

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 25, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-302
Petitioner	:	A.C. No. 15-16478-3602
	:	
v.	:	
	:	
HUBB CORPORATION,	:	
Respondent.	:	Mine: Hubb No. 5

DECISION ON REMAND

Appearances: Marybeth Bernui, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Gene Smallwood, Jr., Polly & Smallwood, Whitesburg, Kentucky, for the Respondent.

Before: Judge Weisberger

In the initial decision in this civil penalty proceeding, I found that Hubb violated two mandatory safety standards, and assessed a penalty of \$4,000.00 for each violation, 20 FMSHRC 615 (1998).

This case is presently before me based on the Commission's decision in this matter (Secretary v. Hubb Corp., 22 FMSHRC 606 (2000)), which vacated the penalty assessments and remanded for entry of findings regarding each of the criteria set forth in Section 110(i) of the Act.

For the reasons set forth in the initial decision, 20 FMSHRC supra, I find, regarding both violations, that the gravity of these violations was of a high degree, and that Hubb's negligence regarding each violation was more than moderate. I accept the parties' stipulations that Hubb demonstrated good faith in attempting to achieve rapid compliance after notification of these two violations, and that Hubb was a small to medium-sized mine. The parties further agreed that findings regarding Violation History, and Effect on Ability to Continue in Business, be made based on the August 15, 2000, deposition of James Hubbard, Hubb's president since 1991, and which shall be part of the record in this case.

Hubbard testified that Hubb has no income, that the mine was closed on May 16, 2000,

that it has very limited funds, that Hubb has “indebtedness” on the equipment located in the mine at issue, and that there are liens against the equipment, that Hubb does not own any other mines. This testimony was not impeached or rebutted. On cross-examination, Hubbard testified that Hubb pays for four security people,¹ that Hubb hauls coal for Cornettsville Coal Company, and uses this income to pay the security guards and to pay Hubbard a “very small” salary, that the trucks used by Hubb to haul coal are owned by a corporation whose president is Hubbard’s wife, and that he (Hubbard) is the president of Cornettsville.

I have considered Hubbard’s testimony. However, the best evidence of Hubb’s financial condition would be its financial records. None of these were proffered by Hubb. I find that Hubb did not come forward with sufficient evidence to establish that a penalty would have a significant impact on its ability to continue in business. I find that a penalty to be assessed would not have a significant impact on Hubb’s ability to continue in business.

Exhibit 21 indicates that, regarding Hubb’s history of violation, it had received 32 violations of 30 C.F.R. § 370(a)(1), of which 11 were non S&S. According to Hubb’s testimony that was not impeached or contradicted, there were no injuries to any of Hubb’s employees or lost work days as a result of these citations. Also, according to Hubb, a “very few” employees filed for Black Lung benefits, but there were no awards to the best of his knowledge. Within this context, I find that Hubb has only a minimal history of violations, considering the minimal consequences of these violations.

Considering all these factors, especially the level of gravity and negligence, but considering also Hubb’s size, history of violations, good faith abatement, and weighing the imposition of a penalty on its ability of continue in business, I find that a penalty of \$4,000 is appropriate for each violation.

Order

It is **ORDERED** that the parties shall, within 30 days of this Decision, comply with all the terms of the previously issued Order in this case, 20 FMSHRC, supra.

Avram Weisberger
Administrative Law Judge

¹Hubb has other expenses on it’s payroll, but is reimbursed from another corporation owned by Hubbard.

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