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SOL (MSHA) v. CYPRUS-PLATEAU MINING
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Federal Mine Safety and Health Review
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 91-44 A.C. No. 42-00171-03602
v.	
CYPRUS-PLATEAU MINING CORPORATION, RESPONDENT	Docket No. WEST 91-45 A.C. No. 42-00171-03604 Docket No. WEST 91-46 A.C. No. 42-00171-03605 Docket No. WEST 91-91 A.C. No. 42-00171-03601 Docket No. WEST 91-118 A.C. No. 42-00171-03606 Star Point No. 2 Mine

ORDER OF REMAND

Before: Judge Morris

Pending herein are the motions of Respondent Cyprus Plateau Mining Company (Cyprus) to strike or in the alternative to remand proposed penalties to the Secretary for recalculation.

BACKGROUND

1. On November 21, 1989, the United States Court of Appeals, District of Columbia Circuit, issued its mandate in Coal Employment Project, et al. v. Elizabeth Harford Dole, in her capacity as Secretary of Labor, United States Department of Labor, 889 F.2d 1127.

Petitioners therein asked the Court to rule on the validity of the single penalty assessment provision ("single penalty") authorized by regulations issued pursuant to the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. 801 et seq. (1982).

In its decision, the Court noted that a single penalty is a $20 civil fine imposed on mine operators for violations that are not serious and have been timely abated. If the single penalty is promptly paid, it is excluded from an operator's violation history for future penalty assessment purposes. The criteria and

procedures for proposed assessments of civil penalties were published and are now codified at 30 C.F.R. 100, et seq. The single penalty assessment is contained in 3 C.F.R. 100.4. (Footnote 1) The preceding section, 30 C.F.R. 100.3, laying out guidelines for taking into account the history of previous violations in regular assessments, states, in part:

> [V]iolations which receive a single penalty assessment, under 100.4 and are paid in a timely manner will not be included in the computation [of history].

In its decision, the Court reviewed the statutory and regulatory background of the Act and observed that "the Secretary has very broad discretion to devise a scheme implementing the Act's civil penalty guidelines," 889 F.2d at 1129. The Court further concluded "that Congress was intent on assuring that civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations. Thus, despite the Secretary's unchallenged broad discretion in devising an effective penalty scheme, the civil penalty regulations must not run contrary to that intent," 889 F.2d at 1127.

In its opinion, the Court further considered all the statutory criteria contained in Section 110(i) of the Act. It further focused on two scenarios involving the impact of the single penalty assessment, 889 F.2d at 1136, 1138.

After reviewing the facts, the Court concluded it was not able to determine from the record whether the manner in which the single penalty is selected and administered is consistent with the Mine Act. Accordingly, the Court remanded the record.

The Court, in fashioning a remedy, stated as follows:

> The penalty scheme in 30 C.F.R. 100.3(c), 100.4 does not appear to provide for consideration of the mine operator's violation record where that record consists of numerous single penalty violations. Without ruling on how MSHA should reconcile the language of 110(i) of the Mine Act, 30 U.S.C. 820(i), with its proposed practices for taking account of an operator's history of previous violations, we remand the record in this case to MSHA (1) to resolve the inconsistency between the MSHA regulations as written and MSHA's written and oral representations to the court, so as 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 (2) 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. 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-amd-substantial violations. We will retain jurisdiction in this case until the remand is complete. An order to this effect is attached.
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> 889 F.2d at 1138

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The Court's order reads as follows:

ORDER

> In accordance with the opinion issued this day in Coal Employment Project, et al. v. Dole, et al., No. 88-1708, it is hereby
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> ORDERED that the Mine Safety and Health Administration ("MSHA") resolve any inconsistency in its regulations and policy statements so as to ensure that the history of past single penalty assessments is considered in regular and single penalty assessments pursuant to 30 C.F.R. 100-3, 100.4 and that MSHA amend or establish policies, as necessary, to ensure that all penalties take account of an operator's history of violations of mandatory standards that do and do not pose significant and substantial threats to miners's safety. It is hereby
>
> FURTHER ORDERED that until MSHA complies formally with said remand, MSHA direct its field personnel in assessing single penalties for non-significant-and-substantial violations to take account of the past history on the part of the mine operators of non-significant-and-substantial violations, and to take into account past single penalty assessments in imposing regular assessments against operators who have previously committed a series of non-significant-and-substantial violations. Consistent with Local Rule 15(c), this court retains jurisdiction over this case until said proceedings are completed. MSHA shall prompty transmit the record in this case to this court.

2. On December 29, 1989, the Secretary responded to the Court's decision by (1) temporarily revising its assessment policies to instruct its field personnel to review non-significant-and-substantial violations involving high negligence and an excessive history of the same type of violation for possible special assessment under 30 C.F.R. 100.5; and (2) temporarily suspending the sentence in 30 C.F.R. 100.3(c) which excludes timely paid single penalty assessments from an operator's history of

violations for regular assessment purposes. Based on its publication in the Federal Register MSHA stated that "[t]herefore, during the interim period, MSHA enforcement personnel will review high negligence non-signif icant-and-substantial violations when there is an excessive history of the same type of violation at the mine for possible special assessment. Further, all violations that have been paid or finally adjudicated will be included in history under the regular formula assessment.

MSHA further stated that in light of the specific instruction from the Court, MSHA must immediately comply with its order, and the Agency was compelled to take immediate action. Under such circumstances, MSHA concluded it would, therefore, be impracticable to comply with the requirements of notice and comment rule-making under Section 553 of the Administrative procedure Act [A.P.A.], 5 U.S.C. 553. Further, under 5 U.S.C. 553(b)(B) MSHA was taking the action in the suspension notice. In addition, for good cause, based on these same reasons and pursuant to 5 U.S.C. 553(d)(3) MSHA's action was excepted from the 30-day delayed effective date requirement of the A.P.A.

MSHA further revised Part 100 by suspending the third sentence in Part 100.3(c) effective December 29, 1989. Part 100.3(c), emphasizing the portion to be deleted, reads as follows:

(c) History of previous violations.

> History is based on the number of assessed violations to a preceding 24-month period. Only violations that have been paid or finally adjudicated will be included in determining history. However, violations which receive a single penalty assessment under 100.4 and are paid in a timely manner will not be included in the computation. The history of previous violations may account for a maximum of 20 penalty points. For mine operators, the penalty points will be calculated on the basis of the average number of assessed violations per inspection day (Table VI). For indepenent contractors, penalty points will be calculated on the basis of the average number of violations assessed per year at all mines (Table VII). (Emphasis added).

MSHA's publication amending Part 100 was entered in the Federal Register Vol. 54 No. 249, December 29, 1989.

3. On April 17, 1990, the United States Court of Appeals filed a supplemental opinion in Coal Employment Project Dole. The Court criticized the Secretary's regulations and noted that MSHA's "high negligence" requirement in its interim regulation runs contrary to the spirit of the original order.

The Court further observed that inasmuch as the issues have not been fully briefed, it declined to fully resolve such issues.

4. On May 29, 1990, MSHA issued a Program Policy Letter ("PPL") No. P90-III-4. The program deals with the subject of increased assessments for mines with excessive history of violations. The PPL under its terms was effective on May 29, 1990.2

5. In the period between April 23, 1990, and September 4, 1990, MSHA issued 18 citations against Cyprus. The proposed penalties involve "significant and substantial" citations and "non-significant-and-substantial" citations.

The penalties proposed against Cyprus for the "S&S" citations are as follows:

DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-44	3583453	5-29-90	$216
91-45	3583497	5-15-90	$229
	3583500	5-21-90	$216
91-46	3225820	4-23-90	$202
	3583465	4-25-90	$292
	3583467	4-26-90	$202
	3583487	5-10-90	$216

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DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-91	3583456	5-31-90	$333
	3583458	6-05-90	$292
	3583460	6-05-90	$216
	3583635	8-02-90	$292
	3583638	8-14-90	$292
	3583639	8-15-90	$292
91-118	3583469	4-26-90	$202

The penalties proposed for the non-S&S citations are as follows:

DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-45	3583499	5-21-90	$136 91-91
	3583632	4-26-90	$126
	3583633	8-01-90	$192

DISCUSSION

The Court's directions to the Secretary in Coal Employment Project have been previously set forth at length in this order. The Court directed the Secretary to consider the operator's history of past single penalty (non S&S) assessments in computing regular assessments; instead the Secretary has created an "excessive history" assessment which relies on both S&S and non S&S violations. The court further directed the Secretary to modify its standard for assessing single penalties to accommodate a history of violations; instead the Secretary implemented an automatic blanket waiver of the single penalty whenever it finds an "excessive history" of violations. To the extent that the Secretary's actions purport to implement the Court's decision, the Secretary has, to a large degree, exceeded the Court's mandate. Accordingly, it is inappropriate for the Secretary to rely on such mandate.

The Secretary further contends the Commission lacks jurisdiction to order the Secretary to reassess a proposed civil penalty. It is argued that Sections 105(a) and (d) and 110(a) and (i) of the Act expressly establish 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.

However, in Youghiogheny Ohio Coal Company 9 FMSHRC 673 (April 1987) the argument was advanced that when the Secretary fails to conform to his own regulations in proposing penalties, the Commission must require him to re-propose a penalty in a manner consistent with his regulations. The Commission ruled "that the Commission's independent penalty assessment authority under the Mine Act's bifurcated penalty assessment scheme serves to provide the necessary and appropriate relief in the vast majority of instances where the Secretary fails to follow his penalty assessment regulations in proposing penalties. We further hold, however, that in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations." 9 FMSHRC at 679.

These limited circumstances appear to be present here when the Secretary's proceedings under Part 100 is a legitimate concern to the mine operator and the Secretary's departure from his regulations can be proven by the operator. In such circumstances, "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," 9 FMSHRC at 680.

The main thrust by Cyprus alleges a lack of Secretarial fidelity to his regulations. On the authority of Youghiogheny Ohio Coal Co., the Secretary's motion to dismiss for lack of jurisdiction is denied.

The penalties proposed here were not computed on the basis of the Secretary's civil penalty regulations but on the basis of a rule that MSHA implemented without public notice and comment as required by the Administrative Procedure Act ("A.P.A.").

The penalties proposed against Cyprus impose an "excessive history penalty" based on an MSHA Policy Program Letter (PPL) issued May 29, 1990. Under the PPL, two changes are made in MSHA's civil penalty assessment scheme: (1) non-significant-and-substantial ("non-S&S") violations with excessive history are no longer eligible for single penalty assessment under 30 C.F.R. 100.4, and instead are computed using the regular formula in 30 C.F.R. 100.3; and (2) significant-and-substantial ("S&S") violations with excessive history that previously would have received a regular formula assessment now receive what MSHA calls "special-history assessment." The penalties are computed by determining the regular assessment formula of 30 C.F.R. 100.3 and then also adding on top of that a "percentage increase for excessive history" which is added to the penalty amount based on total points. MSHA promulgated this policy as an update to its policy manual and did not publish it in the Federal Register.

MSHA's PPL excessive history policy is fatally defective in that it violates the public rulemaking requirements of the A.P.A., 5 U.S.C. 553(b).

Civil penalty rules fall within the requirements for notice and comment. Air Transport Ass'n of America v. Dep't of Transportation 900 F.2d 369 (D.C. Cir. 1990). Yet MSHA's PPL nullifies the applicability of the single penalty assessment, 30 C.F.R. 100.4, to non-S&S violations with excessive history "which are no longer eligible for the single penalty assessment." Secondly, it creates a new type of assessment called a "special-history assessment" consisting of a percentage increase of from 20 percent to 40 percent of the regular formula assessment. However, the regular formula already takes into account an operator's history of previous violations. Advance notice and comment has been required in a similar situation. See Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).

In addition to the foregoing defects, MSHA's policy of excessive history penalties is unlawfully retroactive. In the case at bar nine citations were issued before May 29; one was issued on May 29, and eight were issued after May 29. As previously noted, the PPL was effective on May 29.

The Supreme Court recently observed that the law does not favor retroactivity. Further, statutes and administrative rules will not be construed to have a retroactive effect unless their language requires this result, Bomen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 471 (1988).

Nothing in the Mine Act or in the Coal Employment Project decision dictates the retroactive imposition of such penalties. MSHA's PPL adds considerably to the detriment an operator unknowingly incurred when it chose not to contest earlier single penalty assessments and other violations. Thus, it cannot be applied retroactively. See New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

Cyprus finally argues that penalties proposed by the Secretary do not comply with the regulations in 30 C.F.R. Part 100. (Brief pages 8-14).

Inasmuch as these proposed penalties are to be remanded to the Secretary for publication, comment and recalculation, where necessary, the Secretary will no doubt have an opportunity to consider these additional issues.

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Cyprus has moved to strike or remand the proposed penalties in these cases. Under Rule 12(f), F.R.C.P., an order striking allegations may be proper. However, such a motion would not reach the crux of the issues presented here. Accordingly, the motion to strike is denied.

The alternative motion to remand should be granted.

Accordingly, for the foregoing reasons, I enter the following,

ORDER

1. Respondent's motion to strike is DENIED.

2. Respondent's alternative MOTION TO REMAND is GRANTED.

John J. Morris
Administrative Law Judge

Footnote start here:-

1. The cited section provides as follows:

100.4 Determination of penalty; single penalty assessment.

An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the $20 single penalty and will be processed through either the regular assessment provision (100.3) or special assessment provision (100.5).

2. Subsequently, on December 28, 1990, MSHA published a proposed rule, titled "Criteria and Procedures for Proposed Assessment of Civil Penalties", essentially setting forth the provisions contained in Program Policy Letter No. P90-III-4. 55 Fed. Reg. 53481 et seq. However, it is settled that comments after promulgation of penalty rules did not cure any noncompliance with Section 553. Air Transport Ass'n, 900 F.2d at 379.