

COMMONWEALTH OF KENTUCKY
MINE SAFETY REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. **10-MSRC-016**

COMMONWEALTH OF KENTUCKY,
OFFICE OF MINE SAFETY AND LICENSING

COMPLAINANT

FINAL ORDER
For BRIAN W. JARRELL

BRIAN W. JARRELL, RAYMOND K. ROMAN,
JOSEPH EDMISTON &
FOOLS GOLD ENERGY CORPORATION

RESPONDENTS

Procedural History

This matter comes before the Mine Safety Review Commission (“Commission” or “MSRC”) upon a motion for Default at a scheduled hearing for failure of the Respondent Brian Jarrell to participate in the proceedings (“Respondent”). Previously Fools Gold Energy Corporation entered a Settlement Agreement that was adopted by the Commission as its Final Order resolving the matters herein. **The Motion for Default was granted as to Brian W. Jarrell** for the reasons contained herein with disciplinary measures as outlined below.

The procedural history is summarized in the Complaint filed for the record herein by the Commonwealth of Kentucky, Office of Mine Safety and Licensing (“OMSL”) file number 10-MSRC-016. The Complaint contains numerous allegations regarding failing to supervise and operate the mine in a safe manner all of which are in the non-compliances of record herein and violations of KRS 351.025(l)(a), KRS 351.194(5), KRS 352.390, 805 KAR 8:030, and 805 KAR 8:060.

The Complaint alleged that Respondents were at all relevant times citizens and residents of the Commonwealth of Kentucky holding various certifications regarding their qualifications to mine, and that at all times relevant hereto, Respondents were working in various capacities at the No. DM-2 mine of Fools Gold Energy Corporation ("the Mine"), an underground coal mine located near McDowell, Floyd County, Kentucky.

Jurisdiction for the action was based upon KRS 351.025(1) which requires OMSL to promulgate administrative regulations and enforcement of violations of mine safety laws that place miners in danger of serious injury and KRS 352.390 which provides that MSRC shall revoke, suspend, or probate certificates if it is established in the judgment of the Commission that the holder has become unworthy to hold the certificate by reason of violation of law, failure to comply with the mining laws of the Commonwealth of Kentucky, et cetera.

OMSL further alleged that the unsafe and unlawful conditions and practices at the mine created conditions where miners were placed willfully in imminent danger of death or serious injury, and that Respondents were therefore unworthy to hold mine certificates. These allegations are outlined in detail in the Complaint with copies of the non-compliances attached as exhibits filed for the record herein.

A probable cause hearing was held by MSRC on March 11, 2010, and the Commissioners reviewed the Complaint and found probable cause to believe the Respondents more likely than not had committed the alleged violations of Kentucky mine safety laws. Subsequently, an Order finding probable cause was entered and a Notice of Administrative Hearing was filed.

The Notice and Order regarding Probable Cause and establishing various pre-hearing deadlines for an Answer, discovery and other pre-trial obligations was served upon Respondents via certified mail and regular mail postage pre-paid. Respondents did not request a pre-hearing conference.

The delivery of the Non-Compliances, Closure Orders, the Complaint and Probable Cause determination in different mailings, resulted in Respondent filing a printed copy of an Email on April 1, 2010 accepted as his Answer or other responsive pleading. In the document the Respondent stated that smoke searches were conducted every week and randomly and recorded. He requests the least punishment possible and relief from some violations. He states the cigarette butt was found in Raymond Roman's possession, other items including a pill bottle was in the possession of Clinton Cook, not a party hereto, and that the #3 heading was not mined on his shift with reference made to the shuttle car and continuous feeder violations. Respondent did not appear to testify or submit himself for questioning by the Commission.

At the call of the hearing today counsel for OMSL moved for a default Order citing the fact that Respondent failed to participate or otherwise appear or respond to the many violations cited in this proceeding in any way. OMSL states it has not received any other response in regard to a defense or other motion on any other portions of the non-compliances of any type and none is of record with the Commission.

The Commission took the testimony under oath of OMSL Commissioner and Director Johnny Greene by way of questioning regarding the existence and seriousness of the cited violations. He gave testimony regarding the details of each Notice of Noncompliance, Closure order, Condition or Practice of record herein.

After considering the evidence in support of its motion for default the Commission submits the following Findings of Fact, Conclusions of Law, and Final Order.

Findings of Fact

Based upon the evidence admitted, and the record taken as a whole, the Commission finds the following facts as established by a preponderance of the evidence:

1. OMSL is the agency charged with administering the Commonwealth's safety laws as set forth in KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto.
2. Respondent, Brian Jarrell was at all times relevant to this action a resident of Kentucky, at the addresses provided in the Complaint and held the certificates as indicated above issued by the Commonwealth of Kentucky.
3. Respondent was at all relevant times licensees, supervisors or employees at the mine in the capacities as stated above.
4. Service of the Order and Complaint upon Respondent is determined to be perfected pursuant to 825 KAR 1:020 Section 5 (3) and KRS 13B.050.
5. Jurisdiction for this action is founded upon KRS 352.390, which provides that the "Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the Commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just

cause;” on KRS 351.025(1), which requires the Department of Mines and Minerals (now the Office of Mine Safety and Licensing) to “promulgate administrative regulations...for the imposition and enforcement of sanctions against certified...personnel...whose intentional violation of, or order to violate, mine safety laws places miners in imminent danger of serious injury or death;” and on 805 KAR 8:030 (“Criteria for the imposition and enforcement of sanctions against certified miners”).

6. Respondent Jarrell did file an Answer in regard to some of the allegations but failed to supplement or file or any other responsive pleading within the time limit established by the Commission and KRS 13B. Jarrell did not appear, testify, participate or file other responsive pleading in or before today’s hearing.
7. The factual circumstances detailed in the Complaint, Closure Orders and Notices of Non-Compliance as referenced above are found to be true and correct.
8. Respondent Fools Gold Energy Corporation submitted a Settlement Agreement which was adopted as the Final Order of this Commission resolving the matters herein as to him.

Conclusions of Law

KRS 352.390, “Revocation of Certificates”, provides as follows:

The Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the

commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just cause. The same procedure provided in subsections (10) and (11) of KRS 351.102 shall apply to the certificate holder.

The criteria for the imposition and enforcement of sanctions against certified miners is contained in 805 KAR 8:030, which provides for the enforcement against certified miners whose intentional violation of mine safety laws places miners in imminent danger of serious injury or death. As defined in KRS 352.010(O),

“Imminent danger” means the existence of any condition or practice which could reasonably be expected to cause death or serious physical harm before the condition or practice can be abated.

This Commission’s criteria for imposing penalties against certified miners is set forth in 825 KAR 1:030, as follows:

- (1) Cooperation with investigators;
- (2) The severity of the harm done, such as whether the offense resulted in:
 - (a) Death;
 - (b) Serious physical injury; or
 - (c) The placement of an individual in imminent harm;
- (3) Acceptance of responsibility for actions;
- (4) History of violations;
- (5) Adjudicated violations in other states;
- (6) Mitigating circumstances; and
- (7) Aggravating circumstances. (29 Ky.R. 201; Am. 1272; eff. 11-

12-02).

Based upon the evidence admitted, the admission and request for lesser punishment regarding the violations alleged, the failure of the Respondent to deny or otherwise defend or present any mitigation as to the other violations, and Respondent's failure to appear so that the Commission could inquire further to determine the truth and veracity of his statements and the record taken as a whole, the Commission finds the foregoing facts are established by a preponderance of the evidence. By reason of their role in and responsibilities for the willful violations of Kentucky's mine safety laws set out in the Complaint of record herein the Commission finds that the alleged violations of law existed as stated above in the Complaint, Closure Orders and Notices of Non-Compliance and that Respondent Brian W. Jarrell is jointly and severally responsible for those violations.

Therefore, Respondent Brian W. Jarrell is subject to the imposition of sanctions as provided in KRS 351.025(l)(a), KRS 351.194(5), KRS 352.390, 805 KAR 8:030, and 805 KAR 8:060.

Final Order

The General Assembly has declared in KRS 351.101 (1) that the highest priority is the safety of the coal industry's most valuable resource, the miner. And in KRS 351.241(6), the Legislature recognized that the American zeal for

work and productivity very frequently causes the miner to give second priority to normal safety measures and precautions.

Coal production is important to this state and high priority must be given to increasing productivity and competitiveness. Mine safety can be improved by enforcement of sanctions against certified personnel whose willful violation of mine safety laws place miners in imminent danger of serious injury or death.

In the case now before the Commission, Respondent demonstrated negligence and disregard as detailed in violations outlined in the Complaint, some but not all of the most serious were; smoking materials including a lighter and several partially smoked cigarettes and a failure to abide by the smokers search plan and an accumulation of combustible materials and a non-permissible buggy at the face and #1 cross cut, and an inoperative self-rescuer and a pill bottle containing suboxone with the patient's name scratched out and many others such as inadequate roof support and electrical hazards wherein Respondent was deemed responsible. These events occurred while conducting or otherwise participating in underground coal mining and thus demonstrated a willful violation of mine safety laws that placed miners in imminent danger of serious injury or death.

IT IS THEREFORE ORDERED, that pursuant to KRS 351.194 (5) and (6); 805 KAR 8:030,

1. Respondent **Brian W. Jarrell**'s current certifications shall be **suspended** for **thirty (30) days** from the date of this Order and that his foreman's certificate shall be **probated** for not less than **two (2) years**, following the suspension in accordance with penalties authorized under KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto;
2. Respondent **Brian W. Jarrell** shall attend eight hours of special safety training at the Martin District Office of the Office of Mine Licensing and Safety within thirty (30) days of the date of this Order, in accordance with penalties authorized under KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto;
3. That the final order issued herein by the Commission regarding Respondent constitute a "first offense", as that term is defined in 805 KAR 8:0 10, Section 1(5); and that any future adjudication against these Respondents by the Commission — regarding a separate alleged offense — be deemed a "subsequent offense" as defined at 805 KAR 8:0 10, Section 1(13).
4. Further during probation of any certification any Respondent shall be required to comply with all state and federal mine safety laws and

regulations and any willful violation of any said laws or regulations may result in OMSL filing a motion with the Commission to revoke the Respondent's remaining certificates;

THIS IS A FINAL AND APPEALABLE ORDER, after considering the evidence presented at the hearing and the pleadings and exhibits of record the Commission renders the forgoing Findings of Fact, Conclusions of Law, and this Final Order. Pursuant to KRS 351.194(8), **an appeal of this Final Order shall be filed in the Franklin Circuit Court within thirty (30) days** of the entry of this order.

SO ORDERED, this the 14TH day of October, 2010.



HON. JOE F. CHILDERS, CHAIR
MINE SAFETY REVIEW COMMISSION
132 BRIGHTON PARK BLVD.
FRANKFORT, KENTUCKY 40601
(502) 573-0316
FAX (502) 573-0344

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER was served by certified mail, return receipt requested, and by regular mail, postage pre-paid to the following this 15th day of October 2010

BRIAN W. JARRELL
65 CAMPBELL BR. RD.
NIPPA KY 41240

And by regular mail to:

FOOLS GOLD ENERGY CORP
176 HONEYSUCKLE DR
PIKEVILLE KY 41501

RAYMOND K. ROMAN
15 HATFIELD ESTATES
PRESTONSBURG KY 41653

JOSEPH EDMISTON
225 REED HOLLOW RD
SYDNEY KY 41564

And by messenger mail to:

HON. C. MICHAEL HAINES
OFFICE OF GENERAL COUNSEL
#2 HUDSON HOLLOW
FRANKFORT KY 40601
502/ 564- 2356
FAX 502/ 564 - 9212

And the original shall be kept on file:

BRYON ALAN THOMPSON, GENERAL COUNSEL
MINE SAFETY REVIEW COMMISSION
132 BRIGHTON PARK BLVD.
FRANKFORT, KENTUCKY 40601


BRYON ALAN THOMPSON