

CCASE:  
SOL (MSHA) V. SPURLOCK MINING  
DDATE:  
19930402  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 92-380  
Petitioner : A.C. No. 15-16592-03518  
v. :  
: Docket No. KENT 92-419  
SPURLOCK MINING COMPANY, INC., : A.C. No. 15-16592-03517  
Respondent :  
: Docket No. KENT 92-420  
: A.C. No. 15-16592-03519  
:  
: No. 2 Mine  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 92-306  
Petitioner : A.C. No. 15-12875-03556  
v. :  
: Docket No. KENT 92-307  
SARAH ASHLEY MINING CO., INC., : A.C. No. 15-12875-03557  
Respondent :  
: Docket No. KENT 92-323  
: A.C. No. 15-12875-03558  
:  
: Docket No. KENT 92-324  
: A.C. No. 15-12875-03559  
:  
: Docket No. KENT 92-608  
: A.C. No. 15-12875-03561  
:  
: Docket No. KENT 92-609  
: A.C. No. 15-12875-03562  
:  
: Docket No. KENT 92-701  
: A.C. No. 15-12875-03563  
:  
: Docket No. KENT 92-836  
: A.C. No. 15-12875-03565  
:  
: Docket No. KENT 92-837  
: A.C. No. 15-12875-03566  
:  
: Docket No. KENT 92-838  
: A.C. No. 15-12875-03567  
:  
: Docket No. KENT 92-889  
: A.C. No. 15-12875-03568  
:  
:

: No. 2 Mine

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Hobart W. Anderson, President, Spurlock Mining  
Company, Inc. and Sarah Ashley Mining Company,  
Inc., Ashland, Kentucky, for Respondents

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging Spurlock Mining Company, Inc. (Spurlock) with 13 violations and seeking penalties of \$1,197 for those violations and charging Sarah Ashley Mining Company, Inc. (Sarah Ashley) with 76 violations and seeking amended penalties of \$7,382 for those violations.(Footnote 1)

There is no dispute that the violations were committed as alleged nor is there dispute concerning the Secretary's findings of gravity and negligence under Section 110(i) of the Act as noted on the face of the charging documents.(Footnote 2) It is also undisputed that Respondents are small operators and that they are no longer in business. In spite of this undisputed evidence, Respondents nevertheless assert that the proposed penalties would affect their ability to continue in business. Clearly, however, since they are no longer engaged in business, the proffered excuse is no longer relevant. The financial condition of Respondents is now only an issue of

---

1 Docket Nos. KENT 92-323, KENT 92-324, KENT 92-608, KENT 92-609, KENT 92-701, KENT 92-836, KENT 92-837, KENT 92-838 and KENT 92-889 were consolidated for purposes of this decision following hearings on September 4, 1992, after the parties stipulated that the evidence taken at those hearings would apply as well to these cases.

---

2 Section 110(i) of the Act provides, in part, as follows:  
"In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

collection and while the Secretary may have to stand in line with other creditors this is no longer an issue under Section 110(i) of the Act.

In any event, the Commission has long held that absent proof that the imposition of authorized penalties would adversely affect an operator's ability to continue in business it is presumed that no such adverse affect would occur. *MSHA v. Sellersburg Stone Co.*, 5 FMSHRC 287 (1983), aff'd 736 F.2d 1147 (7th Cir., 1984). Hobart Anderson, a certified public accountant with a masters degree in business administration and 15 years experience in public accounting, testified at hearing on behalf of the Respondents. Anderson incorporated Spurlock around 1987 and incorporated Sarah Ashley in 1988 or 1989. They are closely-held corporations and Anderson is president and chief operating officer of both. Hobart Energies, Inc. (Hobart) owns 100 percent of the stock of Sarah Ashley, Spurlock and 13 other corporations apparently also intermittently engaged in the coal mining business, and Anderson owns 25 percent of the stock of Hobart. Anderson and former accounting partner David Griffith are the only two officers and directors of all these subsidiaries. Anderson sets corporate policy and is responsible for the management of Spurlock and Sarah Ashley.

The financial evidence presented by Anderson primarily consists of state and Federal corporate tax returns, unaudited balance sheets, notices of tax and other liens, and copies of court pleadings apparently involving litigation by creditors against the Respondents and Hobart Anderson personally. While this evidence in itself, as noted by the Secretary in his brief, may not be sufficiently reliable to provide a basis to evaluate the impact of the proposed penalties, it is in any event too limited in scope. It is clear from the evidence in these cases that the relevant operating enterprise for evaluating the criterion at issue must include not only Spurlock and Sarah Ashley but also, under either an equity theory or an alter ego theory, the individual shareholders of the larger operating enterprise.

Under applicable Kentucky law, under either theory the following factors must be considered when determining whether to pierce the corporate veil: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment or overpayment of dividends; (4) siphoning of funds by major shareholders; and (5) guarantee of corporate liabilities by major shareholders in their individual capacities. *White v. Winchester Land Development Corp.*, 584 S.W.2d 56 (Ky App. 1979); *U.S. v. WRW Corporation, et al.*, No. 91-6253 (6th Cir. Feb. 17, 1993) (1993 West Law 36152); *United States v. Daugherty*, 599 F.Supp. 671 (E.D. Tn. 1984).

In these cases Anderson admitted that both Spurlock and Sarah Ashley were thinly capitalized with only \$1,000 of capital investment each. The record demonstrates that this capitalization was insufficient to pay the normal expenses associated with the operation of coal mines. In addition, the evidence shows that corporate formalities have been disregarded. Since 1988 there have been no regular stockholder meetings and there has not been an accounting to all shareholders. The evidence further shows that Hobart Anderson is a personal guarantor on every bank loan to Respondents, that he posted the required bonds to enable Respondents to conduct mining operations, and that he has personally directed the reallocation of assets, including mining equipment between and among his network of corporations as if they were his own.

Anderson himself concedes that no one tells him how to run the businesses. In particular, he notes that he makes all the decisions about the allocation of corporate assets and decides when and where among the various subsidiaries to send the mining equipment. He injected more than \$100,000 from Hobart into Spurlock for expenses and between \$100,000 and \$150,000 from Hobart into Sarah Ashley for operating expenses while both companies continued to lose money. Anderson also made the decision for Hobart to pay Spurlock's \$51,000 bank line of credit. Anderson also transferred equipment owned by Hobart to Sarah Ashley and Spurlock without charge. Hobart and some of its other subsidiaries also pay expenses on behalf of the Respondents.

Hobart also owns 100 percent of eleven other corporate entities identified at the hearings as B&M Mining, Cross Gate Mining Company, Woodland Hills Mining Company, DMV Mining Company, Broken Hill Mining Company, Little Elkhorn Coal Company, Oak Park Coal Company, White Cloud Mining Company, Brass Ring Mining Company and Dusco. Anderson is president and chief operating officer of all 13 corporations and has asserted complete discretion to act on behalf of all of them.

Finally, although the evidence appears inconclusive regarding the distribution of dividends to the individual shareholders and there is no evidence that individual shareholders siphoned off corporate funds, these factors alone do not mitigate against piercing the corporate veil in this case because Respondents were never sufficiently capitalized and appear to have continuously operated at a loss. As the court held in the WRW case, to emphasize these two White factors under the circumstances would be to hold in effect that courts cannot pierce the veil of an insolvent corporation, despite the fact that all other factors favor piercing the corporate veil.

~633

In addition to holding that the equities of this case support piercing the corporate veil, it is clear that the corporate veil should be pierced under the "alter ego" theory, because Respondents and Anderson did not have separate personalities. In light of the lack of observance of corporate formalities or distinction between the individual and the corporations there was indeed a complete merger of ownership and control of Respondents with Anderson personally. WRW, supra.

Thus, even assuming, arguendo, that the criterion at issue is relevant to a mine operator already out of business, I do not find that Spurlock and Sarah Ashley would in any event have met their burden of proving that the proposed penalties of \$1,197 and \$7,382, respectively, would have an adverse affect on their ability to continue in business. Accordingly, and in consideration of the representations and documentation submitted in these cases regarding the criteria under Section 110(i) of the Act, I find that the penalties proposed are indeed appropriate.

ORDER

Spurlock Mining Company, Inc. is directed to pay civil penalties of \$1,197 within 30 days of the date of this decision. Sarah Ashley Mining Company, Inc., is directed to pay civil penalties of \$7,382 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

Distribution:

Anne Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Hobart W. Anderson, President, Spurlock Mining Co., Inc., Sarah Ashley Mining Co., Inc., P.O. Box 989, Ashland, KY 41105 (Certified Mail)

/lh