

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

August 24, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-63
Petitioner	:	A.C. No. 36-02053-03544
v.	:	
	:	Docket No. PENN 94-64
BUCK MOUNTAIN COAL COMPANY,	:	A.C. No. 36-02053-03545
and RICHARD KOCHER, SR.,	:	
OSCAR BLOUGH, JR., DAVID	:	Docket No. PENN 94-65
ZIMMERMAN, PAUL ZIMMERMAN,	:	A.C. NO. 36-02053-03546
and HAROLD SCHNOKE, as	:	
PARTNERS,	:	Docket No. PENN 94-66
Respondents	:	A.C. No. 36-02053-03547
	:	
	:	Docket No. PENN 94-104
	:	A.C. No. 36 02053 03548
	:	
	:	Buck Mountain Slope
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-597
Petitioner	:	
v.	:	Docket No. PENN 94-618
	:	
BUCK MOUNTAIN COAL COMPANY,	:	Docket No. PENN 94-619
and DAVID ZIMMERMAN, PAUL	:	
ZIMMERMAN, HAROLD SCHNOKE,	:	A.C. No. 36-02053-03559
PARTNERS,	:	
Respondents	:	Buck Mountain Slope

## DECISION

Appearances: Gayle Green, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Petitioner;

David Zimmerman, Paul Zimmerman,<sup>1</sup> Harold Schnoke, Richard D. Kocher, Sr.,<sup>2</sup> and Oscar Blough, Jr., pro se, partners Buck Mountain Coal Company, Pine Grove, Pennsylvania, for the Respondent.

Before: Judge Feldman

### **Preliminary Matters**

These proceedings concern a total of 88 citations issued to Buck Mountain Coal Company (Buck Mountain), a general partnership, during the period September 1992 through July 1993. A preliminary hearing in these matters was held on October 25, 1994, in Harrisburg, Pennsylvania, to determine whether the named partners in these proceedings are jointly and severally liable for any/or all of the citations in issue.

The preliminary hearing was followed by my Partial Decision on liability, which is incorporated by reference, wherein I concluded general partners David Zimmerman, Paul Zimmerman and Harold Schnoke are jointly and severally liable for all citations issued to Buck Mountain for violations occurring on or before April 13, 1993. *Partial Decision*, 16 FMSHRC 2367 (November 1994). Thus, the Zimmermans and Schnoke are jointly and severally liable for 80 citations in this matter for which the Secretary has proposed a total civil penalty of \$160,938.

I further concluded that the Zimmermans and Schnoke assigned their interest in Buck Mountain, including Buck Mountain's mineral lease rights at the Buck Mountain Slope, to Richard Kocher and Oscar Blough, Jr., as of April 14, 1993. 16 FMSHRC at 2368. Thus, Kocher and Blough are jointly and severally liable for eight citations with a total proposed civil penalty of \$12,372.

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<sup>1</sup> David Zimmerman appeared on behalf of his father Paul Zimmerman who has severe, chronic obstructive pulmonary disease. (Resp. Ex. 1).

<sup>2</sup> Kocher appeared at the October 25, 1994, preliminary hearing. Blough represented Kocher's partnership interests at the hearing conducted on June 13, 1995.

A hearing on the merits was conducted in Harrisburg, Pennsylvania, on June 13, 1995. At the hearing, counsel for the Secretary moved for the approval of a settlement agreement reached with Kocher and Blough. The settlement concerns all eight of the citations issued after April 13, 1993. These citations are comprised of three citations issued in Docket No. PENN 94-66 and five of the 20 citations issued in Docket No. PENN 94-104. The parties propose a reduction in total civil penalties from \$12,372 to \$2,000 to be paid by Blough in monthly installments of \$50.00. The \$2,000 penalty represents a \$1,850 penalty in Docket No. PENN 94-104<sup>3</sup> and a \$150 civil penalty in Docket No. PENN 94-66.

Blough affirmed the settlement terms on behalf of the partnership in the absence of Kocher, who is incarcerated for conduct related to the cited violations. Although the settlement terms relieve Kocher from civil penalty liability, as a general partner, Kocher is jointly liable for the \$2,000 settlement penalty. Accordingly, I will approve the settlement and proposed payment terms advanced by the parties. However, Blough may seek to recover Kocher's share of the \$2,000 payment.

#### **Statement of the Case**

David Zimmerman, Paul Zimmerman and Harold Schnoke were general partners of Buck Mountain Coal Company since April 1986.

On April 10, 1986, partners D. Zimmerman, P. Zimmerman and Schnoke leased the right to extract anthracite coal from the Buck Mountain Slope from the G.M.P. Land Company, Inc., in return for a payment of \$7.00 per net ton of coal removed. (P. Ex. 3).

A Legal Identity Report completed May 5, 1986, by Paul

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<sup>3</sup> Docket No. PENN 94-104 concerns 20 citations. This decision imposes joint and several liability on Paul Zimmerman, David Zimmerman and Harold Schnoke for a \$2,500 civil penalty in Docket No. PENN 94-104 for the 15 citations attributable to their mining operations on or before April 13, 1993. Thus, considering the \$1,850 liability of Blough and Kocher for the five remaining citations, the total civil penalty in Docket No. PENN 94-104 is \$4,350.

Zimmerman, lists the partners of Buck Mountain as David Zimmerman, Harold Schnook (sic) and Paul Zimmerman. The parties stipulated that Buck Mountain, which operated exclusively at the Buck Mountain Slope in Eastern Pennsylvania, is a very small operator that produced approximately 14,816 tons of coal in 1993.

(Sec'y Br. at 4, 5). During this period Buck Mountain had a total of six or seven employees, including the partners.

On March 5, 1993, an explosion occurred at the Buck Mountain Slope Mine causing serious burn injuries to three underground miners. As a consequence of the explosion, the Mine Safety and Health Administration (MSHA) dispatched an inspection team to secure the mine and investigate the causes of the explosion. As a result of the investigation, 80 citations pertaining to the Zimmermans and Schnoke were issued to Buck Mountain. Of these 80 citations and orders, four orders and one citation, totaling \$130,102 of the \$160,938 total proposed civil penalties, pertain to cited violations that contributed to the March 5, 1993, explosion. The investigation revealed the contributing causes of the explosion were the presence of a non-permissible 40-volt battery locomotive inby the last open crosscut; a broken compressed airline that operated auxiliary fans ventilating the No. 5 face and No. 6 chute; the failure to conduct an adequate preshift examination; and an insufficient velocity of air ventilating the face.

The investigation was conducted by James Dickey and Leonard Sargent. On March 11 and March 26, 1993, Kocher allegedly threatened Dickey with bodily harm. On March 29, 1993, Dickey was accompanied to the mine by Sargent whereupon Kocher allegedly threatened both inspectors. Dickey returned to the mine on April 20, 1993, where he was allegedly threatened by Paul Zimmerman.

Kocher plead guilty to one count of threatening Federal officials Dickey and Sargent on March 29, 1993, in violation of 18 U.S.C. ' 115(a)(1)(B). Kocher also plead guilty to falsifying training records in violation of 18 U.S.C. '' 1001 and 1002(b). Kocher was sentenced to 18 months in prison.

Paul Zimmerman plead guilty to one count of threatening Federal official Dickey on April 20, 1993, in violation of 18 U.S.C. ' 115(a)(1)(B). Zimmerman was sentenced to three years probation and fined \$100.00.

#### **Findings of Fact and Conclusions of Law**

At the hearing, the parties stipulated to the fact of occurrence of the 80 cited violations, as well as to the degree of negligence and the gravity referenced in the citations and orders in issue. Thus, the only outstanding issue to be resolved is the appropriate civil penalties to be assessed.

It is well settled that the Commission and its judges are not bound by the Secretary's proposed civil penalty assessments. *Warren Steen Construction, Inc.*, 14 FMSHRC 1125 (July 1992); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd Sellersburg Stone Co. v. FMSHRC*, 736 F.2d. 1147, 1153 (7th Cir. 1984). Rather, the proper penalty to be assessed must be determined by the trier of fact based upon findings concerning the statutory penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i).

Section 110(i) of the Act requires consideration of six criteria in assessing appropriate civil penalties:

- (1) the operator's history of previous violations;
- (2) the appropriateness of the penalty to the size of the business of the operator;
- (3) whether the operator was negligent;
- (4) the effect on the operator's ability to continue in business;
- (5) the gravity of the violation;
- and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. (Emphasis added).

Specific factual findings supported by the record developed during the course of an adjudicatory proceeding must be made for each of the statutory civil penalty criterion. *Dolese Brothers Company*, 16 FMSHRC 689, 695 (April 1994); *Westmoreland Coal Company*, 8 FMSHRC 491, 492, (April 1986). As noted, the civil penalties to be assessed *de novo* in these proceedings can appropriately be greater than, less than, or the same as those proposed by the Secretary. *Sellersburg*, 5 FMSHRC at 293. Here, the Secretary seeks to impose total civil penalties of \$160,938.

Thus, an analysis of the applicable penalty criteria follows.

The record reflects a history of 39 violations cited during 46 inspection days that occurred during the 24 month period preceding the March 5, 1993, explosion. I view less than one violation per inspection day as a neutral statutory penalty factor that does not materially impact on the appropriate penalty to be assessed.

As aggravating factors, the magnitude of the proposed penalty is supported by the high degree of negligence manifested by the aggravated conduct specified in the stipulated orders

associated with the March 5, 1993, explosion. Similarly, this high penalty is also consistent with the extremely serious gravity of the cited violations that contributed to the explosion as demonstrated by the resultant serious burn injuries. A further aggravating circumstance is the lack of good faith efforts to achieve rapid compliance given the threats by Paul Zimmerman and Kocher, who was then the foreman of Buck Mountain.

However, the fundamental task in this process is to determine the appropriate penalty to be assessed. In this regard, the statutory criteria mandates the civil penalty must be appropriate to the size of the business of the operator. Thus, imposition of a penalty without regard to the size of the operator is contrary to the Act. Similarly, a very large penalty imposed on a very small operator is inappropriate.

The parties have stipulated to Buck Mountain's production of only 14,816 tons of annual coal production in 1993. MSHA Supervisory Inspector James Schoffstall testified Buck Mountain's extraction efforts consisted of only one unit staffed by six or seven people who mined by hand after separating the coal by drilling and blasting. (Tr. 129, 131).<sup>4</sup> In fact, Schoffstall opined Buck Mountain's operations were so small that investment in mechanized mining equipment "wouldn't be feasible." (Tr. 131). With regard to the respondents' profitability, Schoffstall stated, "you could make a living, that's about it."<sup>5</sup> (Tr. 132). In recognition of this undisputed evidence, the Secretary concedes "there is no question Buck Mountain is a very small business in comparison to coal mines nationally ..." (Sec'y Br. at 5).

Finally, although David Zimmerman and Schnoke continue to be employed as miners by successors at the Buck Mountain Slope, the record reflects the Buck Mountain partnership consisting of the Zimmermans and Schnoke ceased to exist as an operator as of April 14, 1993. While the imposition of a \$160,000 civil penalty undoubtedly would have had an adverse effect on this small operator's ability to continue in business, the Commission has not addressed the applicability of the effect of the penalty on an operator's ability to continue in business when the operator is no longer in business. See *Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 1994).

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<sup>4</sup> All references to transcript pages in this decision refer to the June 13, 1995, hearing.

<sup>5</sup> Tax returns for 1993 for David Zimmerman, Paul Zimmerman and Harold Schnoke reflect partnership income of \$24,809, \$14,843 and \$23,510, respectively. (Resp. Exs. 3, 6, 10).

However, the criteria in section 110(i) are not mutually exclusive. Thus, the fact that a small operator is no longer in business does not invalidate the other statutory criteria. For example, gravity and the degree of negligence remain relevant to imposition of the proper civil penalty. Similarly, the size of the operator during the one year period preceding the cited violations remains a relevant statutory consideration despite the operator's termination of business.

As a final matter, there is a rebuttable presumption that the imposition of a civil penalty will not adversely effect an operator's ability to continue in business. *Sellersburg*, 5 FMSHRC at 287. An operator has the burden of proving, through the introduction of financial documentation, that a proposed penalty should be reduced for financial reasons. *Spurlock*, 16 FMSHRC at 700. If established by a respondent, an inability to pay a proposed penalty may be a mitigating consideration in lowering the penalty. Therefore, it is not uncommon for respondents to furnish personal financial information to support a reduction in penalty.

However, the Secretary has advanced the converse theory that the ability to pay a civil penalty, based on one's personal assets, is a factor that should be superimposed on the penalty criteria, thus increasing a penalty that would otherwise be inappropriate under section 110(i). For example, the Secretary has sought to obtain bank statements and real estate appraisals of the respondents' homes and property to support higher penalties despite Buck Mountain's diminutive size. However, financial information, such as bank accounts, tax returns and property appraisals, cannot be used to overcome the statutory penalty criteria that precludes very large penalties for small operators.

In view of the very small nature of the Buck Mountain partnership, I am reducing the Secretary's proposed penalties in these proceedings as follows:

<b>Docket No.</b>	<b>Proposed Penalty</b>	<b>Assessed Penalty</b>
PENN 94-63	\$ 1,964	\$ 200
PENN 94-64	\$ 1,546	\$ 150
PENN 94-65	\$ 1,726	\$ 150
PENN 94-104	\$ 25,600	\$ 2,500

PENN 94-597		
PENN 94-618	\$130,102 <sup>6</sup>	\$13,000
PENN 94-619		

<b>Total</b>	<b>\$160,938</b>	<b>\$16,000</b>
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In reducing these proposed penalties, I note the percentage reduction is compatible with the degree of reduction in the Secretary's settlement agreement with Blough and Kocher. I also note MSHA Conference and Litigation Representative Gerald Moody's testimony that "[Kocher, as mine foreman] was the number one negligent person in this whole situation." (Tr. 107). Kocher's negligence, as an operator's agent, is imputable to the respondent partnership. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991). However, even the concept of

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<sup>6</sup> Identical Docket Nos. PENN 94-597, PENN 94-618 and PENN 94-619 were created for each of the named partners, David Zimmerman, Paul Zimmerman and Harold Schnoke.



imputed negligence has its limitations in the face of the disproportionate \$160,938 proposed penalty in these cases.<sup>7</sup>

In imposing these reduced penalties, I am sensitive to the Secretary's concern that the gravity of the March 5, 1993, accident must not be trivialized by a substantial reduction in penalties. (Sec'y Br. at 30). Rather, the Secretary urges me not to permit "the small size of the mine [as] a factor to be considered in determining the amount of the penalties ... to outweigh the high gravity and negligence which has been stipulated to in this case." (Sec'y Br. at 29). However, I do not consider a \$16,000 penalty on a very small operator to be trivial. Moreover, the penalty criteria in section 110(i) of the Act must be applied as a whole. The negligence and gravity criteria cannot overcome the statutory mandate that the ultimate penalty must be appropriate to the size of the business.<sup>8</sup>

#### ORDER

In view of the above, all citations and orders in these docket proceedings **ARE AFFIRMED**.

Pursuant to the parties' settlement agreement, Richard Kocher, Sr., and Oscar Blough, Jr., are jointly and severally liable, as partners, for payment of a total civil penalty of \$2,000 consisting of a \$1,850 penalty in Docket

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<sup>7</sup> Ironically, the Secretary's proposed settlement with Blough sought to relieve Kocher of liability for civil penalties incurred by Kocher's partnership.

<sup>8</sup> While not asserted by the Secretary, an argument could be made that the statutory penalty criteria applies to individual penalties proposed for each citation. However, the cumulative effect of numerous citations (in this case 80 citations) does not alter the requirement of proportionality for the total penalty sought to be imposed.

No. PENN 94-104 and a \$150 penalty in Docket No. 94-66. Consistent with the parties' agreement, payment is to be made in forty (40) monthly installments of fifty dollars (\$50.00) each. The first installment is due on October 1, 1995, with subsequent payments due on the first of each month until the full \$2,000 civil penalty is received. Upon timely receipt of the entire \$2,000 civil penalty, these matters **ARE DISMISSED**.

As indicated above, Paul Zimmerman, David Zimmerman and Harold Schnoke are jointly and severally liable as partners of Buck Mountain Coal Company for a total civil penalty of \$16,000 in Docket Nos. PENN 94-63, PENN 94-64, PENN 94-65, PENN 94-66, PENN 94-104, PENN 94-597, PENN 94-618 and PENN 94-619. Full payment is to be made in four quarterly installments of \$4,000 each. The first \$4,000 payment is due on September 30, 1995, with subsequent payments due on December 30, 1995, March 30, 1996 and June 30, 1996. Upon timely receipt of the entire \$16,000 civil penalty, these docket proceedings **ARE DISMISSED**.

Jerold Feldman  
Administrative Law Judge

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