16.00 a ton. Its gross revenues from the sale of coal were approximately $2.9 million dollars. According to the operator's unaudited financial statements and answers to interrogatories, its cost of production for the three year period totalled approximately $2.7 million dollars. Its gross profit for the period was therefore approximately $200,000. Despite this, the operator claims a loss on the operation of approximately $189,000. The Secretary's response is that during at least the first two years of its operations NBC leased coal mining equipment valued at $60,000 from Clark and Bush doing business as the C&B Coal Company for which they paid themselves $177,832 in equipment rentals. In addition, the Secretary claims Clark and Bush through NBC paid management fees and administrative salaries to C&B that C&B in turn paid to them individually that totalled $153,120. These allegedly unwarranted diversions of funds totalled $330,952.55 for the first two years of NBC's operations.

~FOOTNOTE_FIVE
5 By the time it ceased operations, NBC had increased the value of these assets to $75,000. Of this, $37,500, was owned outright and the rest was held subject to the usual installment credit arrangements on mining equipment.

~FOOTNOTE_SIX
6 This testimony was given in the parallel proceeding and appears at pages 58, 61-62 of the transcript in Docket Nos. KENT 81-133, et al.

~FOOTNOTE_SEVEN
7 During this period, C&B claimed almost $50,000 in depreciation on this and other equipment it leased out.

~FOOTNOTE_EIGHT
8 Treasury Regulation %571.162-21 (1975). Apparently IRS is not policing this as NBC's accrued but unpaid civil penalties for both 1979 and 1980 were claimed and allowed as deductible costs on NBC's tax returns for those years. For just those two years the amount totalled almost $28,000, almost twice the amount of NBC's present civil penalty liability of $16,520. The reduction from the amount initially assessed of $35,598 resulted from 80%

reductions that were approved on settlement by a trial judge who apparently was unaware of the true business and financial relationship of Clark, Bush and their alter ego corporations. Secretary v. NBC Energy, Inc., Dkt. Nos. KENT 80-185, et al.; Secretary v. NBC Energy, Inc., Dkt. Nos. KENT 80-173, et al., (Decisions Approving Settlement issued April 14 and December 29, 1981).

~FOOTNOTE_NINE
9 Curiously enough, neither individual seems to have reported any investment income or loss on his individual income tax return.

~FOOTNOTE_TEN
10 Mr. Clark testified that in May 1982 he had twelve miners working the mine, was mining 4,000 tons of coal a month, and was meeting a $20,000 a month payroll.

~FOOTNOTE_ELEVEN
11 In fact, the record shows that Messrs Clark and Bush are not really concerned with paying the $1,680 involved in this case. What they are seeking is a declaration by a Commission judge that they can cite as establishing once and for all their right to violate the Mine Safety Law on a discount basis. After years of persistent effort this was the type of relief obtained by the Davis Coal Company. Compare Secretary v. Davis Coal Company, 4 FMSHRC 1168 (1982) [despite small operator's history of poor compliance, marginally safe operation and prior decisions establishing its financial responsibility, operator granted right to write off dozens of violations at 20 cents on the dollar] with Secretary v. Davis Coal Company, Dkt. Nos. WEVA 82-111, et al. (September 15, 1982), [same small operator allowed to write off violations at 20 cents on the dollar before same judge based on his earlier decision and fact that operator had filed a petition in bankruptcy]. Here, unlike Davis however, the solicitor has compelled the production of sufficient financial data concerning the totality of Messrs Clark and Bush's business dealings to permit an objective analysis and evaluation of the operator's self-serving declarations and accounting practices. More aggressive and imaginative use of discovery and the single enterprise theory should do much to curb the belief among small operators that the Commission is prepared to confer a prescriptive right to violate the Act on almost any small operator who is willing to swear his operation is unprofitable. Congress never intended that a mitigating factor should be invoked to systematically deprive miners of the protection of the law or to justify a policy of tokenism in the assessment of civil penalties. Clark and Bush have used the administrative process to their advantage in obtaining an 80% reduction on the 81 violations previously settled. One coalscam is more than enough.

~FOOTNOTE_TWELVE
12 I specifically find that NBC's history of prior violations, approximately 200 over a three year period at an average rate of 66 per month is indicative of a serious lack of concern for mine safety on the part of the operator.

~FOOTNOTE_THIRTEEN
13 The MSHA District Manager after canvassing his inspectors furnished the following with respect to the contractor's attitude toward safety:

"Approximately two weeks prior to the beginning of a regular mine safety AAA (11/30/81) inspection, the mine management replaced the mine foreman (inside foreman), with a foreman who is a more mine safety regulation oriented individual. This foreman has reduced the number of citations with little or no expense to the operator.

An opinion by our inspectors is that much of the previous inability to comply with the mine safety law was due to a lack of effort instead of inadequate working capital. In previous inspections, there were instances of deluge fire suppression systems dismantled on belt drives, face ventilation devices not being used during production and loose coal and float coal dust being allowed to accumulate on equipment and working section. Many of these violations could have been avoided by good management practices. In the most recent regular inspection conducted after the new foreman had taken over, only one violation of the law was observed."

~FOOTNOTE_FOURTEEN
14 Roof falls this year, as every year, are again the leading cause of death in the mines accounting for 39 of the 94 deaths as of September 15, 1982.