

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-275
Petitioner,	:	A.C. No. 15-16418-03549
v.	:	
	:	Docket No. KENT 94-921
DAY BRANCH COAL CO., INC.,	:	A.C. No. 15-16418-03557
Respondent	:	
	:	Docket No. KENT 94-388
	:	A.C. No. 15-16418-03551
	:	
	:	No. 9 Mine
	:	
	:	Docket No. KENT 94-276
	:	A.C. No. 15-16927-03543
	:	
	:	Docket No. KENT 94-389
	:	A.C. No. 15-16927-03547
	:	
	:	Docket No. KENT 94-390
	:	A.C. No. 15-16927-03548
	:	
	:	No. 10 Mine

**DECISION**

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
Petitioner;  
Walter M. Jones, Jr., Esq., Wyatt, Tarrant &  
Combs, Louisville, Kentucky, for Respondent.

Before: Judge Fauver

These civil penalty cases were brought by the Secretary of Labor for alleged violations of safety and health standards under ' 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.

Respondent is a small to medium sized operator. The cases involve 40 alleged violations, 28 of which were the subject of special assessments. The total proposed penalties are \$94,939.

Respondent concedes the violations, but contends the penalties should be only nominal because the proposed penalties would adversely affect Respondent's ability to continue in business. No other defenses are raised.

Ms. Betty Cassim, the office manager and bookkeeper of Respondent, testified that Respondent is owned by Mr. Bobby Joe Hensley, the president of the corporation, who also owns other corporations, such as Bob and Tom Coal Company. Respondent has been operating at a loss for several years. Respondent and another corporation owned by Mr. Hensley have outstanding debts to vendors in the amount of \$250,000 with more than half of this amount owed by Respondent. Recently, a United States District Attorney filed a collection suit against Respondent for over \$500,000 in final civil penalties and interest due under the Mine Act. Ms. Cassim stated that Respondent is unable to pay the amounts involved in that case.

Mr. James Laws also testified on behalf of the Respondent. Mr. Laws is a tax consultant who has worked for Mr. Hensley for approximately 15 years. He stated that Respondent had entered into an agreement with the Internal Revenue Service for installment payments of back taxes over \$138,000, but IRS has recently informed him that it intends to void the agreement for nonpayment and to seize Respondent's assets and shut down its operations. Mr. Laws stated that no litigation was expected by Respondent to prevent this action by the IRS.

#### **DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS**

Section 110(i) of the Act provides six criteria to be considered in assessing civil penalties:

The Commission shall have authority to assess all civil penalties provided in this Act. 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 charges, 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

The effect of a penalty on the operator's ability to continue in business is not dispositive, but is one factor to

consider. The Act does not state that mine operators who are operating at a loss are exempt from civil penalties or should receive only nominal penalties.

Respondent has a long history of serious, repeated mine safety and health violations and has regularly failed to pay about 80 percent of the final civil penalties assessed against it under the Mine Act.<sup>1</sup> This conduct plainly jeopardizes its employees while disadvantaging competitors who pay final civil penalties due under the Act.

The instant cases involve numerous charges of high negligence, unwarrantable failures to comply with the Act and high gravity in exposing Respondent's employees to serious hazards. Respondent has not contested the charges.

The record shows numerous liabilities incurred by Respondent with no apparent intention of paying them. These total well over \$1 million in unpaid federal taxes, accounts due to banks, suppliers and manufacturers, and civil penalties for mine safety and health violations.

Thus, Respondent is a frequent, serious violator of mine safety and health standards that seeks an exemption from civil penalties (or to be assessed only nominal penalties) because of financial hardship. On this record, I find that it would be contrary to the public interest and to the safety of Respondent's employees, to allow Respondent to violate mine safety and health standards with only nominal civil penalties.

Respondent's business conduct in failing to meet its financial obligations, including federal income taxes, bank loans, accounts payable, and civil penalties for serious mine safety and health violations, may cause it to go out of business. However, this result is not prohibited by ' 110(i) of the Act.

---

<sup>1</sup> Under ' 105(a) of the Act, proposed civil penalties that are not contested by the operator, and penalties adjudicated before the Commission, become final orders of the Commission. These are not subject to review by any court or agency. I find that failure of the operator to comply with such orders is an adverse factor in assessing the operator's "history of previous violations" under ' 110(i) of the Act.

In balancing all the criteria in ' 110(i), I find that the proposed civil penalties in these cases should not be reduced.

**CONCLUSIONS OF LAW**

1. The judge has jurisdiction in these proceedings.
2. Respondent violated the safety and health standards as alleged in the 40 citations and orders involved in these cases.
3. The proposed penalties are found to be appropriate for the violations involved. Accordingly, Respondent is assessed civil penalties of \$94,939.

**ORDER**

WHEREFORE IT IS ORDERED that:

1. The 40 citations and orders involved in these proceedings are each AFFIRMED.
2. Respondent shall pay civil penalties of \$94,939 within 30 days from the date of this Decision. Provided: the Secretary may agree to a schedule of installment payments with accrued interest if the Secretary determines that such schedule is appropriate and in the public interest.

William Fauver  
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Walter M. Jones, Esq., Wyatt, Tarrant & Combs, 2600 Citizens Plaza, Louisville, KY 40202(Certified Mail)

/lt