

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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January 9, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 94-238  
Petitioner : A.C. No. 46-08174-03537  
v. :  
KENNIE-WAYNE, INC., : Mine: Kennie-Wayne No. 1A  
Respondent :

**DECISION**

Before: Judge Amchan

This case is before me on a stipulated record. The only issue is whether payment of the proposed civil penalties will adversely affect Respondent's ability to continue in business. In Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), the Commission held, "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse effect would occur." See also Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (April 1994). From these decisions I infer that the operator not only has the burden of going forward with evidence, it has the burden of proving that payment of the penalties will adversely affect its ability to stay in business.

The total amount of penalties proposed for the two citations and one order in this case is \$5,601.<sup>1</sup> However, Respondent's schedule of liabilities attached to its July 19, 1994, contract of sale indicates \$36,560.45 in outstanding MSHA penalties. Moreover, Administrative Law Judge William Fauver's decision and order in Kennie-Wayne, Inc., Docket Nos. WEVA 93-471 through WEVA 93-473 (December 5, 1994), assesses an additional \$40,454 in civil penalties under the Act.<sup>2</sup>

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<sup>1</sup>These citations and order are affirmed based on the stipulations of the parties.

<sup>2</sup>Kennie-Wayne, Inc., Docket Nos. WEVA 93-471, WEVA 93-472,

In the instant proceeding the parties have made the transcript of the August 30, 1994, hearing before Judge Fauver in Docket Nos. WEVA 93-471 through WEVA 93-473 part of the record. That transcript establishes that Stephen Hairston purchased Kennie-Wayne on July 16, 1994 (Tr. 6-7).

In this case, as in the one before Judge Fauver, Mr. Hairston contends that Kennie-Wayne mines coal under a contract with M & H Coal Company (M & H). M & H leases the mine property from McDonald Land Company. Respondent states that it cannot sell the coal that it mines to anyone other than M & H without M & H's permission. Mr. Hairston testified that he purchased Kennie-Wayne with the understanding that he would be able to sell any coal not purchased by M & H to Hampden Coal Company, but that M & H has neither paid him in a timely fashion nor allowed him to sell to Hampden (Tr. 8-11, 18, 39-40).

As noted by Judge Fauver, the record does not establish that Respondent is contractually prohibited from selling its coal to customers other than M & H (Judge's decision, Docket Nos. WEVA 93-471 through WEVA 93-473, page 1). Moreover, the record establishes only that M & H was five days late on one payment for coal delivered by Respondent (Tr. 16-18).

Judge Fauver ruled against Respondent primarily on the grounds that it had not established that it was on the brink of financial collapse (Judge's decision, page 3). I go one step further and find that even if Respondent's ability to continue in business is in jeopardy, the proposed penalties in this case are largely irrelevant to its situation.

Respondent's accountant, Glenn Hall, testified that Kennie-Wayne's financial well-being was "precarious" (Tr. 59). However, he stated further that if Respondent could sell its coal to Hampden Coal its cash flow would improve and it could resume profitable operations (Tr. 59-60).

Thus, I conclude that if Respondent is successful in getting its shipments to Hampden resumed, or in getting paid by M & H or other customers, it will be able to continue in business regardless of whether I reduce the penalties in this case. Conversely, if Respondent is unsuccessful in these endeavors it will likely go out of business even if I reduce the penalties herein to one dollar.

In conclusion, I find that the instant record indicates that assessment of the \$5,601 civil penalty proposed by the Secretary will have no effect on Respondent's ability to continue in business. Therefore, I assess civil penalties

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and WEVA 93-473 (ALJ Decision December 5, 1994).

in that amount.

**ORDER**

Respondent is ordered to pay Petitioner \$5,601 in civil penalties within 60 days of this decision, or pursuant to any payment plan to which the parties may agree. Upon payment of the penalties this case is **DISMISSED**.

Arthur J. Amchan  
Administrative Law Judge

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