

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 26, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-639
Petitioner	:	A.C. No. 40-02934-03549
v.	:	
	:	Mine No. 78
KELLYS CREEK RESOURCES INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On March 12, 1997, the Commission issued a decision reversing my determination (17 FMSHRC 1325 (August 1995)), that the violation conceded by Kellys Creek Resources, Inc. (AKellys Creek@), was not significant and substantial and was not the result of its unwarrantable failure, and remanding this matter for penalty reassessment.

Based on the Commission's finding that the violation was as the result of Kellys Creek's unwarrantable failure, I find that the level of Kellys Creek's negligence to constitute more than ordinary negligence, and to be aggravated conduct. I previously found that the violation constituted a very high level of gravity. I reiterate this finding in light of the Commission's determination that the violation was S & S. On the other hand, the level of the penalty to be assessed should be reduced taking into account its effect on Kellys Creek's ability to continue in business for the reasons set forth in Kellys Creek Resources, 17 FMSHRC 1085, 1092, (June 29, 1995). Taking all the above into account, I find that a penalty of \$500 is appropriate.

Avram Weisberger
Administrative Law Judge

Distribution:

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

Mr. Hollis Rogers, Kellys Creek Resources, Inc., Route 4, Box 662, Whitwell, TN 37397
(Certified Mail)

/mh