FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 26, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-289-M
Petitioner	:	A.C. No. 41-03932-05515
	:	
v.	:	Docket No. CENT 2003-290-M
	:	A.C. No. 41-03932-05516
GRANITE MOUNTAIN CRUSHING, LLC,	:	
Respondent	:	Granite Mountain Crushing

DECISION

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor;
David M. Williams, Esq., San Saba, Texas, for Granite Mountain Crushing, LLC.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Granite Mountain Crushing, LLC ("Granite Mountain"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve 23 citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of $11,578 for the alleged violations. An evidentiary hearing was held in Austin, Texas. The parties introduced testimony and documentary evidence and, at the close of the hearing, presented oral argument.

I. BACKGROUND

Cold Spring Granite Company, USA, ("Cold Spring") operates a granite quarry near Marble Falls, Texas. Granite Mountain was organized in May 1996 to reduce the spoil piles at the granite quarry. (Tr. 10; Ex. R-1). Granite Mountain entered into an agreement with Cold Spring to crush material from its spoil pile, mostly mill block fragments, to produce Class A road stone, cover stone, ballast, rip rap, and other specially crushed engineering stone. (Tr. 16; Ex. R-1). The original participants in the venture were Cold Spring and Texas Architectural Aggregates, Inc., ("TAA"). Contributions to the venture included quarry and mill site premise leases from Cold Spring, an operations agreement from TAA, and the guarantees from both

corporations on a note to purchase necessary mining and milling equipment through Cargill Leasing Corporation.

As a result of operations problems, Cold Spring withdrew from the venture after about three years but continued its leases and supply agreements. (Tr. 11; Ex. R-1). Granite Mountain continued with the operation and obtained additional financing through Orix Financial, the CIT Group, and equipment suppliers, which maintained security interests in the mill, heavy machinery, and parts which they supplied. (Tr. 12; Ex. R-1).

Because of high operations expenses, Granite Mountain made the decision in the spring of 2003 to cease operations on the Cold Spring property and to salvage as much of the company's investment in the venture as possible. The project "never did prove feasible." (Tr. 11). Granite Mountain auctioned off its salvageable equipment and machinery through Ritchie Brothers Auctioneers in Fort Worth in September 2003. The crushing plant, which had a cost basis of about $1.5 million sold for less than $225,000. (Ex. R-1). The net proceeds from the sale of the equipment and machinery at auction was $244,592 which was paid directly to Orix Financial and the CIT Group. (Tr. 13, 22; Ex. R-1). Granite Mountain represents that, excluding MSHA's proposed penalties, it owes its creditors about $115,000. (Tr. 15, 28). Granite Mountain further represents that, although it had a large supply inventory when it liquidated its assets, that material is in the possession of Cold Spring and Granite Mountain has no rights to it. (Tr. 13-14, 41-42). Granite Mountain states that its only assets are additional equipment that were not suitable for auction with a net fair market value of about $11,000 and accounts receivable of about $5,800. (Tr. 14, 36-38; Ex. R-1). Accounts receivable includes accounts that are unlikely to be collected.

Granite Mountain has not filed for bankruptcy, but does not have any income at this time. (Tr. 15). The manager of Granite Mountain has been paying off some of the company's debt with his own funds, but he had no legal obligation to do so. (Tr. 30). He has not been making these payments with funds from other companies in which he has an interest. (Tr. 31). Granite Mountain states that it is possible "with a different crushing system, new granite lease arrangements, and improved market trends, that Granite Mountain could return to the business of mining and crushing granite." (Ex. R-1 p. 2; Tr. 39-40).

The 23 citations contested in these cases were issued during an MSHA inspection on March 6 - 7, 2003. Prior to the hearing in these cases, the parties entered into joint stipulations in which the parties agreed that (1) Granite Mountain is an operator within the meaning of the Mine Act that is subject to the jurisdiction of the Mine Act; (2) the products of Granite Mountain enter commerce or affect commerce within the meaning of section 4 of the Mine Act; (3) the Commission has jurisdiction over these cases; and (4) Granite Mountain abated or terminated all citations within the time frame initially set by the MSHA inspector.

The parties also stipulated that all of the citations "were properly served by the duly authorized representative of the Secretary upon an agent of Granite Mountain on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its

issuance and for the truthfulness or relevance of any statements asserted therein." The parties further stipulated that "Granite Mountain admits that it committed the violations alleged in the citations [attached to] the Secretary's Petitions for Assessment of Civil Penalty." Finally, the parties stipulated that Granite Mountain contends "that the proposed assessed penalties in the total amount of $11,578.00 are not appropriate and requests that the Court make a determination of the proper amounts, if any, to be assessed against Respondent in light of Respondent's affirmative assertion that it is no longer in business and is presently unable to pay the penalties as assessed."

II. SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary maintains that Granite Mountain has not met its burden of establishing that the proposed penalties will have an "effect on the operator's ability to continue in business." 30 U.S.C. § 620(I). (Tr. 44-46, 50-52). The fact that Granite Mountain ceased operations does not demonstrate that the proposed penalties of $11,578 would affect its ability to resume operations if it chooses to do so. The Secretary objected to the introduction of Exhibit R-1 on the basis that it is hearsay and it was not accompanied by supporting documents. (Tr. 7-8). The Secretary believes that, if Granite Mountain's statement that it is carrying a debt load of $115,000 is accepted, then that fact helps to establish its current financial condition but it does not show that it is unable to pay the proposed penalty. In addition, there may be other potential "cash revenues" from accounts receivable. *Id.* The Secretary relies, in part, on the decision in *Energy Trucking*, 19 FMSHRC 1685, 1691 (Oct. 1997) (ALJ). In that case, the administrative law judge held that "net operating losses are not proof of an inability to continue in business." *Id.* Because Granite Mountain did not meet its burden of showing that the penalties will negatively affect its ability to continue in business, the proposed penalties should be affirmed.

Granite Mountain contends that "it is essentially penniless." (Tr. 48). It is in debt and is trying to stay out of bankruptcy. Granite Mountain maintains that the proposed penalties will affect its ability to continue in business. (Tr. 49). Finally, it argues that it is not only in debt but it also has no significant assets.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well settled that the Commission assesses civil penalties de novo and is not bound by the Secretary's proposed penalties. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty to be assessed, Commission Rule 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, that in assessing civil 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. Although the parties focused on the ability to continue in business criterion, I am required to evaluate all of the criteria based on the evidence presented at the hearing.

A. Size of the Mine Operator

Granite Mountain is a small operator, as set forth in the record.

B. The Mine Operator's History of Previous Violations

The record establishes that Granite Mountain was issued 23 citations during the 24 months prior to March 2003. This is a relatively high number of citations for a small operator. The Secretary's proposed penalties were heavily influenced by this history. Indeed, the Secretary assigned the maximum number of penalty points for this criteria under 30 C.F.R. § 100.3(c). In addition, the Secretary added 20 extra penalty points for "excessive history" to the total points for most of the citations. All but 5 of the 23 citations at issue in these cases were designated as not being of a significant and substantial nature ("S&S"). Because of this "excessive history," the Secretary proposed penalties for these non-S&S citations that were significantly greater than her typical single penalty proposals under 30 C.F.R. § 100.4. The proposed penalties for the non-S&S citations ranged between $259 and $1,428 each. But for the "excessive history" determination, the penalties for these non-S&S citations would have been $60 each. I find that, although the penalties should take into account Granite Mountain's relatively high history of previous violations, the Secretary's proposed penalties are too high when taking this criterion into consideration, especially with respect to the non-S&S violations.

C. Negligence of the Operator

As set forth in the citations, Granite Mountain's negligence was moderate with respect to each violation except with respect to the violation alleged in Citation No. 6226697 where its negligence was high.

D. Gravity of the Violations

The gravity of the violations are as set forth in the citations. The most serious violations are as set forth in Citation Nos. 6226697, 6226701, 6226704, 6226705, and 6226714, which are S&S.

E. Demonstrated Good Faith in Achieving Rapid Abatement of the Violations

Granite Mountain demonstrated good faith in quickly abating the violations.

G. Effect on the Operator's Ability to Continue in Business

I find that the Secretary's proposed penalties will have a negative effect on Granite Mountain's ability to continue in business. Granite Mountain has virtually no assets and it has substantial debts. The proposed penalties will affect its ability to resume operations. I credit the testimony of Granite Mountain's corporate secretary as to the financial condition of the company. The Secretary's reliance on *Energy Trucking* is misplaced. In that case, the judge determined that the operator was "essentially a 'pass through' business whereby almost all of its income passes through the company to one or more "lessor-operators." 19 FMSHRC at 1691. He concluded that a company with such a structure "would effectively have an exemption from civil penalties under the Act if its reported net losses were accepted as proof of an inability to pay substantial penalties and continue in business." *Id.* The present case presents a different situation. Granite Mountain is not operating at a loss; rather it is not generating any income at all and it is in debt.

In reaching this conclusion, I note that there is no evidence that Granite Mountain's decision to liquidate its assets was motivated in any part by the Secretary's proposed penalties. There is also no evidence that Granite Mountain was operated as a shell corporation or that it was deliberately under-capitalized in order to avoid responsibility for paying its debts.

In conclusion, I have reduced the penalties proposed by the Secretary for two reasons. First, I find that the Secretary increased her proposed penalties for "excessive history" by more than is justified under the circumstances presented in these cases. With respect to the non-S&S citations, the proposed penalties are four to nine times higher than they would have been without the excessive history designation. I have also reduced the penalties under the ability to continue in business criterion, as discussed above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
CENT 2003-289-M		
6226697	56.6130(b)	$1,000.00
6226698	56.4101	120.00
6226699	56.16005	120.00
6226700	56.6132(a)(10)	200.00
6226701	56.6101(a)	500.00
6226702	56.6131(a)(1)	200.00
6226703	56.6130(d)	120.00
6226704	56.14100(b)	250.00
6226705	56.4101	250.00

6226706	56.20013	120.00
6226707	56.12006	120.00
6226708	56.12008	120.00
6226709	56.12008	120.00
6226710	56.14107(a)	120.00
6226712	56.14107(a)	120.00
6226713	56.14107(a)	120.00
6226714	56.11012	500.00
6226716	56.14107(a)	120.00
6226717	56.14107(a)	120.00
CENT 2003-290-M		
6226718	56.9300(a)	120.00
6226719	56.15001	120.00
6226720	56.12004	120.00
6226721	56.18002(a)	120.00
	TOTAL PENALTY	$4,820.00

For the reasons set forth above, the citations at issue in these cases are **AFFIRMED**. Granite Mountain Crushing LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $4,820.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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