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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 24, 1990

DAVID THOMAS AND
GEORGE ISAACS

v. Docket Nos. KENT 89-13-D
KENT 89-14-D

AMPAK MINING, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), complainants David Thomas and George Isaacs have sought discretionary review of that portion of the supplemental remedial decision of Commission Administrative Law Judge Gary Melick in which the judge denied their post-trial motion to proceed individually, on the basis of an alter ego theory, against Geary Burns and Peggy A. Kretzer, the alleged owners of respondent Ampak Mining, Inc. ("Ampak"). 12 FMSHRC 428 (March 1990)(ALJ). In addition, the complainants have moved the Commission, in light of its decision in Ronald Tolbert v. Chaney Creek Coal Co., 12 FMSHRC 615 (April 1990) ("Tolbert II"), to remand this matter to the judge for reconsideration of his denial of their post-trial motion. By previous orders, we granted the complainants' petition for review and suspended briefing. Ampak has not responded to the complainants' motion to remand. For the reasons that follow, we grant the complainants' motion vacate that portion of the judge's decision denying the complainants post-trial motion, and remand this matter to the judge for further appropriate proceedings.

The relevant procedural history may be summarized briefly. Thomas

and Isaacs filed with the Commission, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3), discrimination complaints against Ampak, and the proceedings were consolidated for hearing and disposition before Judge Melick. In his decision on the merits, the judge concluded that Ampak had discriminated against the complainants in violation of section 105(c)(1) of the Act by laying off the complainants as a result of their protected activities. 11 FMSHRC 2552 (December 1989)(ALJ). At

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the direction of the judge, the parties stipulated to the amount of back pay, attorney's fees and expenses to be awarded the complainants. Subsequently, the complainants moved the judge for leave to proceed individually against Ampak's asserted owners, Geary Burns and Peggy A. Kretzer, on an alter ego theory. The complainants have asserted that Ampak will be unable to provide them the stipulated relief because the company is no longer in business, has no assets, and is burdened with substantial debt. The complainants have argued that the owners and the corporation share a unity of interest and are not, in fact, separate legal personalities.

In his remedial decision, the judge awarded complainants the stipulated damages but denied their motion to proceed individually against the owners. 12 FMSHRC at 430. The judge relied upon the Commission's decision in *Ronald Tolbert v. Chaney Creek Coal Corp.*, 9 FMSHRC 1847 (November 1987) ("Tolbert I"). There, the Commission denied a discrimination complainant's motion, proffered after the decisions in question had become final, to proceed against an individual owner on an alter ego theory. The Commission held that the course of action was for the complainant to seek the Secretary of Labor's enforcement of the final Commission decisions.

After issuance of the judge's remedial decision in this matter, the Commission issued its decision in *Tolbert II*. *Tolbert II* arose after the complainant had heeded the Commission's directions in *Tolbert I*. and had invoked the Secretary's representation to secure summary enforcement of the Commission's final orders in the United States Court of Appeals for the Sixth Circuit. See 12 FMSHRC at 617. Nevertheless, the respondent had still failed to comply with the enforced orders. Among other things, the Commission concluded in *Tolbert II* that "[i]n light of the remedial purposes of section 105(c) [of the Mine Act], ... the Commission, in appropriate cases and on such terms as are just, may reopen a discrimination case for reasonable supplemental [Commission] proceedings in aid of compliance." 12 FMSHRC at 618. Pursuant to that principle, the Commission reopened *Tolbert* to consider the complainant's request for a determination as to the individual corporate owner's possible alter ego status. 12 FMSHRC at 619.

The Commission noted that the individual corporate owner had never been a party to the proceeding. 12 FMSHRC at 619. Accordingly, in remanding the matter to the judge, the Commission directed him to decide whether the complainant should have determined the alleged alter ego's status at a more timely juncture of the litigation and to rule on the precise legal theory and authority upon which any joinder might now be justified. 12 FMSHRC at 619. The Commission further required that the

alleged alter ego be afforded the opportunity to be specially heard on the issues affecting his status and, if made a party, be heard on any and all liability or remedial issues affecting him. 12 FMSHRC at 619- 20.

Here, the motion to join the alleged individual owners was made before Judge Melick's final decision in this matter. As in Tolbert II, the complainants have raised an alter ego issue that may bear on their ability to recover the stipulated damages. In light of Tolbert II, we

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conclude that the complainants' claims of liability on the part of Ampak's owners, based on an alter ego theory, should be considered by the judge. As in Tolbert II, we remand this proceeding to the judge for needed factual findings and legal analysis as to whether Burns and Kretzer may be brought into this proceeding at this stage, whether the complainants should have determined the owners' alleged alter ego status at a more timely juncture, and to determine the precise legal theory and authority upon which such joinder may now be justified. See Tolbert II, 12 FMSHRC at 619. Ampak's owners shall be specially heard on these issues. If the judge concludes that they may properly be made parties to these supplemental compliance proceedings, they shall "continue to be afforded full opportunity to participate on any and all liability or remedial issues affecting them." Tolbert II, 12 FMSHRC at 619-20.

For the foregoing reasons, we vacate that portion of the judge's remedial order denying complainants' motion to proceed against Burns and Kretzer, and we remand this matter to the judge for proceedings consistent with this opinion.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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