CCASE:
SOL (MSHA) V. KENNIE-WAYNE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 5, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 93-471
	:	A.C. No. 46-08174-03528
v.	:	
	:	Docket No. WEVA 93-472
KENNIE-WAYNE INCORPORATED, Respondent	:	A.C. No. 46-08174-03529
	:	
	:	Docket No. WEVA 93-473
	:	A.C. No. 46-08174-03530
	:	
	:	Kennie-Wayne No. 1-A

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Durden, Esq., Howe, Anderson & Steyer, Washington, D.C., for Respondent.

Before: Judge Fauver

These are consolidated actions for civil penalties totalling $40,454 under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The citations and orders are not contested and have been affirmed by the judge. The only issue is whether payment of the proposed civil penalties will adversely affect Respondent's ability to continue in business. The burden of proof rests with Respondent on this issue.

Glenn Hall and Stephen Hairston testified as to Respondent's financial condition. Hall testified that Kennie-Wayne, Inc. is a contract miner for M & H Coal Company. M & H is the lessee of a tract of property owned by McDonald Land Company. According to Hall, M & H has "total rights of ownership to sell, ship or retain the coal" that is mined by Kennie-Wayne at the property leased by M & H from McDonald. Tr. 40. He also said that Kennie-Wayne was incorporated around August 15, 1991, and signed a contract mining agreement with M & H around March or April 1992. Notwithstanding this testimony, it does not appear that Kennie-Wayne has in fact signed a formal agreement with M & H. See Exh. R-7. He stated that according to this agreement Kennie-

Wayne has the right to mine coal from M & H's land and M & H is to pay Kennie-Wayne $19.60 per ton with a deduction of $0.60 per ton for power, and the payment terms have been modified two or three times since the agreement was signed. M & H is also supposed to pay Kennie-Wayne on the 10th and the 25th day of each month, and Hall represented that although M & H has usually been timely in its payments, as of the hearing date, August 30, 1994, it had not made its payment that was due on August 25, 1994.

In addition, Hall said that Kennie-Wayne does not have the discretion to sell the coal it mines to any coal company besides M & H "who is willing to take all the coal that Kennie-Wayne sends it." Tr. 62, 63, 77. However, before Stephen Hairston became the owner of Kennie-Wayne (July 19, 1994), M & H had periodically allowed Kennie-Wayne to ship coal to Hampden Coal Company in the previous 2 years, and it had been more profitable for Kennie-Wayne to ship its coal to Hampden than to M & H. Hampden Coal would split the payment between what was due Kennie-Wayne (the contractor) and what was due M & H.

According to Hall and Hairston, M & H has filed for bankruptcy. Hall testified that for the first quarter of 1994 Kennie-Wayne reported a loss of $135,460.35 and the company's balance sheet shows total assets of $1,191,743.12 and total liabilities of $1,543,786.85. Tr. 50; Exh. R-5. Hall also testified that if Kennie-Wayne is "allowed to mine coal and ship its coal to Hampden Coal their cash flow would improve considerably and they could resume profitable operations."

Hairston testified that, although he purchased Kennie-Wayne, Inc., subject to liabilities and with knowledge that M & H had filed for bankruptcy, he assumed that it was going to be paid by M & H for its production and that Kennie-Wayne was going to be profitable. In addition, he understood that M & H would allow Kennie-Wayne to sell its coal to Hampden if Kennie-Wayne developed payment problems with M & H. From Hairston's testimony, it appears that up until two Fridays before the hearing Kennie-Wayne had been delivering coal to Hampden but that a few days before the hearing, M & H decided not to allow Kennie-Wayne to sell its coal to Hampden.

Hairston testified that he draws an $8,000 per month salary and that he believes that paying the $40,454 in proposed penalties would affect Kennie-Wayne's ability to remain in business.

DISCUSSION

In assessing civil penalties under 110(i) of the Act, a Commission judge is not bound by the penalty proposed by the Secretary. Rather the judge is to assess a penalty de novo based upon the following six statutory criteria: (1) the operator's

history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in abatement of the violation. Secretary of Labor v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, 736 f.2d 1147 (7th Cir. 1984).

In evaluating the fourth factor, the Commission has held that, "in the absence of 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 effect would occur." Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (1994), quoting Sellersburg Stone Co., 5 FMSHRC 287. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. Robert G. Lawson Coal Company, (1972). However, "the penalties may not be eliminated . . . , because the Mine Act requires that a penalty be assessed for each violation." Spurlock Mining, supra, 16 FMSHRC at 699, citing 30 U.S.C 820(a); Tazco, Inc., 3 FMSHRC 1895, 1897 (1981)

Respondent's witnesses seem to portray Kennie-Wayne as being financially viable rather than a business on the brink of financial collapse. Hairston stated that he purchased Kennie-Wayne subject to liabilities with knowledge of M & H's petition for bankruptcy and the amount of MSHA's proposed penalties. He considers himself a good judge of the value of mining operations and obviously assessed Kennie-Wayne as a good investment. The production capacity is about 24,000 clean tons of coal per month, and each ton is worth about $20.25. Hampden Coal is a very willing buyer of Kennie-Wayne's mined coal and according to Hairston it is in a strong financial condition. Tr. 19, 34. There is no evidence that Kennie-Wayne does not have a legal right to sell coal to Hampden if M & H is unable to buy it. FOOTNOTE 1 The fact that Kennie-Wayne is capable of paying Hairston a salary of $96,000 per year is a revealing indication of Kennie-Wayne's financial condition.

Respondent presented balance sheets indicating its profits, losses, assets and liabilities. However, financial statements showing a loss, by themselves, are not sufficient to reduce penalties because they are not indicative of the ability to

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1/ Hairston testified that part of his agreement with M & H is the understanding that Kennie-Wayne has the right to sell coal to Hampden Coal if M & H defaults in paying for it. In addition, under West Virginia law it appears that Kennie-Wayne would have a mechanic's lien to sell the coal for its work or labor. West Virginia Code 38-2-31 (1994). Respondent has not submitted any documentation showing that M & H's bankruptcy proceeding would prevent Kennie-Wayne from selling coal to Hampden Coal.

continue in business. Spurlock Mining, Inc., 16 FMSHRC at 700, citing Peggs Run Coal Co., 3 IBMA 404, 413-414 (1974).

In conclusion, I find that Respondent has failed to prove by a preponderance of the evidence that payment of the proposed civil penalties would adversely affect its ability to continue in business. I also find the proposed civil penalties of $40,454 to be appropriate for the violations found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent committed the violations as alleged in the citations and orders attached to the Secretary's petitions for civil penalties.

3. Respondent has not proven that payment of the proposed civil penalties would adversely affect its ability to continue in business.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties of $40,454 within 30 days of this decision.

William Fauver
Administrative Law Judge

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