

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 14, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-590
Petitioner : A.C. No. 15-17164-03549
v. :
 : Mine No. 1
NARROWS BRANCH COAL INC., :
Respondent :

DECISION

Appearances: Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Ms. Deborah Childers, Narrows Branch Coal Co. Inc., Hardy, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The above-captioned case was brought by the Secretary of Labor (Secretary) seeking a civil penalty for an alleged violation of 30 C.F.R. § 75.203(a) by Narrows Branch Coal Inc. (Narrows Branch). A hearing was held on November 9, 1995, in Charleston, West Virginia. The Secretary filed a Brief on December 15, 1995. Narrows Branch did not file any brief.

Narrows Branch indicated in a set of stipulations filed at the onset of the hearing, that it does not contest the existence of the cited violation, nor does it contest the cited gravity and negligence. Narrows Branch raised as the only issue the question of whether the penalties should be reduced pursuant to one of the six criteria set forth in section 110(i) of the Act, i.e., the effect of the penalty on the operator's ability to continue in business.

Deborah Childers, Narrows Branch's bookkeeper, testified on its behalf. She opined that Narrows Branch might be about to go out of business. In support of her opinion she indicated that Darrell Williams, its sole corporate officer and sole stockholder, was attempting to obtain new financing. Childers

was not aware of the type of financing that was being sought.

Narrows Branch only leased one mine, and owned no real property. It was running two production shifts and one maintenance shift at the time of the hearing, and employed approximately 28 people.

Narrows Branch entered into evidence documents showing a balance due of over \$250,000 on loans from three banks, and past due debts totaling \$301,316.05, including a total of over \$45,000 to the states of Kentucky and West Virginia (Resp Exs. 1-8). Childers testified that Narrows Branch was paid for coal on a per-ton basis, but was not aware of its current income. Narrows Branch currently owes over \$122,000 in unpaid civil penalties (Gov't. Ex. 4).

Narrows Branch did not offer any financial audits in evidence. It did not adduce any reliable evidence as to its assets, liabilities, revenue or expenses. I find that it accordingly did not adduce sufficient reliable evidence to establish its present financial situation. Nor has it adduced reliable evidence to establish that it has gone out of business, and definitely will never resume business. I do not place any probative value on the testimony of Childress that Narrows Branch might go out of business, as such an opinion is mere speculation.

For all the above reasons, I find that there is no basis to mitigate a penalty based on its effect on Narrows Branch's ability to remain in business. Considering the history of Narrows Branch's violations (Gov't Ex. 3), the degree of its negligence, and gravity of the violations as set forth in the order at issue, and the remaining factors set for in Section 110(i) of the Act as stipulated to by the parties, I find that a penalty of \$3,000 is appropriate.

ORDER

It is ORDERED that Narrows Branch pay a penalty of \$3,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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