CCASE:
SOL (MSHA) V. SPURLOCK MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: Docket Nos.	KENT 92-380
	:	KENT 92-419
	:	KENT 92-420
v.	:	
SPURLOCK MINING COMPANY, INC.	: Docket Nos.	KENT 92-306
	:	KENT 92-307
and	:	KENT 92-323
	:	KENT 92-324
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	KENT 92-608
	:	KENT 92-609
	:	KENT 92-701
	:	KENT 92-836
v.	:	KENT 92-837
	:	KENT 92-838
SARAH ASHLEY MINING COMPANY, INC.	:	KENT 92-889

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), raise the issue of whether Commission Administrative Law Judge Gary Melick, in assessing penalties, properly considered the effect of a penalty on an operator's ability to continue in business, one of the penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. 820(i).(Footnote 2) 15 FMSHRC 629

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1 Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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2 Section 110(i) provides in relevant part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the

(April 1993)(ALJ). The judge determined that Spurlock Mining Company ("Spurlock") and Sarah Ashley Mining Company ("Sarah Ashley")("the operators"), were no longer in business, and directed them to pay penalty assessments of $1,197 and $7,382, respectively, as proposed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Id. at 633. The Commission granted the operators' petition for discretionary review, which challenges the penalties. For the reasons set forth below, we affirm the judge's decision in result.

I.

Factual and Procedural Background

This case involves 28 citations issued to Spurlock and Sarah Ashley. The parties did not dispute the violations and a hearing was held solely on penalty issues.

Hobart Anderson, who represented both operators and was the only witness at the hearing, is founder, president and chief operating officer of Spurlock and Sarah Ashley. 15 FMSHRC at 631. Both operators are closely-held corporations, wholly owned by Hobart Energies Corporation, Inc. ("Hobart"). Id. Anderson and David Griffith, Anderson's former accounting partner, are directors and officers of both operators. Id. They, along with two other individuals, own all the stock in Hobart.

Neither operator was producing coal at the time of the hearing. Spurlock ceased mining in November, 1991, and Sarah Ashley did so in April, 1992. Anderson testified that the companies had not been dissolved and that he hoped to make them operational in the future. Tr. 67.

Before the judge, the operators asserted that the proposed penalties would affect their ability to continue in business. The judge found that, because the companies were no longer in business, the penalty criterion of ability to continue in business was not relevant. 15 FMSHRC at 630. He determined that the operators were liable for the penalties and that the financial condition of the operators was "only an issue of collection" for the Secretary. Id. at 630-31.

The judge stated that, if the criterion were applicable in this case, "the relevant operating enterprise for evaluating the criterion ... must include not only Spurlock and Sarah Ashley but also, under either an equity ... or ... alter ego theory, the individual shareholders of the larger operating enterprise." Id. at 631. In reaching this conclusion, the judge applied Kentucky law to "pierce the corporate veil." Id. He then found that Spurlock and Sarah Ashley had failed to prove that the proposed penalties

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> effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

would affect their ability to remain in business and directed them to pay the penalties proposed by MSHA. Id. at 633.

II.

Disposition

The operators contend that the judge erred by failing to take into consideration the effect of the proposed fines upon their ability to continue in business because "either company could re-open existing mines ... if suitable financing arrangements could be made." PDR at 2. The operators also object to the judge's decision to pierce their corporate veils. PDR at 3. They ask the Commission to either eliminate or reduce the penalties. PDR at 3. In response, the Secretary argues that no reduction of penalties is warranted when an operator, no longer in business, has substantial remaining assets. S. Br. 8, 11. The Secretary also asserts that the operators failed to prove that the assessed penalties would have an adverse effect on their ability to continue in business sufficient to warrant a reduction in penalties. S. Br. 12.

We note, preliminarily, that the penalties may not be eliminated, as requested by the operators, because the Mine Act requires that a penalty be assessed for each violation. 30 U.S.C. 820(a); Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981).

We reject the judge's finding that the operators were out of business because that finding is not supported by substantial evidence in the record.(Footnote 3) Neither Spurlock nor Sarah Ashley has been dissolved. Tr. 67. Anderson testified that he planned to resume operations at both mines if financing could be secured. Tr. 67; see also PDR at 2. At the time of the hearing, Sarah Ashley's equipment was valued at approximately $80,000 and Spurlock's at approximately $86,000. Tr. 77. While the operators were not then producing coal, there is no evidence that they would not resume mining operations in the future. Compare Iron Mountain Ore Co., 8 FMSHRC 1840, 1849-50 (November 1986)(ALJ); CRD Coal Co., 2 FMSHRC 2247 (August 1980)(ALJ).

We conclude that the penalty criterion of ability to continue in business applies in this case and we look to relevant case law for guidance in

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3 The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980).

applying it. In Sellersburg Stone Co., 5 FMSHRC 287 (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." Id. at 294. See also Pegg's Run Coal Co., 1 FMSHRC 350, 351-52 (May 1979).

The operators contend that the penalties would affect their ability to resume operations because it would be "impossible to get ... financing if there are outstanding judicial liens upon equipment and accounts receivable that could come in front of the claims of any such lender." PDR at 2. We decline to reduce the penalties based on the operators' mere speculation that the penalties would result in the imposition of judicial liens and that those liens would foreclose financing.

The operators failed to introduce specific evidence to show that the penalties would affect their ability to resume operations and to continue in business. At the hearing, Anderson submitted the operators' 1990 tax returns as well as their 1991 balance sheets and a number of tax liens and judgments against the operators. Exs. R-1, A, B, D, F, H, I, K, L, M; R-2, A-1, A-2, B, E, F; G. Ex. 1. The tax returns indicate that, while Spurlock had gross receipts of $900,000 for the year and Sarah Ashley had gross receipts of $1,400,000, both incurred losses. Ex. R-1, D; Ex. R-2, B. Neither the tax returns nor the financial statements, which Anderson testified might not be correct (Tr. 113-15), prove that payment of $1,197 by Spurlock and $7,382 by Sarah Ashley would adversely affect their ability to continue in business if they chose to do so. See Peggs Run Coal Co., 3 IBMA 404, 413-14 (November 1974)(financial statements showing a loss were not sufficient to reduce penalties).

For the foregoing reasons, we affirm the judge's decision in result. Consequently, we do not reach the issue of whether the criterion of the effect of a penalty on an operator's ability to continue in business applies to an operator who is out of business, nor do we reach the issues related to piercing the corporate veil.

III.

Conclusion

Spurlock is directed to pay civil penalties in the amount of $1,197, and Sarah Ashley is directed to pay civil penalties in the amount of $7,382.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner