

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, MSHA,
Petitioner

v.

THE AMERICAN COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2008-666
A.C. No. 11-02752-161958

Docket No. LAKE 2009-006A
A.C. No. 11-02752-162890-05

New Era Mine

DECISION ASSESSING PENALTIES UPON REMAND

Before: Judge Manning

On January 24, 2017, the Commission issued its decision in the above-captioned cases. *The American Coal Company*, 39 FMSHRC 8 (Jan. 2017). In that decision, the Commission reversed the findings of former Commission Administrative Law Judge Michael Zielinski with respect to Order No. 6673874 in LAKE 2008-666 and Order No. 6673876 in LAKE 2009-006A. Both orders were issued under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 814(d)(2). The ordering paragraph of the Commission’s decision provides, in pertinent part:

We reverse the Judge's decision with regard to the accumulations and on-shift examination violations, Order Nos. 6673874 and 6673876 respectively, and conclude that they resulted from an unwarrantable failure to comply, with high negligence and gravity as set forth above. We remand Order Nos. 6673874 and 6673876 for the imposition of penalties consistent with this opinion.

39 FMSHRC at 23. Thus, the only issue on remand is the amount of the penalty that should be assessed for each order. These cases were assigned to me on June 27, 2017. By order dated June 29, 2017, I directed the parties to enter into negotiations in an attempt to agree upon appropriate penalties for the two orders. I twice granted requests for extensions of time, but the parties were unable to reach agreement on appropriate penalties.

The Secretary originally proposed a penalty of \$188,000 for Order No. 6673874 as a flagrant violation using his special assessment procedure. *See* 30 C.F.R. § 100.5. Judge Zielinski determined that the violation was not flagrant and the Secretary did not appeal his finding in that regard to the Commission. 39 FMSHRC at 9 n. 3. The Secretary originally

proposed a penalty of \$60,000 for Order No. 6673876 using his special assessment procedure.

Because the parties were unable to agree upon an appropriate penalty for the two orders upon remand, I am assessing a penalty based upon the record in the cases and the decisions of Judge Zielinski and the Commission.

Order No. 6673874

With respect to Order No. 6673874, Judge Zielinski determined that The American Coal Company (“AmCoal”) violated section 75.400, that the violation was significant and substantial (“S&S”), and AmCoal’s negligence was “moderate to high,” but was not the result of its unwarrantable failure to comply with the safety standard. *The American Coal Company*, 36 FMSHRC 1311, 1340-52 (May 2014). He reduced the gravity from “fatal” to “reasonably likely to result in lost work days injuries to two miners.” *Id.* at 1345, 1368. He also determined that the violation was not flagrant, which finding was not appealed by the Secretary. *Id.* at 1362-63; 39 FMSHRC at 9, n. 9. Judge Zielinski assessed a penalty of \$7,500 for this violation.

The Commission reversed the judge’s “findings of no unwarrantable failure and his negligence and gravity determinations.” 39 FMSHRC at 17. With respect to negligence, the Commission determined that AmCoal’s negligence was high. *Id.* at 20. With respect to gravity, the Commission concluded that “the level of gravity from the occurrence of a fire in the [applicable] section of the mine is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.” *Id.* at 21.

Order No. 6673876

With respect to Order No. 6673876, Judge Zielinski determined that AmCoal violated section 75.363(b), the violation was S&S, and AmCoal’s negligence was “moderate to high,” but was not the result of its unwarrantable failure to comply with the safety standard. 36 FMSHRC at 1352-54, 1369. As with the previous order, he reduced the gravity from “fatal” to “reasonably likely to result in lost work days or restricted duty injuries to two miners.” *Id.* at 1353. Judge Zielinski assessed a penalty of \$4,000 for this violation.

The Commission reversed the judge’s finding that the violation was not the result of AmCoal’s unwarrantable failure. 39 FMSHRC at 21-22. The Commission also reinstated the Secretary’s high negligence designation. *Id.* at 23. Finally, the Commission determined that the gravity for the violation was “a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.” *Id.*

Appropriate Civil Penalties

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s

effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties stipulated that AmCoal demonstrated good faith in abating the violations in a timely manner and that the proposed penalties would not affect its ability to remain in business. Stips. 8 & 10; 36 FMSHRC 1364. Judge Zielinski determined that "AmCoal is a very large operator, as is its controlling entity[.]" 36 FMSHRC 1364. Based on his review of the record, the parties' briefs, and the Secretary's Part 100 regulations, Judge Zielinski concluded that AmCoal's history of previous violations should be characterized as "a moderate overall violation history." 36 FMSHRC at 1364-65. The findings with respect to these four elements are not in dispute at this stage of the proceeding.

Penalty for Order No. 6673874

This order was issued because, in part, the MSHA inspector found float coal dust, loose coal, paper, cardboard, wood and plastic under and along an energized conveyor belt and adjoining crosscuts. Taking into consideration the four penalty criteria discussed above plus the Commission's determination that the violation was the result of AmCoal's unwarrantable failure to comply with the safety standard, AmCoal's high level of negligence and the violation's high level of gravity, I conclude that a penalty of \$40,000 is appropriate.

As stated above, the Commission held that there was a "reasonable likelihood of serious or fatal smoke inhalation or burn injuries to *a number of miners*." 39 FMSHRC at 21 (emphasis added). The Secretary alleged that ten miners were exposed to the hazard but Judge Zielinski found that two miners were affected. 36 FMSHRC at 1345 n. 36. In using the phrase "a number of miners," the Commission did not specifically address this dispute. Under the Secretary's penalty point system, the number of persons potentially affected can significantly influence the amount of the proposed penalty. The penalty point system is not binding on the Commission.¹ The Commission has "consistently considered gravity holistically, considering 'factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of

¹ The Commission is responsible for assessing final penalties. The Commission has held that:

Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a *de novo* assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use as a guidepost for his/her assessment.

The American Coal Company, 38 FMSHRC 1987, 1990 (Aug. 2016).

miners *potentially* affected.” 39 FMSHRC at 20, quoting *Newtown Energy Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016) (emphasis added). The crucial point is that the Commission determined that in the event of a fire it was reasonably likely that at least some of the miners working in by the ignition point would have been seriously or fatally injured. The penalty initially proposed by the Secretary was quite high because the Secretary deemed the violation to be flagrant, but Judge Zielinski rejected that determination and his finding was not appealed. 30 U.S.C. § 820(b)(2). In assessing the penalty, I placed considerable weight on the gravity of the violation, the negligence of AmCoal, and the fact that AmCoal is a very large mine operator.

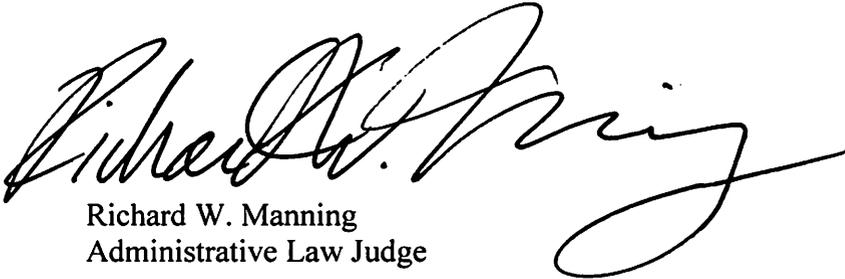
Penalty for Order No. 6673876

This order was issued because hazardous conditions, including those described in Order No. 6673874, were not recorded in the examiners’ on-shift book, as required. Taking into consideration the four penalty criteria discussed above plus the Commission’s determination that the violation was the result of AmCoal’s unwarrantable failure to comply with the safety standard, AmCoal’s high level of negligence and the violation’s high level of gravity, I conclude that a penalty of \$40,000 is appropriate.

As discussed above with respect to Order No. 6673874, the Commission took a holistic approach in determining that the gravity of this violation was serious. The Commission determined that “the dangers described in our analysis of the accumulations violation apply to this violation as well, and the dangers affected additional crews.” 39 FMSHRC at 23. The penalty differs from that initially proposed by the Secretary because he used his special assessment procedure in calculating the proposal and Commission judges are not bound by that regulation. 30 C.F.R. § 100.5. In assessing the penalty, I placed considerable weight on the gravity of the violation, the negligence of AmCoal, and the fact that AmCoal is a very large mine operator.

ORDER

For the reasons set forth above, The American Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$80,000 within 30 days of the date of this decision.²


Richard W. Manning
Administrative Law Judge

² Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

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