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SOL (MSHA) v. UTAH POWER AND LIGHT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 90-320 A.C. No. 42-00121-03725
v.	
UTAH POWER AND LIGHT COMPANY, MINING DIVISION, RESPONDENT	Docket No. WEST 90-321 A.C. No. 42-00121-03726 Deer Creek Mine Docket No. WEST 90-322 A.C. No. 42-01944-03578 Docket No. WEST 90-323 A.C. No. 42-01944-03579 Docket No. WEST 90-324 A.C. No. 42-01944-03580 Cottonwood Mine

ORDER DENYING RESPONDENT'S MOTION TO REMAND

Respondent UPL's Motion to Remand (dated November 16, 1990) the above five dockets (containing 30 challenged enforcement documents, i.e., Citations or Orders) to the Secretary of Labor (MSHA) for recomputation (reassessment) of the proposed penalties in accord with the Secretary's regulations (30 C.F.R. Part 100), is opposed by the Secretary (Opposition to Motion to Remand dated January 30, 1990).

Summary of Contentions:

UPL contends:

1. That the 30 proposed penalties were calculated on the basis of rules that MSHA "unlawfully implemented without public notice and comment as required by the Administrative Procedure Act," i.e., its Program Policy Letter P90-III-4. (Footnote 1) Related to

this contention, is UPL's argument that MSHA did not follow its own (pre-existing the PPL) regulations pertaining to penalty assessment.

2. The PPL exceeds the scope of the Court's Order in Coal Employment Project.

3. MSHA's "excessive history" penalties under the PPL provisions are unlawfully retroactive since all but 1 of the 30 subject citations were issued prior to the effective date of the PPL, May 29, 1990; the new PPL "policy" is detrimental to a mine operator since the mine operator is deprived of a knowing choice between contesting or paying earlier "single penalty assessments and other violations."

MSHA contends:

1. The Commission lacks jurisdiction to order MSHA to reassess a proposed penalty.

2. a. The PPL was properly applied by MSHA in proposing the penalties involved here because it is not subject to the notice and comment provisions of the Administrative Procedure Act (herein APA).

b. Assuming arguendo that the "notice and comment" re-requirements of the APA apply to the PPL, the directive of the Circuit Court in Coal Employment Project, supra, places the PPL within the "good cause" exception [5 U.S.C. 553(b)(B)] which provides that the notice and comment provisions are not applicable "when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." (Footnote 2)

c. As to 22 of the 30 subject citations and orders, such were the subject of "special assessments" under 30 C.F.R. 100.5 and were proper and consistent with such regulation since it provides that "some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under" the regular assessment formula (Section 100.3) or the single penalty assessment formula (Section 100.4)."

(i) Section 100.5 clearly provides that "MSHA may elect to waive" the regular assessment formula if it determines that conditions surrounding the the violation warrant a special assessment.

(ii) Types of violations qualifying for special penalty assessment are identified in Section 100.5(h) as those involving:

a) a high degree of negligence

b) a high degree of seriousness

c) unique aggravating circumstances. (Footnote 3)

3. The "excessive history" provisions of the PPL were not retroactively applied since:

a. the critical time consideration is when the alleged violations were assessed by MSHA, not when the citations were issued; when the 30 subject penalty proposals (assessments) were issued the PPL provisions were in place.

b. the "excessive history" provisions do not constitute a "rule" within the meaning of the APA, and assuming arguendo they were applied retroactively, since they were not a rule the APA prohibitions against retroactivity do not apply.

Decision

MSHA's contention that the Commission lacks general jurisdiction to order the requested remand is rejected. Absent change of policy in the future, the Commission has ruled on this question. Thus, while the Commission has previously determined that the Secretary's penalty regulations are not binding on the Commission, Sellersburg Stone Co., 5 FMSHRC 287 (1985), aff'd, 736 F.2d 1147 (7th Cir. 1984), the Commission has specifically held

that a mine operator may, prior to hearing, raise and, if appropriate, be given the opportunity to establish, that in proposing penalties the Secretary failed to comply with her Part 100 penalty regulations. Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679-680 (1987). Given the Commission's independent penalty assessment authority, the scope of the inquiry is limited: whether the Secretary had arbitrarily proceeded under a particular provision of her penalty regulations. Secretary v. Missouri Rock, Inc., 11 FMSHRC 136 (Feb. 1989). What the Commission actually stated in Youghiogheny, in terms of the purposes of and restrictions for remand is significant:

> We further conclude, however, that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings. However, given that the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations, and given the Commission's independent penalty assessment authority, the scope of the inquiry into the Secretary's actions at this juncture necessarily would be limited. (Emphasis added).

Summing up:

1. The motion for remand must be made prior to a hearing to obtain "possible avoidance of full adversarial proceedings" and to obtain Secretarial fidelity to assessment regulations;

2. the Secretary need only defend on the ground that she "did not arbitrarily proceed under a particular provision" of the regulations; and

3. the scope of the inquiry, in view of the Commission's de novo assessment authority, is limited.

Under its own rules announced in Youghiogheny, supra, is the Commission's jurisdiction to remand to MSHA for penalty reproposal authorized, that is, did the Secretary (MSHA) arbitrarily proceed under the Part 100 regulations? Assuming for the sake of argument that the Commission remand is found warranted under Youghiogheny, whether such remand should be ordered in view of the Circuit Court's pending jurisdiction over the questions would seem to be a policy matter for the Commission which I do not directly entertain here. Nevertheless, the possibility is recognized that Commission remand might well turn--as UPL urges--on the invalidation of the PPL, an action the Circuit Court has not yet taken.

I am unable to conclude that the action of the Secretary in proposing penalties calculated under the formula of the PPL is arbitrary. It remains to be seen whether or not such formula will ultimately be determined to be inconsistent with both

> (a) its Part 100 regulations as they were interpreted prior to the assertion of the Circuit Court's jurisdiction in Coal Employment Project, and
> (b) the Circuit Court's directive and mandate in Coal Employment Project.

What is clear is that the PPL is MSHA's direct attempt at compliant response, i.e., a reinterpretation of certain of its Part 100 regulations, to the Court's directives in Coal Employment Project. See Per Curiam Opinion (No. 88-1708) filed April 17, 1990, in this section (Ex. R-8 to UPL's Memorandum), wherein in the Court indicated that it was dissatisfied with MSHA's interim regulation (prior to the PPL):

> In particular, we are troubled by the scenario of repeated low negligence violations. By our reading of the MSHA interim regulation, unless MSHA determined that such repetition amounted to high negligence, the offending mine operator would be assessed only a series of single penalties. . . . In light of MSHA's substantial discretion in determining what constitutes "high negligence," we fear that even a series of identical non-S&S violations may not require MSHA to invoke the violation history criterion and may not generate more than a single penalty each time. Thus MSHA's "high negligence" requirement seems inconsistent with the concerns we voiced. . . in our opinion that even a string of non-S&S violations would generate only a series of $20 penalties.

Subsequent to the Court's Per Curiam Opinion, the PPL was issued. Thereafter, the mine operator's motion to remand to MSHA for reassessment in this matter (and at least two other such motions in similar circumstances before other administrative law judges) have been filed.

There is no question but that the penalty assessments here under the PPL are calculated differently from and are higher (the augmentation being based on increases stemming from ("excessive history" calculations) than they would have been under pre-Coal Employment Project and pre-PPL Part 100 formulations. Thus, the question of arbitrariness--and Commission jurisdiction to remand--appears to rest on whether (1) the Court's assertion of jurisdiction over MSHA and its penalty assessment regulations, and (2) its resultant directives to MSHA, justify such changes. There is no reason to conclude that MSHA's promulgation and application of the PPL was instigated by any consideration other than the Circuit Court's mandate. (Footnote 4) The increases in UPL's 30 assessments here result from the Court's instructions to MSHA. In such circumstances can MSHA's complained-of action be said to be arbitrary? (Footnote 5)

I think not and, in agreement with the Secretary's well-delineated position, I find that it was proper and not arbitrary for the Secretary in this case, in response to the Court's directive in Coal Employment Project to consider UPL's "excessive history" of violations, not only in determining whether 8 of the 30 violations qualified for single penalty assessment, but also whether the remaining 22 violations should be assessed under the special assessment formula of Section 100.5 instead of the regular assessment formula of Section 100.3. To do otherwise would result in inconsistent enforcement of the Mine Act: recividous mine operators (or operators with otherwise unsatisfactory compliance track records) would be able to evade the consequences of their "excessive history" of violations solely because their conduct was too serious to be considered for a single penalty assessment. Application of the Secretary's excessive history policy only to violations whch might qualify for single penalty assessment, and not to violations which otherwise would be reguarly assessed, would result in a situation where the more serious violations (i.e., the regularly assessed violations) are treated more leniently than violations which pose a lesser threat to the miners' safety and health (i.e., the singly assessed violations). Given the Court's concern in Coal Employment Project about assigning proper weight to an operator's history of violations and the need for civil penalties to serve as a deterrent to future violative conduct, the Secretary's policy of considering whether an operator's history is sufficient to raise a regular assessment is consistent with the holding in Coal Employment Project as well as with the Mine Act.

The related argument of UPL bears scrutiny. At page 9 of the Memorandum supporting its Motion, UPL contends:

> The computations of the proposed penalties for the 22 alleged S&S violations have characteristics of both regular and special assessments, but are in fact neither. The proposed penalties are based in part on penalty points computed by using the criteria in 30 C.F.R. 100.3, like the regular assessment, including penalty points for history of previous violations, with the unenhanced proposed penalties reported on the standard MSHA Form 1000-179, as though they were regular assessments. . . . Yet, like special assessmens, these proposed penalties come with "Narrative Findings for a Special Assessment," which expressly waive the regular assessment formula MSHA in fact just used, invoke the special assessment regulation, and state that the penalty amount has been increased by a certain percentage for "excessive history." . . . Thus, rather than "waive the regular assessment formula (100.3)," and impose a special assessment as 100.5 provides where "it is not possible to determine an appropriate penalty under [the regular assessment formula or the single penalty provision]," MSHA instead did compute the penalty under the regular assessment formula but then also added to it an additional penalty under 100.5.

This contention is found hypertechnical and is rejected. Specifically, it appears that MSHA, following the temporary interim procedure outlined in the PPL did for all intents and purposes waive the regular assessment formula and did impose a special assessment under Section 100.5. The PPL itself indicates: "MSHA has elected to waive the regular formula assessment and assess them under the special assessment provisions of 30 C.F.R. 100.5." The clear--and stated--purpose of the PPL is t implement a program for higher civil penalties at mines with an excessive history of violations and this directly deals with the concerns of the D.C. Circuit Court in Coal Employment Project, supra.

It is found that the special-history assessment provisions of the PPL fall within the special penalty assessment formula of C.F.R. 100.5. The Secretary's assessing 22 of the 30 violations at issue under the special penalty assessment provisions of Section 100.5 is consistent with her 30 C.F.R. Part 100 regulations. Thus Section 100.5 specifically provides that "MSHA may elect to waive the regular assessment formula (100.3) or the

single assessment provision (100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment." (Emphasis added).

Some of the types of violations which the Secretary has identified as qualifying for a special penalty assessment appear in Section 100.5(h), to wit: "Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances." (Emphasis added). The special-history assessment provisions challenged by UPL constitute a proper method for implementing this special category. The special-history provisions of the PPL were reasonably adopted by the Secretary to ensure that the penalty fits the infraction where an operator's history of violations is such that it properly constitutes an "aggravating circumstance." It is held that "excessive history" (like excessive negligence and excessive gravity) fits within the category of "aggravating circumstances" and that there exist reasoned bases for this judgment of the Secretary.

Finally, and once again assuming arguendo, that the "notice and comment" provisions of the APA apply to the PPL, since the PPL accomplishes the result mandated by Coal Employment Project, to properly consider the operator's history of violations--the PPL falls within the "good cause" exemption of the APA. Specifically, the notice and comment provisions of the APA do not apply when the agency, as here, "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). (Emphasis added). See Mid-Tex Elec. Coop, Inc., v. F.E.R.C., 822 F.2d 1123 (D.C. Cir. 1987), involving as here, an "interim" order of a temporary nature. In the instant case, the overwhelming fact of the D.C. Circuit Court's control over and directions to MSHA would seem sufficient to trigger the applicability of the "good cause" exemption of the APA to the PPL, and, if sufficient for that purpose, would negate the presence of caprice, whim, bad faith, and arbitrariness in MSHA's issuance of the PPL.

Conclusion

There is no basis asserted in the record to find that the Secretary has proceeded arbitrarily under any provision of her penalty regulations. As the Secretary argues, this case involves the manner in which MSHA "weighs" the "history of violations" criterion--a mandatory statutory penalty assessment factor--and UPL's objection actually goes to the weight assigned by MSHA to an assessment criterion (the history criterion) rather than to

the arbitrary failure of the Secretary (MSHA) to follow her regulations. Respondent's motion is found to lack merit.6

ORDER

The Commission's standard for remand of the Secretary's penalty proposals for recomputation not having been met by Respondent UPL, its motion therefor is DENIED.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. After receiving a directive of the Circuit Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989) to do so, MSHA promulgated its three-page MSHA Policy Program Letter P90-III-4 (herein PPL) which issued and became effective May 29, 1990, the stated purpose of which was to implement a program for higher civil penalty assessments at mines with an "excessive history" of violations.

2. I subsequently conclude that the PPL complied with the triggering provisions of the "good cause" exception. See also Fn. 13, Secretary's Opposition dated January 30, 1991.

3. MSHA contends that the "special history" assessment provisions of the PPL qualify as implementation of the special assessment provision under 100.5 since a mine operator's history of numerous violations can be such as to constitute "aggravating circumstances." Although not the crux of this decision, I emphatically concur with this argument.

4. The authority of the federal court, once having been exercised in a particular matter, guards against deviation. See City of Cleveland v. Federal Power Commission, 561 F.2d 344 (D.C. Cir. 1977).

5. The word "arbitrary" is not synonymous with "correct." American Petroleum Institute v. E.P.A., 661 F.2d 340, 349 (5th Cir. 1981). Black's Law Dictionary (5th Ed. 1979) defines "arbitrary" as follows:

> Arbitrary. Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrrannical; despotic; Cornell v. Swisher County, Tex. Civ. App., 78 S.W.2d 1072, 1074. Without fair, solid, and substantial cause; that is, without cause based upon the law, U.S. v. Lotempio, D.C.N.Y. 58 F.2d 358,

> 359; not governed by any fixed rules or standard. Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be on performed without adequate determination of principle and one not founded in nature of things. Huey v. Davis, Tex. Civ. App. 556 S.W.2d 860, 865.
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> Certainly, MSHA, in attempting to carry out the Circuit Court's will, cannot be accused of bad faith or acting in a capricious, tyrannical, irrational, or absolutistic way. Whether or not it is determined in the future that it proceeded at the time of its passage of the PPL in accordance with all of the numerous requirements being placed on it from several different directions begs the question. There is no basis to find that it acted without substantial cause or without good reasons.

6. In failing to obtain remand, UPL is not left without substantial remedy. Independent de novo penalty evaluation is achievable before the Commission, should administrative or pre-trial settlement negotiation with MSHA not mitigate penalty levels. As to the propriety of the PPL penalty conformations, such are subject to challenge before the federal appellate court. Both forums presently have active jurisdiction for these respective purposes.