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SOL (MSHA) V. W R W CORP.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 83-39 A.C. No. 15-12685-03502
v.	
WRW CORPORATION, RESPONDENT	Docket No. KENT 83-63 A.C. No. 15-12685-03503 Docket No. KENT 83-65 A.C. No. 15-12685-03504 Docket No. KENT 83-68 A.C. No. 15-12685-03505 Docket No. KENT 83-138 A.C. No. 15-12685-03506 Docket No. KENT 83-179 A.C. No. 15-12685-03507 Docket No. KENT 83-213 A.C. No. 15-12685-03508 Docket No. KENT 83-250 A.C. No. 15-12685-03509 No. 1 Mine

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Michael T. Gmoser, Esq., Hamilton, Ohio, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", in which the Secretary seeks civil penalties against the WRW Corporation (WRW) of

$89,999 for 30 violations of regulatory standards.(Footnote.1) WRW does not dispute the existence of the cited violations, nor does it challenge the special "significant and substantial" and unwarrantability findings made by the Secretary in connection with certain citations and orders herein. In defense, WRW claims that it was not responsible for the violations because it was not an "operator" within the meaning of section 3(d) of the Act. WRW argues in the alternative that even if it was an "operator" under the Act, since the subject mine was only a small operation from which it made no profit and since it has only $10 or $15 remaining in corporate assets, it should not be required to pay the proposed penalties.

These proceedings were delayed at the request of the parties pending resolution of a Federal Grand Jury investigation purportedly concerning the deaths of 2 miners resulting from the same incidents underlying the violations charged herein. After the lapse of more than a year without any stated disposition by the Grand Jury it was deemed appropriate to proceed on the merits of the cases before this Commission.

In the early evening of January 5, 1982, Joe Main and Alfred Gregory, Jr., miners with no training and less than a months experience, were killed at the WRW No. 1 underground mine as a direct result of egregious violations of mine safety regulations. The men died from carbon monoxide remaining in the mine atmosphere because of grossly inadequate ventilation and after unlawful blasting from the solid without stemming and blasting simultaneously at six working faces.

The day shift, consisting of five miners and the uncertified supervisor Paul Jordan, had arrived at the mine around 9:30 a.m., on January 5, 1982. Jordan and four of the miners loaded and hauled coal to the surface until about 1:00 p.m. After lunch, the crew reentered the mine and drilled 11 blast holes in each of the faces of the six working places. After charging each of the holes with caps and five or six sticks of explosives, (thus totaling 300 to 360 sticks) they were wired for simultaneous blasting. At about 4:30 p.m., Jordan connected a blasting cable to a 220-volt AC circuit and detonated the explosives from the surface.

The second shift crew consisted of three surface employees (slate pickers) and Alfred Gregory, the underground scoop operator. Jordan told Gregory "not to go underground for awhile" so the smoke from the explosives could clear up. Gregory entered the mine around 5:30 p.m. and hauled three loads of coal to the surface without incident. He entered a fourth time, but did not return. Joe Main, one of the surface employees, then entered the mine to look for Gregory. Main returned once to the surface unable to locate him. Around 6:30 p.m., Main returned underground to continue his search. Main did not reappear after 30 minutes so another surface employee, Keith Turner, went for help. Turner and Ellis Gregory Jr., brother of the deceased, later entered the mine and found the bodies of Gregory and Main.

WRW maintains that it was not responsible for those deaths or for any violations at its No. 1 Mine, because it was not an "operator" within the meaning of section 3(d) of the Act. It contends that it did not exercise control or supervision over the mine or the miners, and relinquished all control and supervision to an independent contractor, Paul Jordan.

Section 3(d) of the Act, defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine." It is not disputed that WRW was lessee of the coal mine at issue (Exh. G-12). The issue then is whether during relevant times WRW operated, controlled or supervised that mine. As evidence that it did not, WRW cites mining agreements reached in May and November 1981 with Paul Jordan, the purported independent contractor (Exh. G-6, and G-7). Whether or not WRW was operating, controlling or supervising the subject mine does not, however, depend upon the formalities of a document but rather is a factual issue determined by all the surrounding circumstances. In this regard, there is substantial credible evidence to conclude that WRW continued to be an "operator" within the meaning of section 3(d) of the Act even after engaging the services of the purported independent contractor, Paul Jordan.

It is undisputed that the subject mine has always been operated under an identification number issued to WRW based upon its application to MSHA, as the responsible mine operator, and that even after it had been cited by MSHA for previous violations WRW never sought to change its official status as responsible mine operator. Under section 109(d) of the Act, the mine "operator" is required to file with MSHA its name and address as the operator responsible for the mine and must promptly report to MSHA any changes in that relationship.

WRW was cited by MSHA at a time when it claims that an independent contactor was solely responsible for the mine operation. However the evidence shows that WRW paid for those citations with checks drawn on its own bank account and that the "independent contractor" was represented in the citations as a partner and, therefore, as an agent of WRW. There is no evidence, moreover, that WRW disclaimed its legally established status as "operator" at any time prior to the initiation of these cases. Accordingly, WRW is estopped from now denying that relationship. Secretary v. Swope Coal Co., 1 FMSHRC 1067 (1979).(Footnote.2)

In addition to holding itself out as the responsible mine operator WRW also exercised actual supervision and control over significant mining activities. It is undisputed that WRW furnished all equipment and supplies necessary for the mining operations and had an exclusive contract to purchase all of the coal produced. In addition, according to Jess Alford, a certified mine foreman with whom WRW contracted to buy coal from January to May 1981, Noah Woolum, president of WRW, directed Alford's associates in performing work in the surfaces areas of its two mines including the cutting and hauling of logs to construct a tipple for the No. 2 Mine. Woolum also made the decision to begin mining the No. 2 Mine and suggested to Alford that he work at night to avoid the mine inspectors.(Footnote.3)

According to one of the miners working for Alford, Roy Hampton, Noah Woolum had him perform various job assignments usually through instructions to Alford. On one occasion however, Woolum directly told Hampton to build a coal tipple

at the No. 2 Mine. Woolum was at the mine every weekend as the tipple was being built and directed its construction. Hampton continued to work for 2 or 3 weeks at the No. 2 Mine after Alford quit and indeed produced some coal for WRW even though he was not a certified foreman and Woolum knew he was not. (Footnote.4) Hampton later tried to get a certified foreman for Woolum but was unsuccessful.

Paul Jordan subsequently met Noah Woolum at a gas station where Jordan was having his car repaired. Jordan said that Woolum approached him about running his mine and even though Jordan told him that he was not a mine foreman. Woolum nevertheless asked Jordan to be his "foreman". Jordan thereafter examined the two mines and agreed to "give it a try." They reached a contract on May 30, 1981, and Jordan began work the same day.

Marty Smith, Noah and Bill Woolum, Bill Woolum Sr., William Eastrich, Paul Jordan, and his brother Leroy Jordan showed up on the first day of work. Noah first directed that the equipment be moved from the No. 1 to the No. 2 Mine. Later, several men went into the No. 2 Mine to prepare for production. During this time a rock fell on Leroy Jordan's foot, crushing it. Noah Woolum later told Leroy that since WRW did not have workmen's compensation coverage WRW would pay his hospital bills directly. The evidence shows that WRW paid Leroy for about 2 months lost work and for some of his medical bills.

After the accident at the No. 2 Mine Noah told Paul Jordan to move the equipment back to the No. 1 Mine. Woolum also asked Jordan around this time whether he had a certified mine foreman's license and when Jordan replied in the negative, Woolum reportedly said "never mind, we can't make any money operating legally."

Thereafter, Noah Woolum was reportedly present at the mine every other weekend, bringing the "payroll" and sometimes operating the loader. According to Jordan, Woolum also occasionally directed the men to load coal and move equipment. On one occasion Woolum told Jordan to place a cable across the mine access road "to keep the inspectors

out." According to Jordan, they also began working a midnight shift on Woolum's instructions in order to further avoid contact with the mine inspectors.

According to Jordan, Woolum also told him where to drive the headings, where to put power lines, how to pump water out, and how to maintain the mining equipment. On one occasion, Woolum even removed the mine ventilation fan, telling Jordan only that it belonged to someone else. Woolum then reportedly had Leroy Jordan help him replace the fan with a smaller one and move it to a new location. The ventilation was so bad after that that both Jordans complained "numerous" times to Woolum about the problem and on at least one occasion Paul Jordan told Woolum that "the guys were getting sick on bad air." In response, Woolum reportedly offered only to try to hang new (brattice) curtains inside the mine.

According to Jordan, Bill Woolum, another WRW officer, appeared at the mine site on the alternate weekends. Bill worked on the loader moving mud and dirt, built a canopy and set up some electrical wiring and lights. He occasionally used Leroy Jordan to assist him. According to Paul Jordan, all the major decisions concerning the mine were made by Noah or Bill Woolum, including decisions concerning equipment break downs, hauling coal, buying pumps, night work, and the direction of mining. Jordan conceded, however, that he was never specifically told how to mine the coal and that he hired and fired his own workers and set their level of pay. (Footnote.5)

According to Leroy Jordan, he was hired by Noah Woolum in mid May or early June 1981. On his first day of work, Woolum directed him to move mining equipment from the No. 1 to the No. 2 Mine. Noah and Bill Woolum were then operating the "tractors." Jordan later went underground at the No. 2 Mine operating a scoop and setting timbers. The No. 2 Mine had been driven about 80 feet to 100 feet at that time. After his foot was fractured in a roof fall, Noah and Bill Woolum told him that while they were not insured, they would take care of "everything". Leroy thereafter received $100 a week for 6 weeks as compensation from WRW, and payment by WRW for some of his medical bills.

After recuperating, Leroy returned to the No. 1 Mine and "picked slate". During this time Noah Woolum usually appeared on Friday and Saturday and performed cleanup, repair and electrical work. Noah also had Leroy help him do cleanup work, move rocks and equipment and climb poles to erect electrical wires. According to Leroy, Noah also told Paul Jordan where to mine, and had co-worker Marty Smith cutting timbers for roof suppot, cleaning up rocks, "picking slate" and shovelling loose coal. In particular, Leroy recalled that Noah told him on one occasion to haul a ventilation fan in the "jeep" and set it up in a new location. Noah also reportedly told the miners to avoid contact with mine inspectors. They were told to run off into the woods or hide in the mine if the inspectors showed up. Noah also began the night shift to further avoid contact with mine inspectors.

After the ventilation fan was replaced by a smaller one Jordan and the other miners began getting sick from lack of ventilation and complained to Noah. Noah later brought in some plywood to "direct the air." The ventilation was still inadequate however and Leroy continued to get sick. He had dizzy spells, throbbing headaches, nausea and felt like he was going to pass out. He was taken to the hospital five times for these problems and finally quit about 2 weeks before the fatalities.

Tony Evans was a miner hired by Paul Jordan. He had never previously worked in a coal mine, had no training, and was not a certified coal miner. On one occasion Noah Woolum directed him to build a canopy over the mine portal. Woolum was present for about 4 days during that week.

Noah Woolum testified that he and his brother Bill inherited the property here at issue, and that they incorporated with a friend, Roger Richardson, to have the coal mined. They were referred by their attorney to a certified mine foreman Jess Alford who would obtain the necessary licenses and permits to mine coal. Woolum knew that it was necessary to have a certified person run the mine and therefore "hired" Alford.

The corporation, known as WRW, thereafter contracted with Alford to mine the coal and WRW furnished all the supplies and equipment, including an $18,000 scoop, a $10,000 loader and a truck. A charge account was also established for Alford at supply stores and he was purportedly given free rein to charge the supplies he needed. Woolum denied ever telling Jess Alford what to do, and claims that Alford quit because of "water problems" and not because of managerial interference. After Alford quit, an

uncertified employee, Roy Hampton, was retained to "cleanup" and to "look for" coal in the mines. Hampton was to get a certified foreman to operate the mine for Woolum but was unsuccessful.

According to Woolum, Paul Jordan later approached him at a service station near the mine and asked if "we still needed someone to run the mine." Jordan allegedly represented that he was qualified to run the mine. Without verifying his qualifications, WRW then contracted with Jordan to produce coal. As noted, Noah asserts that he never directed Jordan in any of his activities and was present at the mine only once a month to pay for the work. These assertions have not been found credible. fn. 2 and 4, supra. According to Woolum, WRW never made a profit in the enterprise and, after the fatalities, sold all its equipment to satisfy creditors. At the time of hearing, only about $10 in corporate assets remained. The mines have been closed and the coal lease terminated.

Within the above framework of evidence I conclude that WRW not only held itself out in its relationship with MSHA and other agencies as the responsible mine "operator" within the meaning of section 3(d) of the Act but also exercised, through its officers and agents, sufficient actual supervision and control over mine operations during relevant times to constitute an "operator" as a factual matter within that meaning. Accordingly, I find that WRW was a mine "operator" responsible under the Act for the violations at its mine. (Footnote.6)

WRW acknowledges the existence of the violations charged in these cases and does not dispute the special "significant and substantial" and "unwarrantable failure" findings associated with some of the citations and orders at bar. It is nevertheless necessary to review the gravity of each violation and the degree of negligence attributable to WRW for purposes of determining the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. As to all violations, however, I find that WRW was grossly negligent based on the credible evidence that Noah Woolum, on behalf of WRW, knowingly engaged a non -certified and unqualified person to operate his mines. All of the

violations are directly attributable to this negligent act since the violations were caused by the ignorance and/or negligence of this unqualified miner. I find further negligence based on the evidence that Woolum, as president of WRW, knew he was operating the mines illegally and attempted to conceal these illegal operations from MSHA. Specific findings of negligence are also designated in the discussion below where it has been found appropriate to a specific violation.

Docket No. KENT 83-39

Citation No. 979126 alleges a violation of the standard at 30 C.F.R. 75.512 for failure to have a qualified person employed at the mine to perform required electrical inspections on the electrical equipment. According to the undisputed testimony of MSHA supervisor Lawrence Spurlock, the failure to have such a qualified person at the mine contributed to many of the other violations including uninsulated power wires, impermissible mining equipment and electrical boxes without lids. These violative conditions in conjunction with the wet mine floor and inadequate methane testing could have resulted in explosions and electrocution. The violation was accordingly a serious one.

Citation No. 979127 charges a violation of the standard at 30 C.F.R. 75.516 and alleges that the underground cable providing 220 volt power was not installed on insulators. It is undisputed that the conditions existed as cited and that because of the bare spots in the insulation of the 220-volt wire and the fact that it was lying on the wet floor there was a serious electrocution and shock hazard. The violation was accordingly serious. Inasmuch as Jordan conceded that the insulation had been intentionally removed so the wire could be used to detonate explosives, the violation was the result of gross negligence.

Citation No. 979128 alleges a violation of the standard at 30 C.F.R. 75.1200 and charges that no accurate and current mine map was available at the subject mine. This was a serious violation in that without an accurate mine map it would be difficult for rescuers to quickly locate victims. This was a particular hazard in this case because of the presence of noxious gases. Without an accurate mine map, there is also the potential of mining into old works with possible flooding and/or inundation by "black damp."

Docket No, KENT 83-63

Citation No. 979125 alleges a violation of the standard at 30 C.F.R. 75.503 and charges that the rubber-tired

electrical scoop was not maintained in a permissible condition. The battery leads were not installed in a conduit, the control panel box had an opening in excess of .005 inch and the battery couplers were not locked. The undisputed evidence is that these violations created a potential ignition source for triggering a coal dust or methane explosion. The hazard was particularly serious inasmuch as there was no methane detector available at the mine site.

Docket No. KENT 83-65

Citation No. 979121 alleges a violation of the standard at 30 C.F.R. 75.309 and charges that no qualified person was employed at the mine to perform methane tests. Indeed, Paul Jordan had never even seen a methane detector at that mine. According to the undisputed testimony of MSHA supervisor Spurlock, a particularly serious hazard existed from the failure to perform methane testing because of the existence of the electrical permissibility violations.

Citation No. 979130 alleges a violation of the standard at 30 C.F.R. 75.1713-7 in that the requisite first aid equipment was not available at the mine. According to Spurlock, the violation was serious because, for example, in the absence of a tourniquet, a miner could bleed to death.

Docket No. KENT 83-68

Citation No. 979005 alleges that the operator failed to withdraw persons who were not necessary to abate conditions described in a previously issued section 104(b) order. According to the undisputed testimony of supervisor Spurlock, miners were continuing to work in an area affected by the section 104(b) withdrawal order and which required additional roof support. The miners were thereby exposed to the serious hazard of roof falls.

Citation No. 979006 was dismissed at MSHA's request as having been erroneously issued.

Order No. 979095 alleges a violation of the standard at 30 C.F.R. 75.307 in that there was no qualified person employed at the mine to perform methane tests. Such tests are required at each working place immediately before energizing electrical equipment and at intervals during mining operations. In light of the number and seriousness of the permissibility violations existent at this time, this violation was particularly serious and could have led to fatal explosions.

Order No. 979097 alleges a violation of the standard at 30 C.F.R. 75.400 in that loose coal and coal dust accumulations were present throughout the subject mine. In light of the significant quantities of loose coal and coal dust throughout the mine, the presence of ignition sources from permissibility violations and the practice of blasting without stemming, there was indeed a serious hazard of fatal explosions.

Order No. 979100 alleges a violation of the standard at 30 C.F.R. 75.1600 in that there was no two-way radio communication available at the mine. According to Spurlock, this deficiency would prevent an injured person inside the mine from communicating for rescue purposes. It accordingly presented a serious hazard.

Docket No. KENT 83-138

Order No. 979098 alleges a violation of the standard at 30 C.F.R. 75.402 in that there had been no rock dusting at the subject mine. According to MSHA's supervisor Spurlock, without rock dust, coal dust becomes suspended in the air, thereby creating an explosive environment. The violation was particularly hazardous because of inadequate ventilation at the mine, the existence of electrical permissibility violations, and the practice of blasting without stemming.

Docket No. KENT 83-179

Order No. 979093 alleges a violation of the standard at 30 C.F.R. 75.306 in that there was no qualified person at the mine performing ventilation tests. It is undisputed that there was not even an anemometer available at the mine to perform such tests. MSHA supervisor Spurlock opined that this violation directly contributed to the fatalities in the mine. Proper testing would have revealed insufficient ventilation in the area where the miners were killed.

Order No. 979096 alleges a violation of the standard at 30 C.F.R. 75.314 in that there was no qualified person at the mine to perform examinations of idled and abandoned areas. Such examinations would detect low oxygen, the existence of methane, poor roof conditions and other serious hazards.

Order No. 979099 alleges a violation of the standard at 30 C.F.R. 75.517 in that insulation had been removed from portions of the 220-volt power cable and the cable was lying on the wet mine floor. Under the circumstances, the serious hazard of burns, shock, and electrocution existed.

Citation No. 979122 alleges a violation of the standard at 30 C.F.R. 77.512 and charges that the cover plate on the main power box had been removed. Persons could thereby contact the exposed wires and suffer burns, shock and electrocution.

Order No. 979123 alleges a violation of the standard at 30 C.F.R. 77.513 in that there was no insulation mat to insulate people from electrical shock at the switch box. The violation could result in electrical shock, burns and electrocution, and was accordingly serious.

Order No. 979124 alleges a violation of the standard at 30 C.F.R. 77.1301(b) in that detonators and deteriorated explosives were stored together. The evidence shows that a serious explosion hazard existed from the potential spontaneous ignition of the deteriorated explosives.

Docket No. KENT 83-213

Citation/Order No. 979092 alleges a violation of the standard at 30 C.F.R. 75.200 in that loose roof had not been supported and hill seams were not cribbed as required by the roof-control plan. MSHA supervisor Spurlock found that an imminent danger of death and serious injuries existed from the described hazard. This finding is not disputed.

Citation No. 979129 alleges a violation of the standard at 30 C.F.R. 75.1715 and charges that there was no check-in and check-out system in effect at the mine. Without such a system, there was no way of obtaining positive identification of persons who may have been working underground. Without such a system, neither management nor potential rescuers could determine whether any persons remained in the mine after an accident. Under the circumstances, rescuers may be placed at unnecessary risk in trying to locate persons who may no longer be in the mine. The violation was accordingly serious. It was particularly serious in this case because rescuers did in fact continue to search the mine for other possible victims of the noxious gases.

Docket No. KENT 83-250

Order No. 979081 alleges a violation of the standard at 30 C.F.R. 75.301 in that the working faces of the active places in the mine were not being ventilated by a current of air sufficient to dilute, render harmless and carry away carbon monoxide, smoke, explosive fumes and other harmful gases. The evidence reveals that this violation was a

direct cause of the subject fatalities. The unstemmed charges had been exploded around 4:00 or 5:00 p.m., and Spurlock was still not able to enter the working places 6 hours later because of the inadequate ventilation. The evidence shows in fact that it was impossible to devise a ventilation system that could provide sufficient air in the working places and the closure order remains in effect in the subject area. The violation was a serious one and, as indicated, was a direct cause of the two fatalities. The violation was also related to the interference by WRW president Noah Woolum in removing a larger ventilation fan, and in selecting the direction of headings. Woolum had also been warned on several occasions of the inadequate ventilation but did nothing to correct it.

Citation No. 979082 alleges a violation of the standard at 30 C.F.R. 75.302 in that no line brattice was being used to improve the ventilation of the subject mine. According to Spurlock, this was also a direct cause of the fatalities in that the failure to have line brattice permitted the buildup of fatal carbon monoxide. The violation was also attributable to the failure of Noah Woolum to have furnished the brattice that he said he would provide.

Order No. 979083 charges a violation of the standard at 30 C.F.R. 75.304 in that there was no certified person at the mine to perform on-shift examinations. The evidence shows that the requisite instrumentation for conducting such examinations, including a methane detector and a flame safety lamp, were not even available at the mine. These were serious violations that could have contributed to the fatalities in this case.

Order No. 979084 charges a violation of the standard at 30 C.F.R. 75.320 and alleges that no methane tests were performed before or after blasting at the subject mine. The evidence shows that a mine explosion could be triggered by the blasting if methane or coal dust were present. A serious hazard accordingly existed.

Order No. 979085 alleges a violation of the standard at 30 C.F.R. 75.1303 in that the mine operator was blasting six places at one time with 300 sticks of explosives. As a result of the use of excessive amounts of explosives, dust and gases were put into suspension thereby potentially propagating an explosion of the entire mine. The hazard was aggravated in this case by the failure to stem the explosives, thereby creating a serious ignition source for any suspended coal dust or methane that might be present. Excessive carbon monoxide also resulted from these blasting practices, and, as noted, was the direct cause of the

fatalities in the case. The violation was accordingly quite serious.

Order No. 979086 alleges a violation of the standard at 30 C.F.R. 75.1714(a) in that there was an insufficient number of self-rescuers available for the number of miners working. Inasmuch as self-rescuers filter out carbon monoxide, it is quite possible that, had the deceased miners been equipped with self-rescuers, they might have survived. The violation was quite serious and may be considered a contributing cause to the fatalities in this case.

Citation No. 979087 alleges a violation of the standard at 30 C.F.R. 75.48.5 in that the new miners employed at the subject mine had not received the training required by section 115 of the Act. One of the deceased miners had only 1 week experience and the other began working the night of his death. It may be reasonably inferred that had the miners had the proper training, they would have been able to understand the hazards they faced in working in the subject mine, thereby possibly preventing their death.

Citation No. 979088 alleges a violation of the standard at 30 C.F.R. 75.48.7 in that none of the miner's at the subject mine had received task training before assignment to work duties. It may reasonably be inferred that if such training had been given that the miners would have been aware of the hazards presented by the subject mine.

Citation No. 979089 alleges a violation of the standard at 30 C.F.R. 75.300 in that the mine fan was neither installed nor operated in an approved manner. The fan was installed in front of the mine opening, in a combustible wood housing and without a water gauge. According to MSHA supervisor Spurlock, the violation directly contributed to the fatalities in the case inasmuch as the fan was not providing sufficient ventilation to remove carbon monoxide from the area in which the victims were working. The violation was accordingly serious. Since the fan was obtained and positioned by Noah Woolum himself, WRW was, for this additional reason, grossly negligent.

Order No. 979091 alleges a violation of the standard at 30 C.F.R. 75.303 in that a certified person was not employed at the mine or available to perform preshift examinations. The violation was quite serious and contributed to the fatalities in the case. The violation is directly attributable to WRW's failure to have engaged a certified foreman at its mine.

Order No. 979094 alleges a violation of the standard at 30 C.F.R. 75.305 and alleges that no certified person was employed at the mine to perform the required weekly examinations, including examinations of the intakes, return air courses, and escapeways. If such a person had been employed and had been performing his duties, the evidence shows that the violations that led to the fatalities in this case would probably have been discovered and the fatalities avoided. The violation was accordingly quite serious. The violation was also directly attributable to WRW's failure to have engaged a certified foreman at its mine.

In determining the amount of penalties I am assessing in these cases, I have also considered the evidence that WRW was a small mine operator. I also note that considering its size and the length of time it had been operating, WRW had only a moderate history of reported violations. That reported history does not however reflect the evidence that WRW had been operating its mines without MSHA's knowledge for at least 7 months. It may reasonably be inferred that it was operating during this time with many of the same violative conditions cited in these cases since it was being operated under the direction of the same unqualified and uncertified individual. It appears that the violations in these cases that could be abated, were in fact abated, but both the No. 1 and No. 2 Mines have been abandoned. WRW is no longer in the mining business and has no intention to resume such business.

The evidence also shows that WRW has so depleted its assets that it has only "$10 or $15" remaining. However because of the egregious violations in these cases coupled with the gross negligence on the part of WRW principals, I find that the substantial penalties I am imposing herein are appropriate. I fully expect that, should MSHA find itself unable to collect these penalties from corporate assets, it will pursue collection proceedings against the individual stockholders by piercing the corporate veil. The facts in this case clearly warrant such proceedings. See U.S. v. Pisani, 646 F.2d 83 (3rd Cir.1981); and DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681

(4th cir.1976).(Footnote.7) Consistent with the goals of the Act the message must be crystal clear that unscrupulous mine operators will not be permitted to use corporations with little or no assets to escape responsibility under the Act. It is apparent moreover, because of the direct personal involvement by WRW president Noah Woolum in several of the more serious violations, that penalty proceedings against that corporate officer would also be warranted under section 110(c) of the Act.

ORDER

WRW Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. KENT 83-39

Citation No.	Amount of Penalty
979126	$500
979127	450
979128	450

Docket No. KENT 83-68

979100	200
979005	500
979095	500
979097	300
979100	200

Docket No. KENT 83-63

979125	150

Docket No. KENT 83-65

979121	345
979130	100

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Docket No. KENT 83-138

979098	255

Docket No. KENT 83-179

979093	500
979096	400
979099	750
979122	400
979123	400
979124	350

Docket No. KENT 83-213

979092	500
979129	300

Docket No. KENT 83-250

979081	10,000
979082	10,000
979083	5,000
979084	5,000
979085	10,000
979086	10,000
979087	5,000
979088	5,000
979089	10,000
979091	8,000
979094	5,000
	$90,350

Gary Melick
Assistant Chief Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Citation No. 979006, Docket No. KENT 83-68 was dismissed at hearing upon the Secretary's request for withdrawal. Commission Rule 11, 29 C.F.R. 2700.11.

~Footnote_two

2 WRW also applied for, and was issued as mine "operator", a Surface Disturbance Mining Permit from the Commonwealth of Kentucky (Exh. G-44) and a performance bond was obtained by WRW in its own name in connection with that application (Exh. G-43). WRW therefore not only held itself out as the responsible mine operator to MSHA but also to state authorities.

~Footnote_three

3 Woolum denied that he directed mining activities or that he suggested methods to avoid inspectors. I do not find these denials to be credible in light of the contrary testimony of Alford, Roy Hampton, Tony Evans, Paul Jordan and Leroy Jordan discussed infra. In particular no reasonable motive to falsify has been attributed to Alford, Hampton or Evans. In addition, because of the consistency and cross corroboration provided among and by these witnesses to the testimony of Paul and Leroy Jordan I find the testimony of these witnesses to be credible also.

~Footnote_four

4 Woolum's testimony that Hampton performed "clean up" work in the WRW mines is not inconsistent with Hampton's testimony that he produced coal for Woolum. Both activities constitute mining and the evidence that Woolum had a person known to him not to have been a certified foreman performing such activities supports Paul Jordan's testimony, discussed infra, that Woolum retained him knowing that he was not a certified foreman.

~Footnote_five

5 Noah Woolum testified at the hearing that he "never instructed them [Jordan and his crew] what to do about anything". This statement and other similar denials are without credibility in light of the overwhelming contradictory evidence. See fn. 3 supra.

~Footnote_six

6 WRW does not argue in these cases that the Secretary failed to properly apply his independent contractor enforcement policy. See Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982) and Secretary v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984). The credible evidence herein does in any event establish that the Secretary did indeed properly apply this policy.

~Footnote_seven

7 Consider in these cases, for example, the absence of corporate records such as the corporate minutes allegedly lost, the apparent failure to observe corporate formalities, the undercapitalization of the firm and the maintenance of its undercapitalization by loaning it money instead of investing equity in it, the absence of dividends and eventual insolvency, the intentional conduct by one or more stockholders of illegal mining activities and efforts to deceive Federal inspectors and the fundamental injustice in these cases of permitting the stockholders to be shielded.