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SOL (MSHA) v. MOGOFIN-JOHNSON & MORGAN STONE  
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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 85-57-M  
A.C. No. 15-00061-05508

v.

MJM Mine & Mill

MAGOFFIN-JOHNSON & MORGAN  
STONE COMPANY,  
RESPONDENT

DECISION

Before: Judge Kennedy

This matter is before me on the parties responses to my show cause order of June 7, 1985. This order required the parties to show cause why the decision in Secretary v. Adams Stone Corporation and Magoffin, Johnson & Morgan Stone Company, 7 FMSHRC 692, Judge Steffey, (May 1985), does not collaterally estop MJM from claiming that (1) it is not owned and controlled by Stuart Adams Stone Corporation, or (2) is not financially capable of paying the \$105 penalty proposed in this proceeding for the single violation charged.

After reviewing the parties' responses, the decision in Adams Stone, and the undisputed facts of record, I find:

1. That in the prior proceeding the operator had a full and fair opportunity to litigate the claim that it was not an instrumentality owned and controlled by the single enterprise entity doing business under the name of Stuart Adams Corporation and Subsidiaries (SACS) and that it is not financially able to pay monetary penalties.
2. That these are the sole issues contested in this proceeding.
3. That the operator represents it is unable to attend an evidentiary hearing or to submit

any evidence on the contested issues that was not considered by Judge Steffey in the Adams Stone case.(FFOTNOTE.1)

4. That Judge Steffey's decision in Adams Stone was not appealed and has by operation of law become a final decision of the Commission.

5. That under the twin doctrines of res judicata and collateral estoppel Judge Steffey's finding that MJM is an instrumentality owned and controlled by the single enterprise entity

doing business under the name Stuart Adams Corporation and Subsidiaries (SACS) is final and conclusive on MJM in this proceeding.

6. That Judge Steffey's finding that MJM is financially capable of paying monetary penalties is final and conclusive in this proceeding.

7. That Judge Steffey's finding in Adams Stone that MJM failed to sustain its burden of showing that payment of monetary penalties will impair its ability to do business is final and conclusive in this proceeding.

Since the fact of violation is admitted and the sole issue contested is MJM's ability to pay, this is not a proceeding to determine responsibility for violating the law but only whether MJM and the single enterprise entity of which it is a part can pay the \$105 penalty assessed. The Supreme Court has encouraged the use of the single enterprise entity theory to penetrate schemes that employ corporate shells or proprietary corporations to circumvent enforcement of regulatory statutes. *NBC Energy, Incorporated*, 4 FMSHRC 1860, 1861 (1982). Indeed, Congress has exempted regulatory enforcement proceedings, such as this penalty proceeding, from the automatic stay provisions of the Bankruptcy Act. 11 U.S.C. 362(b)(4); *Leon's Coal Company*, 4 FMSHRC 572 (1982).

Since, as Judge Steffey found, MJM is a mere instrumentality of the larger SACS enterprise it will be appropriate for the Secretary to seek recovery from the SACS enterprise if MJM defaults in payment of the penalty assessed. But since this has not occurred and since Adams Stone found MJM failed to sustain its burden of showing that payment of much larger penalties would result in economic jeopardy to MJM it is unnecessary to reassign liability at this stage.

If, the Secretary is unable to collect the penalty from MJM, he may pursue collection proceedings against the SACS enterprise and, if necessary pierce the corporate veil and collect from the stockholders of SACS. See *NBC Energy, supra*, *WRW Corporation*, 7 FMSHRC 245, 259 (1985).

Finally, I find that where, as here, there is an identity of parties and legal issues and where, as here, MJM has had a full and fair opportunity to litigate its financially



This ambivalence on the part of the Commission and its draconian sanctions for even merited criticism of those who enjoy a specially protected status demeans the status of its judges; undermines public confidence in the Commission's neutrality; and encourages condonation of lawyer conduct that would be deemed unacceptable by the courts.