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SOL (MSHA) v. HOBET MINING
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-65 A.C. No. 46-02249-03546
v.	
HOBET MINING, INCORPORATED, RESPONDENT	No. 7 Mine

DECISION ON MOTION TO REMAND

AND
CERTIFICATION OF INTERLOCUTORY
RULING TO THE COMMISSION

Before: Judge Fauver

This action is a petition for assessment of civil penalties under 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The Secretary seeks civil penalties for 11 citations. The penalties proposed for four of them were determined under the "regular assessment" method of 30 C.F.R. 100.3; the penalties proposed for seven citations were determined under the "special assessment" method of 30 C.F.R. 100.5.

Hobet Mining objects to the Secretary's application of the "special assessment" method to the seven citations on the ground that it includes an increase for an "excessive history" of violations based on a new policy, stated in Program Policy Letter P90-111-4. In its Motion to Remand, Hobet Mining contends the policy letter is invalid and seeks to remand the seven proposals to the Secretary "for recalculation of the proposed assessment without reference to [the policy letter]."

In summary, Hobet Mining contends the policy letter is invalid because:

> (1) The policy letter exceeds the scope of the Court's remand order in Cole Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989).

(2) It was unlawfully implemented without public notice and comment as required by the Administrative Procedure Act.

(3) The "excessive history" proposed penalties under the policy letter are unlawfully retroactive.

The Secretary contends that the Commission lacks jurisdiction to review the manner in which the Secretary proposes a penalty and, in the alternative, if the policy letter is reviewable by the Commission, it should be held to be exempt from the rulemaking requirements of the APA, consistent with the Court's remand order, and otherwise lawful.

The Penalty Assessment Scheme

Under the Act, the Secretary proposes penalties for violations of the Act, but the Commission has exclusive jurisdiction to assesses penalties. When the Secretary proposes an assessment, it becomes final if it is not contested. If it is contested, the proposal goes before the Commission, which decides a penalty de novo based on an evidentiary hearing. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-79 (1987). In proposing and assessing penalties, the Secretary and the Commission, respectively, are guided by the six penalty criteria contained in 110(i) of the Mine Act. (Footnote 1) In proposing civil penalties, th Secretary possesses "unchallenged broad discretion in devising an effective penalty scheme." Coal Employment Project v. Dole, 889 F.2d 1127, 1133 (D.C. Cir. 1989).

As noted, one of the statutory criteria is the operator's "history of violations." The D.C. Circuit's decision in Coal Employment Project figures prominently in the way in which the Secretary may consider an operator's history of violations for penalty purposes.

Prior to the Court's decision, the Secretary proposed a $20 civil penalty (called a "single penalty assessment") for all

violations considered to be timely abated and not "significant and substantial." 30 C.F.R. 100.4. The Secretary's single penalty assessment system exempted from an operator's history of violations all $20 violations that were timely paid. 30 C.F.R. 100.3(c). See 47 Fed. Reg. 22,286. The Coal Employment Project and the United Mine Workers of America challenged the "single penalty assessment" system on the grounds (among others) that assessments under 100.4 did not give proper weight to the history of violations criterion in the Act, and that, under the regular assessment formula, paid single penalty violations were improperly excluded from an operator's history.

The Court recognized the Secretary's "broad discretion" to determine how she would propose penalties. However, it found it unreasonable for the Secretary to fail to weigh the history of violations in determining whether a violation qualifies for a "single penalty" (i.e. $20, non-S&S) assessment. It also found it unreasonable for the Secretary to fail to consider paid single penalty violations as part of an operator's history in calculating regular proposed assessments under 30 C.F.R. 100.3(c). Accordingly, the Court remanded the case to the Secretary to determine how "to ensure that MSHA does take account of past single penalty violations in deciding whether a special assessment is required in a case where the violation itself might qualify for another single penalty" and "to amend or establish regulations, as necessary, that clarify how administration of the single penalty standard will take account of the history of violations of mandatory health and safety standards that do and do not pose significant and substantial threats to miners' safety." 889 F.2d at 1138.

The Court's remand directed that, pending completion of formal compliance with the remand, the Secretary take immediate corrective measures to comply with its decision. The Court stated:

> In the interim, until MSHA formally complies with our remand, we direct MSHA to instruct its field personnel in assessing single penalties to consider an operator's history of non-significant-and-substantial violations, and to consider an operator's history of past single penalty assessments when imposing regular assessments against operators who commit a significant-and-substantial violation after having committed a series of non-significant-and-substantial violations.

889 F.2d at 1138 (emphasis added). The Court retained jurisdiction to consider the issues further after the Secretary complied with its remand order. (Footnote 2) Id.

In response to the Court's remand, on December 29, 1989, the Secretary, through MSHA, published an interim final rule which temporarily suspended the sentence in 30 C.F.R. 100.3(c) that excluded single penalty violations from an operator's history of violations for regular penalty assessment purposes. 54 Fed. Reg. 53,609. In the interim final rule, MSHA also revised its enforcement policies by instructing its personnel to review non-S&S violations involving high negligence and an excessive history of the same type of violation for possible special assessment under 100.5.

MSHA's interim final rule was challenged by the Coal Employment Project and United Mine Workers of America on the ground that it was not responsive to the Court's remand order. In a per curiam opinion issued on April 12, 1990, the Court agreed, stating that it was "primarily concerned" with MSHA's "high negligence" requirement, and ordered the agency to devise a "suitable interim replacement" within 45 days.

On May 29, 1990, the Secretary responded to the Court's April 12 order by issuing Program Policy letter No. P90-111-4, which sets forth a new policy called "Increased Assessments for Mines with Excessive History of Violations." Through this letter, the Secretary addressed the concern of the Court that the "history of violations" criterion of 110(i) of the Mine Act be properly considered in determining whether a violation qualifies for single penalty (i.e. $20, non-S&S) assessment. P.P. Ltr. at 2. (Footnote 3) She did this by providing for increased penalties for non-S&S violations by operators found to have an "excessive history" of violations, defined as either 16 or more penalty points out of a possible 20 points in the preceding two-year period, or 11 or more repeat violations of the same health or safety standard in a preceding one-year period. P.P. Ltr. at 1. "Non-S&S violations with excessive history are no longer eligible for the single penalty assessment. MSHA has elected to waive the single penalty (as provided in 30 CFR 100.[4]) in such cases and assess penalties under the regular formula contained in 30 CFR 100.3." P.P. Ltr. at 2 (emphasis added). The policy letter also states that "S&S violations with excessive history that previously would have received a regular formula assessment now receive a special-history assessment" for which "MSHA has elected to waive the regular formula assessment and assess them under the special assessment provisions of 30 CFR 100.5." Id. (emphasis added). The "special-history assessment" is based on the regular

formula point system plus a percentage increase for excessive history.(Footnote 4)

The Secretary served Program Policy Letter No. P90-111-4 upon all mine operators, including Hobet Mining. P.P. Ltr. at 3. Subsequently, on December 28, 1990, MSHA published a proposed rule, entitled "Criteria and Procedures for Proposed Assessment of Civil Penalties," setting forth essentially the same provisions contained in Program Policy Letter No. P90-111-4. 55 Fed. Reg. 53481 et seq.

The Issue of the Commission's Jurisdiction to Order the Secretary to Re-propose Penalties

The Mine Act does not grant authority to the Commission to determine the validity of the Secretary's rules or procedures for proposing civil penalties. Indeed, 105(a) and (d), and 110(a) and (i) of the Act indicate that the penalty proposal function is within the exclusive domain of the Secretary, while the critical penalty assessment function is within the exclusive domain of the Commission.

This plain reading of the Act is consistent with the Commission's long-held view concerning the "separate roles of the Secretary and the Commission under the Mine Act's bifurcated penalty assessment scheme" by which, after a non-binding penalty is proposed by the Secretary, the Commission conducts a de novo evidentiary hearing in contested cases, and independently assesses a penalty on the basis of the hearing evidence and the statutory criteria, not on the penalty formulas in the Secretary's regulations. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-79 (1987). Cf. UMWA v. Secretary, 5 FMSHRC 807 (1983) (miners may not initiate Commission review of citations issued by MSHA as there is no authorization under the Mine Act to do so), aff'd, 725 F.2d 126 (D.C. Cir. 1983).

In Y&O, supra, the operator contended that in proposing penalties the Secretary failed to comply with Part 100 of his regulations, and moved a Commission judge to remand the matter to the Secretary to re-propose a penalty in a manner consistent with the Secretary's regulations.

The judge denied the motion, holding that:

> The operator's attack on the MSHA's special assessment procedures is without merit. The Commission has repeatedly held that the procedures by which penalty assessments are proposed by the Secretary of Labor are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. [8 FMSHRC at 134.]

The Commission affirmed the judge's denial of the motion to remand after discussing principles that will govern its review of objections to the Secretary's manner of proposing penalties. The Commission held that, in light of its exclusive authority to assess penalties de novo after an evidentiary hearing, "it generally is neither required nor desirable to require the Secretary to re-propose a penalty." 9 FMSHRC at 679. "[O]nce a hearing has been held, a determination by the Commission or one of its judges that the Secretary failed to comply with Part 100 in proposing a penalty does not require affording the Secretary a further opportunity to propose a penalty. Rather, in such circumstances the appropriate course is for the Commission or its judges to assess an appropriate penalty based on the record." Id.

However, before a hearing is held, the Commission stated, "in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations." Id. Rather than a statutory authorization, this limited review rests on the axiom that "an agency must adhere to its own regulations." The scope of review in such cases is narrowed by the Commission's holding that, when a prehearing objection is raised as to the Secretary's manner of proposing a penalty, "the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations" (9 FMSHRC 680).

The Commission's discussion of its scope of review of objections to the Secretary's manner of proposing penalties is similar to the "clean hands" doctrine in equity cases. A party (the Secretary) seeking relief (a civil penalty) before the Commission may first be required to comply with its own obligations (Part 100 of the Secretary's regulations) toward the respondent. However, review by the Commission is limited to prehearing objections and to a test of arbitrariness concerning an alleged failure of the Secretary to comply with Part 100 of the regulations.

In sum, the Commission has not held that it has authority to determine the validity of the Secretary's regulations or rules

for proposing civil penalties, but it has held that it has a limited scope of review of objections that the Secretary has failed to comply with Part 100 of her regulations in proposing a penalty.

The instant case is distinguished from the Y&O case because it does not involve a question of complying with Part 100 of the Secretary's regulations. Those regulations, in the part contended to be relevant here, are under remand by a Court of Appeals, which still has jurisdiction. The question which the operator seeks to raise in this forum is whether Program Policy Letter No. P90-111-4 is valid as being in compliance with the Court's remand order and with the rulemaking requirements of the APA. I hold that such issues are for the courts, and lie outside the jurisdiction of the Commission. The Commission's exclusive authority to assess penalties de novo based on an evidentiary hearing would render any defects in Program Policy Letter P90-111-4 irrelevant and harmless in a case before the Commission. Two other Commission judges have ruled on motions to remand based on Program Policy Letter P90-111-4, and reached different results. (Footnote 5) My conclusions differ from the holdings in both those cases. The matter is plainly ripe for review by the Commission.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Remand is DENIED. Under Rule 74(a)(1) of the Commission's Procedural Rules (29 C.F.R. 2700.74(a)(1)), this interlocutory ruling is CERTIFIED TO THE COMMISSION.

William Fauver
Administrative Law Judge

Footnotes start here:-

1. Section 110(i) identifies the six criteria as: "(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3), whether the operator was negligent, (4) the effect upon the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." (Emphasis added.) Section 110(i) also provides that "the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the [six] above factors."

2. As of this date, jurisdiction still lies with the Court.

3. The Secretary also addressed the concern of the Office of Inspector General that "repeat violations" receive a higher penalty assessment. Id.

4. MSHA has set forth a conversion table equating an

operator's "Overall History Points" and "Number of Repeat [Violations]" to a percentage increase in the proposed penalty. P.P. Ltr. at 2.

5. In one case, the judge held the policy letter to be reviewable and found it invalid, thus granting the motion to remand (Drummond Company, Inc., SE 90-126, _____ FMSHRC _____ (Judge Merlin, March 6, 1991). In the other, the judge held the policy letter to be subject only to limited review -- on a test of arbitrariness -- and found the operator did not meet this standard for remand, thus denying the motion to remand (Utah Power and Light Company, Mining Div., WEST 90-320, et al., _____ FMSHRC _____ (Judge Lasher, March 19, 1991)).