

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 21, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-140
Petitioner : A.C. No. 15-15746-03596
v. :
 : Docket No. KENT 95-555
CONAKAY RESOURCES, INC., : A.C. No. 15-15746-03602
Respondent :
 : Docket No. KENT 94-1031
 : A.C. No. 15-15746-03593
 :
 : No. 3 Mine

DECISION

Appearances: Joseph B. Lockett, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee, for
the Petitioner;
Saul E. Akers, Safety Director, Conakay Resources,
Matewan, West Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These consolidated cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging violations by Conakay Resources, Inc. (Conakay) of various mandatory regulatory safety standards. Pursuant to notice, a hearing was held on July 11, 1995, in Huntington, West Virginia, concerning Docket Nos. KENT 94-1031 and KENT 95-140. Subsequent to the hearing, Petitioner filed a motion to consolidate Docket No. KENT 95-555 with Docket Nos. KENT 94-1031 and KENT 95-140. The motion was not opposed by Conakay and it is granted. It is ordered that Docket No. KENT 95-555 be consolidated with Docket Nos. KENT 94-1031 and KENT 95-140.

Findings of Fact and Discussion

The parties stipulated as to the facts of the violations cited in the orders and citations at issue. Conakay does not contest the findings set forth in the citations and orders at

issue. The parties also stipulated that Conakay is a small to medium size operator, and that the violations were corrected in good faith. The only issue raised by Conakay is whether the penalty should be reduced based on the effect of the penalty on its ability to continue in business.

Saul Akers, Conakay's safety director, testified that as of May 12, 1995, Conakay A ... no longer exists due to financial problems ... @ (Tr. 13), as the company had only leased one mine, and that mine had been taken over by the entity from which it had been leased. Akers indicated that Conakay is not operating any mines, nor does it have any plans to operate any mines in the future.

Two financial statements were admitted in evidence on behalf of Conakay, one dated June 30, 1994, and one dated May 31, 1995.

Each statement indicates that Conakay s assets and liabilities are equal. Each statement was prepared by an accountant and includes the following language. A[m]anagement had elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the users conclusions about the Companies assets, liabilities, revenues, and expenses.@

Akers testified that he did not personally participate in the drafting of these financial statements. He did not have anything to do with any of the financial aspects of Conakay.

Conakay did not offer the testimony of anyone who has personal knowledge of its financial situation. The accountant who prepared the financial statements did not testify. These statements were not audits, and contained omissions that might relate to its assets, liabilities, revenue and expenses. Thus, not much probative weight was accorded the financial statements.

Also, Conakay did not offer the testimony of any individual having the authority to make business decisions on its behalf. Thus, Conakay has failed to adduce sufficient reliable evidence to establish its present financial situation. Nor has it adduced sufficient evidence to establish that it has dissolved, and definitely will never resume business. It is mere speculation to assume that it will not be able to obtain financing and elect to continue in business.

For all the above reasons, I find that there is no basis to mitigate a penalty based on its effect on Conakay's ability to remain in business. Considering the history of Conakay's violations (Government Exhibit 4), the degree of its negligence and gravity of these violations as set forth in the citations and

orders at issue, and the remaining factors set forth in Section 110(i) of the Act as stipulated to by the parties, I find that the following penalties are appropriate for the violations set forth in the following citations:

KENT 94-1031

<u>Citation No.</u>	<u>Penalty</u>
4005203	\$362
4005204	\$362
4005205	\$ 50
4005206	\$431
4005210	\$ 50
4005211	\$362
4005212	\$362
4005213	\$50
4005214	\$362
4005216	\$362
4005217	\$362
4005218	\$362

KENT 95-140

<u>Order No.</u>	<u>Penalty</u>
4501453	\$7,500
4501454	\$6,000
4501555	\$7,500

KENT 95-555

<u>Order No.</u>	<u>Penalty</u>
4505565	\$267
4505566	\$1019
4505567	\$267
4505569	\$189
4505570	\$595

ORDER

It is **ORDERED** that Respondent shall pay a civil penalty of \$26,814 within 30 days of this decision.

Avram Weisberger

Administrative Law Judge

Distribution:

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