**JERSEY MINIERE ZINC division of Union Zinc, Inc.,**

**Plaintiff/Appellee,**

**VS.**

**GENERAL STEEL CONTRACTORS, INC.,**

**Defendant/Appellant.**

**Montgomery County Circuit Civil No. C9-259**

**Appeal No. 01-A-01-9607-CV-00304**

**FILED**

**December 18, 1996**

**Cecil W. Crowson**
**Appellate Court Clerk**

**IN THE COURT OF APPEALS OF TENNESSEE**
**MIDDLE SECTION AT NASHVILLE**

**APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY**
**AT CLARKSVILLE, TENNESSEE**

**HONORABLE JAMES E. WALTON, JUDGE**

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**MODIFIED, AFFIRMED AND REMANDED.**

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE
WILLIAM C. KOCH, JR., JUDGE

| | | |
|---|---|---|
| **JERSEY MINIERE ZINC division of Union Zinc, Inc.,** | ) | |
| **Plaintiff/Appellee,** | ) | **Montgomery County Circuit Civil No. C9-259** |
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| **Defendant/Appellant.** | ) | |

# O P I N I O N

The defendant, General Steel Contractors, Inc., has appealed from a non-jury judgment in favor of the plaintiff, Jersey Miniere Zinc Inc., division of Union Zinc, Inc., in the amount of $164,096.18 for cost of repairs and consequential loss of profits from interruption of production by negligence of employees of defendant.

The only issue on appeal is the amount of damages due plaintiff.

The following facts are uncontroverted:

Plaintiff operates a large facility for producing pure metallic zinc. A part of the refining process includes production of a powder called calcine which is stored in silos to await further processing into zinc. The facility operates 24 hours per day every day of the year. As a result of the negligence of defendant's employees, the production of calcine was interrupted for a period of 26-1/4 hours during which the production of 554 tons of calcine was lost. During the interruption of the production of calcine, zinc production from the calcine stored in the silos was continued, but the ultimate total production of zinc during the year was reduced by 338.39 tons. The demand for zinc exceeds the supply, so that plaintiff is able to dispose of all the zinc it can produce. Although plaintiff maintains an inventory of zinc, the inventory "turns over" several times per month. The zinc produced in April 1992 would normally have been sold during May, 1992, when market price of zinc was 62.1508 cents per pound.

The Trial Court awarded damages as follows:

| | | |
|---|---|---|
| 1. | Cost of repairing damaged equipment .... | $ 783.33 |
| 2. | Fuel costs ............................................. | 2,552.27 |
| 3. | Loss from interrupted production .......... | 160,760.66 |
| | TOTAL | $164,096.18 |

The first two items were stipulated. The issue before the Trial Court and before this Court is the third item of $160,760.66, which is the loss of profit. Lost profits are recoverable as damages provided they are proven with reasonable certainty and are not remote or speculative. *Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publishing Company*, 42 Tenn. App. 92, 298 S.W.2d 788, 793 (1956).

The evidence should establish loss of profits with reasonable certainty. Loss of profits must be established by data from which the extent of the loss can be ascertained. All that is necessary is to show facts from which it would be reasonable to infer a loss of profit and the approximate amount of such loss. 25 CJS. Damages § 162(4) pp. 82 et seq.

The testimony of the plaintiff's comptroller shows:

1. The production of 338.39 tons of zinc was permanently and irretrievably lost by the interruption of the production of calcine.

2. The zinc that would have been produced during the interruption would normally have been available for sale during the month of May, 1992, at then prevailing price of 62.1508 cents per pound, for a total of $420,624.18.

3. If the operation had continued without interruption, the costs of producing the 338.39 tons of zinc would have been:

| | |
|---|---|
| Cost of raw material ............................. | $232,450.07 |
| Power .................................................. | 19,755.68 |
| Other operating costs ........................... | 7,863.52 |
| | $259,863.52 |

4. The net profit loss was $420,624.18 minus $259,863.52, or $160,760.66.

Appellant presents a number of arguments against the award of $160,760.66 lost profits.

First, the appellant points out evidence that the production of metallic zinc was not interrupted but continued by processing reserves of calcine stored in the silos. The same evidence shows that the production of zinc from calcine was slowed to prevent complete depletion of the reserve calcine which would have brought production to a complete halt. In short, the production of calcine was halted, but the production of zinc was slowed. The result was the same, a deficiency in the amount of zinc produced.

Appellant next argues that there can be no recovery for loss of profits without proof of loss of sales, citing *American Buildings Company v. White*, Tenn. App. 1982, 640 S.W.2d 569, wherein lost profits were claimed for loss of occupancy of a building which would have accommodated an additional volume of business for which plaintiff had a “backlog of orders.” The cited authority is somewhat similar to the present case, but is distinguishable by the uncontradicted evidence that the demand for zinc is greater than the supply, that plaintiff can sell every ton of zinc it can produce, and the price is based upon the fluctuations of a market in London.

Appellant's next challenge is the use of the May, 1992 market price of zinc in computing the amount of lost profits. Plaintiff's comptroller testified:

> A. Once I determined the metal of 338.39 tons, I applied the price of 62.1508 cents per pound, and equated a lost sales of $420,624.18. The price --
>
> Q. How did you get that price?
>
> A. The price that I used was Savage Zinc Company's average for the month of May, 1992.
>
> Q. Why did you use May rather than April?
>
> A. Because the incident occurred on April the 22nd. And those zinc tons would not have been on the floor available for sale until the month of May.
>
> Q. Now, is that an accurate reflection on his -- is his position correct then that the outage for 26 hours did not affect our inventory? Or putting it another way: How did the outage of 26 hours affect our year-end inventory?
>
> A. Again, I would think -- and in my opinion the effect of the inventory would be zero. And the reason I feel that way is because the outage occurred in April. And I feel very comfortable we would have sold those tons before the end of the year.
>
> You are going to see a buildup in inventory at the end of this calendar year period that you look at here, but that's typical that you see inventories go up at the end of the year simply because the companies we sell to, they want to defer tax as long as they can, so they will slow down their shipments at the end of the year.
>
> Any time that we can accommodate a customer who buys tons of zinc from us all the time, we will try to do that. So our inventory will and has historically, not every year, but has historically risen at the end of a calendar year, and I think mainly for tax purposes on the people who buy. They don't want to pay personal property tax on inventory sitting around just like we don't.
>
> Q. In your working inventory -- and I believe that's what you called it, working inventory?
>
> A. I was speaking specifically of finished goods at that time, but working inventories have the same effect.
>
> Q. About how often do you turn your inventory over?
>
> A. Well, we turn our finished goods inventory over -- you know, we keep a working finished good inventory in the neighborhood of two thousand tons. Less than that most of the

time. But you know, that's a good round number. So if we sell nine to ten thousand tons a year -- I mean a month, we turn it over four or five times a month, finished goods.

Q. Is that what you generally do?

A. Yes, sir. That is what we generally do.

Q. So if you would have had an additional 338 tons of metal production, would you have logically turned it over the following month, in May?

A. I think so, yes, sir.

Q. Lets say that the company did have a surplus of zinc metal for whatever reason. Are there ways to dispose of that metal?

A. Yes, sir, there are.

Q. Tell us about that.

A. Basically zinc metal is sold -- it's a commodity. Okay? So it's sold worldwide based upon the London Metal Exchange price that's quoted two times a day. In the contracts that we sell -- we buy concentrate on and we sell metal on is the average of those two day prices. And that price is called the LME settlement price, cash settlement price. So that's determined for you. You have no negotiations when you're selling for that price.

But what is negotiable are the premiums that you charge on top of the LME. So if in a high demand market, it's common to think that your premium prices are higher.

A lot of metal in any given year is already spoken for because of contract agreements we have with customers that do continuous business with us. But what is left -- and as a round number -- and these are not exact -- but we produce nine to ten thousand tons, and we have contracts that will consume on an average year seven to eight thousand of those tons. So you're looking at two to twenty-five hundred tons available each month to sell on a spot basis.

And this is usually where you can get your best premium, or I guess if the market were to go the other way, it would be where you would get your worst premium. But we can simply sell more metal by adjusting our premiums.

Q. You don't have any evidence that a sale was lost to any given customer due to inability to fulfill a contract?

A. I cannot take you to a customer and tell you we called John Doe and told him we couldn't deliver. No, I cannot do that specifically.

Q. And you didn't have to go into the market to buy zinc from somebody else in order to fulfill the contract here, did you?

A. No in this case, no, sir.

Q. And you can't go into the market to buy calcine. It's not available.

A. We have not found that to be feasible, no, sir. We have looked at that but we have not found that to be feasible.

Q. Because of this 26-hour shutdown of the roaster plant, that did not prevent Jersey Miniere at all times from being able to supply all of the zinc that it had contracted to sell to its customers?

A. On a contract basis, I would agree with that, because not all of our tons are sold on a contract basis. As I stated earlier, you took away the opportunity of spot sales.

Q. Now, does that not mean that at the end of 1992, there were in inventory ready to sell 2,304 more tons than there were at the beginning of the year?

A. In total tons that we had on our books, yes, sir, I would agree with that.

Q. Now, does that not mean that if the 338 tons had been made, they would have just gone into inventory and not been sold?

A. If it would have been in December, I would agree to that, but with it being in April, I would disagree.

Q. Now, does this mean you're identifying specific zinc, the zinc that was there ready to be produced in April and would have gone through the roaster and through the cell house and through the casting house and then been sold within ten days; is that what you're doing? Are you identifying specific zinc?

A. I did not identify specific zinc. I did a calculation based upon the way our plant operates. And that is if we would have roasted those tons in April, we would have had tons of metal on the floor in May that I feel very strongly that we would have sold in May.

The average price that we received, according to this annual report, showed 58.76 cents a pound.

And I did my calculation based upon the 62 cent price average, which against was our May average price.

> Q. You don't have any evidence that you would have sold anymore of the zinc, the 338 tons, if it had been produced?
>
> A. No, sir. But I would dare say I would have a better chance of selling it if I could have made it.
>
> Q. Why was your opinion no, that production was lost rather than simply postponed?
>
> A. Because we had 26 hours and 15 minutes taken away from us to operate the roaster. We can never regain those 26 hours. We can operate another 26 hours. I won't argue that. But through no fault of our own, we lost the availability to use our roaster for 26 hours and 25 minutes or 15 minutes that we will never be able to get back.
>
> I mean, it's -- it's -- that is our most critical bottleneck in the process. If we don't have calcine tons, we can't make zinc.

In *National Steel Corp. v. Great Lakes Towing Co.*, 6th Circ. 1978, 574 F.2d 339, a steel producer was permitted to recover the cost of purchasing steel to fulfil its contracts while production was interrupted.

In the present case, it is admitted that all contractual obligations were fulfilled without purchases of zinc. However, the evidence shows that the demand was constant and zinc could be sold at the prevailing price at any time it was available for sale. The unanswered question is, what was the prevailing price at the time plaintiff lost the sale of the 338.39 tons of zinc that was not produced?

Although the comptroller testified that, in the normal process, zinc produced in April would normally be marketed in May, this does not establish that the loss of opportunity for sale and profit occurred in May. The reason for this is that plaintiff maintains a stock, or inventory of finished zinc which was not exhausted at any time during May. Therefore, so far as this record shows, no loss of opportunity to sell zinc in May 1992 resulted from the interruption of production.

Such an opportunity may have been lost under the normal management of inventory, but this was not proven. For example, the official who controlled the sales of zinc might have testified that company policy required that a minimum inventory be maintained and that no sales be made be made which would reduce the inventory below the minimum; that, during the high market in May all inventory above the minimum was sold at the high price; and that, if the missing 338.39 tons had been in the inventory, then 338.39 more tons could and would have been sold without reducing the inventory below the minimum. However, no such evidence or its equivalent appears in this record.

Although there is no satisfactory evidence of a loss of opportunity to sell 338.39 tons during May, 1992, there is a reasonable inference that the total annual sales would have been 338.39 tons greater if the interruption had not occurred. Therefore, it may be reasonably inferred that the opportunity to sell 338.39 more tons was lost sometime during the year. Under this inference the most reasonable and probable measure of damages is the profit produced by the annual average price of sales, rather than the price during May, 1992.

As above stated, the comptroller used the May, 1992 price of 62.1508 cents per pound in computing the sale price of 338.39 tons to be $420,624.18 and the resulting net profit to be $160,760.66. The annual average price was 58.76 cents per pound.

By substituting the annual average price of 58.76 cents per pound for the 62.1508 cents per pound in May, 1992, the computations of the comptroller would result in lost profit of $137,812.22. This is demonstrated as follows:

| | |
|---|---|
| 338.39 tons at 62.1508 cents per pound equals ..... | $420,624.18 |
| 338.39 tons at 58.76 cents per pound equals ......... | 397,675.92 |
| Difference in sale price of 338.39 tons .................. | $ 22,948.24 |

Lost profit at 62.1508 cents per pound ........... $160,760.66

Difference in sale price between 62.1508

per pound and 58.76 cents per pound ......................... 22,948.24

Lost profit at 58.76 cents per pound .............. $137,812.42

As a result of the foregoing, the judgment of the Trial Court is reduced from $164,096.18 to $141,147.94. As modified, the judgment is affirmed. Costs of this appeal are assessed equally, that is, each party shall pay one-half. The cause is remanded to the Trial Court for entry of judgment in conformity with this opinion and such other proceedings, if any, as may be necessary and proper.

**MODIFIED, AFFIRMED AND REMANDED.**

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE