FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, DC 20004

August 19, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of REUBEN SHEMWELL, Complainant, v. ARMSTRONG COAL COMPANY, INC. & ARMSTRONG FABRICATORS, INC., Respondents	: : : : : : : : : : : : :	DISCRIMINATION PROCEEDING Docket No. KENT 2013-362-D MADI CD 2013-01 Parkway Mine Surface Facilities Mine ID 15-19356

ORDER DENYING JOINT MOTION TO APPROVE SETTLEMENT
DECISION ON CIVIL PENALTY
AND
SUPPLEMENTAL DECISION ON RELIEF

Appearances: Matt S. Shepherd, Esq., Mary Beth Zamer, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Tony Oppegard, Esq., Lexington, Kentucky, for Reuben Shemwell; Mason L. Miller, Esq., Adam K. Spease, Esq., Miller Wells, PLLC, Louisville, Kentucky, for Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.; and Daniel Z. Zaluski, Esq., Madisonville, Kentucky, for Armstrong Coal Company, Inc.

Before: Judge Feldman

This matter is before me based upon a discrimination complaint brought by the Secretary of Labor ("the Secretary") on behalf of Reuben Shemwell ("Shemwell") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"). 30 U.S.C. § 815(c)(2). This matter presents the novel question of whether a suit brought

by Armstrong Coal Company and/or Armstrong Fabricators (collectively referred to as "Armstrong") under Kentucky state tort law for misuse of a Commission proceeding initiated by a complaint filed pursuant to section 105(c)(1) of the Act[1] is immune from Mine Act liability based on an assertion of a First Amendment right to petition.

An interim Decision on Liability issued on June 19, 2013, determined that Armstrong's Kentucky civil suit brought in Muhlenberg County is: contrary to federal law in that it is both preempted, and baseless and retaliatory; contrary to Kentucky state law which requires a final decision on the merits in the discrimination proceeding Armstrong alleges has been misused; contrary to the provisions of sections 105(c)(1) and 506(a) of the Mine Act that prohibit interference with the exercise of a miner's protected statutory right through use of conflicting state laws, 30 U.S.C. §§ 815(c)(1), 955(a); and contrary to legislative intent that seeks to promote and encourage miner participation in safety-related matters. 35 FMSHRC __, slip op. (June 19, 2013) (ALJ). Consequently, the Decision on Liability was accompanied by a Cease and Desist Order requiring Armstrong to withdraw its civil suit.

The interim Decision on Liability noted that it "[shall] not become final until a Decision on Civil Penalty and Supplemental Decision on Relief is issued."[2] *Id*., slip op. at 23 (emphasis in original). The interim decision provided the parties with the opportunity to file a Joint Stipulation on Relief, on or before August 23, 2013. The interim decision noted that "[any] agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision." *Id.*

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[1] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

[2] On July 19, 2013, Armstrong Coal Company and Armstrong Fabricators filed a Joint Petition for Discretionary Review. The Commission denied the joint petition on July 26, 2013, citing section 113(d) of the Mine Act that only allows for review of final decisions. 30 U.S.C. § 823(d). The Commission noted that the judge retains jurisdiction in this matter until a final Decision on Civil Penalty and Supplemental Decision on Relief is issued, at which time the decision is appealable. *Order Denying Petition for Discretionary Review*, slip op. at 2 (July 26, 2013).

I. Settlement Motion

The Decision on Liability granted the relief sought by the Secretary by finding that Armstrong's civil suit violates section 105(c) of the Act. Nevertheless, on August 8, 2013, the Secretary joined Armstrong in filing a Joint Motion for Approval of Settlement. The settlement terms reflect that, at Armstrong's request, the Muhlenberg County Circuit Court civil action against Shemwell has been dismissed with prejudice. Consequently, the parties' proposed settlement terms reflect that the Secretary has "agreed to accept a reduced penalty [from $70,000.00 to $35,000.00] *in exchange for . . . the dismissal of the state court action*." Mot. at 3 (emphasis added). The Secretary's agreement to accept a reduced civil penalty is also based on settlement terms that require Armstrong to take remedial actions that include providing miner training and the posting of miner protections under section 105(c)(1). *Id.* Finally, the settlement terms include exculpatory language that allows Armstrong to deny that its civil suit violates section 105(c) in any legal matter involving any local, state, or federal statute, or any principle of common law, provided that the legal matter is not brought under the Mine Act. *Id.*

a. *Procedural Dismissal*

The propriety of approving the subject settlement motion must be viewed in the context of the circumstances in this case. In non-discrimination cases, judges lack jurisdiction to consider motions for approval of settlement after issuance of their written decisions, because their decisions are final and may only be challenged by filing a Petition for Discretionary Review ("PDR") with the Commission. Commission Rule 69, 29 C.F.R. § 2700.69. In discrimination cases, a decision on liability is not a 'final decision' that is ripe for appeal until a decision on relief is issued. *See, e.g., Order Denying Petition for Discretionary Review*, slip op. at 2 (July 26, 2013). While not 'final' procedurally with respect to its capability of being appealed, a decision on liability is a final decision on the merits as contemplated by Rule 69 that is not subject to modification or withdrawal through settlement agreements by the parties. In other words, judges' decisions are not advisory opinions that are subject to alternative resolution by the parties. Consequently, the June 19, 2013, decision on liability is binding, as it is the law of the case.[3] An aggrieved mine operator challenging a determination of 105(c) liability may file a PDR within 30 days after both the related decisions on liability and relief have been issued. Commission Rule 70, 29 C.F.R. § 2700.70.

[3] The "law of the case" doctrine holds that an adjudicative decision issued following a hearing becomes the final disposition of the matter, unless it is challenged on appeal. *See, e.g., Pepper v. United States*, 131 S.Ct. 1229, 1250 (2011); *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993). As a general proposition, a judge may only modify a finding in exceptional circumstances, such as where the prior decision is clearly in error and would work a manifest injustice, *Pepper v. United States*, 131 S. Ct. at 1250-51 (citations omitted), or there has been a drastic change in legal authority, *United States v. Bell,* 988 F.2d at 251 (citations omitted).

In the final analysis, there are two circumstances where settlement motions can be considered by the Commission or its judges. These situations are: (1) by a judge when the proposed settlement is submitted for approval prior to a written decision on the merits; and (2) by the Commission upon withdrawal of a PDR by an aggrieved party. Neither of these circumstances are present in this case. Consequently, the motion to approve the joint settlement agreement shall be dismissed as the filing of the settlement motion is contrary to Commission Rules 69 and 70.[4]

b. *Alternative Dismissal as Contrary to the Public Interest*

Assuming that the parties' proposed settlement agreement is not procedurally improper, for the reasons discussed below, approval of the settlement agreement shall also be denied on the merits because the settlement agreement is contrary to the public interest in that it conflicts with the statutory goal and enforcement scheme of the Mine Act. In addition, the settlement agreement shall be denied because its approval would avoid a final decision on the legality of civil actions that conflict with the Mine Act, invoking the doctrine of "capable of repetition yet evading review."

In this case, the operative exculpatory settlement terms for consideration are:

> Respondents assert that *except for proceedings under the Act*, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations. Further, Respondents assert that *except for proceedings under the Act*, nothing contained herein is intended to constitute an admission of civil liability under any local, state, or federal statute or any principle of common law.

Mot. at 3 (emphasis added).

Assuming that the parties' proposed settlement agreement is not procedurally improper, the Commission long ago articulated its authority to review settlements. The Commission stated:

> [W]e emphasize the Commission's authority to review settlements entered into between the parties in contested penalty proceedings. The source of our authority is section 110(k) of the Mine Act. 30 U.S.C. § 820(k). Section 110(k) in part provides, "No proposed penalty which has been contested before the Commission under

[4] While the motion for settlement shall be denied, as discussed herein, I construe the parties' settlement terms with respect to civil penalty and remedial relief as a Joint Stipulation for Relief filed pursuant to the directive in the June 19, 2013, Decision on Liability that established August 23, 2013, as the deadline for filing such stipulations.

> section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission." Accordingly, it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or to reject settlements in contested penalty proceedings. As we observed in *Co-op Mining Company*, 2 FMSHRC 3475, 3475-3476 (1980), "[S]ection 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements."

Amax Lead Co., 4 FMSHRC 975, 977 (June 1982).

The Commission has concluded that its authority in section 110(k) to review settlement terms also applies to proposed settlements in discrimination cases. *Secretary of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998) (citing *Secretary of Labor on behalf of Hopkins v. ASARCO, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390, 390 (Mar. 1993); *Secretary of Labor on behalf of Corbin v. Sugartree Corp*., 9 FMSHRC 197, 198 (Feb. 1987); *Secretary of Labor on behalf of Gabossi v. Western Fuels–Utah, Inc.*, 11 FMSHRC 134, 135 (Feb. 1989)). In this regard, the broad grant of Commission oversight authority conferred in section 110(k):

> . . . must of necessity include the authority to review settlement agreements arising under section 105(c), for if no such authority existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be severely curtailed, a result at odds with the intent of the Mine Act. All the more compelling a reason for Commission review of settlements is the chance of an agreement being made that is "inconsistent with the enforcement scheme of the Act." *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 978 (June 1982).

Leeco, Inc., 20 FMSHRC at 708 (footnote omitted).

Mine operators are free to admit or deny liability *for an alleged violation* under the Mine Act in a settlement agreement submitted for a judge's approval. *Amax Lead Co.*, 4 FMSHRC at 977-78. Settlement terms that contain limitations of liability, such as language limiting liability only to proceedings under the Mine Act, are frequently approved based on the vagaries of litigation when they are submitted prior to the issuance of a decision. *See, e.g., Id.* at 978-79 (noting the propriety of pre-decisional exculpatory settlement language that is not inconsistent with the enforcement scheme of the Mine Act with respect to an operator's history of violations and exposure to liability for a pattern of violations). In ruling on the propriety of such settlement terms, the judge must consider the overriding Commission responsibility to ensure that proposed settlement terms are in the public interest because they are consistent with the enforcement scheme of the Act. *Id.*; *Knox County Stone Co.,* 3 FMSHRC 2478, 2479 (Nov. 1981) (noting

that Commission judges must ensure that settlements are consistent with the Act's objectives).

In addressing whether settlements are consistent with the public interest, a judge must examine "all relief . . . not just the [monetary] provisions of the settlement . . . ." *Madison Branch Mgmt.*, 17 FMSHRC 859, 868 (June 1995) (quoting *Luevano v. Campbell*, 93 F.R.D. 68, 86 (D.D.C. 1981)). As noted in the Decision on Liability, the plain language of the Mine Act as well as its legislative history reflect that its fundamental goal is to achieve a safer working environment by ensuring that miners are not retaliated against or otherwise discouraged from engaging in safety related protected activity. The filing of civil actions seeking compensatory and punitive damages in response to a miner's exercise of protected statutory rights is a direct assault on the achievement of this goal. Mine operators must be dissuaded from filing civil actions that interfere with the exercise of protected federal statutory rights under the pretense that such law suits are protected by the First Amendment. Thus, the public interest requires ensuring that the proffered settlement terms do not provide a colorable basis for Armstrong, or any other mine operator, to file similar civil actions in the future that conflict with federal law.

The parties' settlement agreement seeks to limit the substantive significance of Armstrong's liability by including language that Armstrong is only admitting liability with respect to "proceedings under the [Mine] Act," excluding proceedings "under any local, state, or federal statute or any principle of common law."[5] Mot. at 3. Ordinarily, such settlement terms limiting admissions of liability to only Mine Act proceedings while relieving complainants of the adverse effects of discrimination are not contrary to the public interest, in that they acknowledge rather than undermine the protections afforded under the Mine Act.[6] However, this matter

[5] By inserting this language in a proposed settlement, rather than filing a joint petition for relief, Armstrong obviously is seeking to limit the substantive significance of the liability decision.

[6] For example, in *Sec'y o/b/o Hopkins v. Asarco,*19 FMSHRC at 2, the Commission stated it would favorably entertain a settlement motion which included Asarco's withdrawal of its PDR of Judge Manning's decision that Asarco had violated section 105(c) of the Act by discharging Hopkins. During the pendency of the PDR, the parties reached a settlement agreement with respect to minor modifications of the monetary relief awarded to Hopkins and the amount of civil penalty imposed by Judge Manning. *Asarco* was a routine discrimination matter that did not involve the novel circumstances in this case concerning preempted civil actions. Moreover, the settlement terms in *Asarco* did not conflict with the public interest.

Significantly, *Asarco* involved a *quid pro quo* not present in this case. By withdrawing its appeal, Asarco agreed to accept liability if the Secretary agreed to the settlement terms concerning the civil penalty and backpay. The *Asarco* settlement agreement was in the public interest as withdrawal of the PDR promoted judicial economy. Here, there is no furtherance of the public interest in allowing Armstrong to escape the findings and conclusions in the Decision on Liability. Approving the settlement agreement after the litigation in this case

involves more than an adverse action inflicted upon a particular complainant miner. It involves an adverse action inflicted upon the essence of the Mine Act - the achievement of a safer mining environment through participation of miners in safety related matters. I am unconvinced that this broad exculpatory language that seeks to shield Armstrong from responsibility for discriminatory conduct in virtually any statutory or common law matter that may arise outside of a Mine Act proceeding, can reasonably be construed as a means of dissuading Armstrong, or any other mine operator similarly motivated, from filing similar civil actions that will be in violation of section 105(c)(1).

The exculpatory language is not the sole reason why the proposed settlement may not effectively deter future violative civil actions. The parties' settlement terms include reducing the proposed penalty from $70,000.00, the maximum allowable under section 110(a)(1) of the Act, to $35,000.00. There are no mitigating circumstances to justify the proposed reduction. Armstrong was obligated to withdraw its Kentucky lawsuit pursuant to the Cease and Desist Order issued in this matter. The other settlement remedies, such as relevant postings and training, are routine actions required of mine operators as a consequence of discriminatory conduct. The Commission recently addressed its responsibility in assuring that civil penalties must be sufficient to deter mine operators from similar violative conduct. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865 (Aug. 2012). The Commission stated:

> The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates.

Id.

The insidious nature of such civil actions cannot be overstated if Armstrong or other mine operators are not effectively deterred from initiating similar lawsuits. These civil actions are contrary to the public interest goals of the Mine Act due to the potential chilling effect of such suits on miners in general. More specifically, although Armstrong has moved to dismiss its civil suit, it presumably has managed to intimidate mining personnel, who undoubtedly have been aware that they too, like Shemwell, could be a defendant in a civil action if they express unwelcome safety-related complaints. By making an example of Shemwell, Armstrong has managed to effectively discourage its mining personnel from making protected safety-related complaints for one year, since it filed its Kentucky lawsuit on August 22, 2012. Any civil penalty imposed in this matter may have been offset by savings from the suppression of safety complaints during the last year, such as complaints requiring remedial measures resulting in lost production, or, complaints requiring additional expenditures for the purchase of new respirator

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would waste judicial resources and risk the reoccurrence of similar violative civil suits.

protection.

In summary, settlement agreements can only be approved if they are consistent with the enforcement scheme of the Mine Act. Baseless and retaliatory civil actions that discourage miner participation in achieving a safer mining environment are anathema to the Act's central goal of promoting mine safety. In view of the above, it is clear that the settlement terms with respect to the exculpatory language, as well as the reduction in proposed penalty, cannot meet with Commission approval as any settlement terms that create even the remote possibility of a repetition of this egregious retaliatory conduct must be rejected. Thus, as discussed below, the legality of such civil suits, which are capable of repetition, must not be allowed to evade review.

By submitting their settlement agreement for approval, the parties, in essence, rely on the dismissal of Armstrong's civil suit in Muhlenberg County to support the proposition that all matters in issue have been resolved, and that further proceedings have essentially been rendered moot. However, the Commission has recently noted that "voluntary cessation of a challenged practice does not render a case moot unless there is no reasonable expectation that the wrong will be repeated." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012) (citations omitted). This concept expressed in *North American Drillers* is an exception to the mootness doctrine that is entitled "capable of repetition, yet evading review." *See, Marfork Coal Co.*, 29 FMSHRC 626, 628 (Aug. 2007), *citing* 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3533.8 (2d ed. 1984).

In *Marfork*, the Commission explained that the "evading review" exception to mootness applies where:

> "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, R. dissenting) (alteration in original). For example, election issues are "among those most frequently saved from mootness by this exception." *National Right to Life Political Action Comm. v. Connor*, 323 F.2d 684, 691 (8th Cir. 2003). Similarly, the Commission has stated that "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable." *Mid-Continent,* 12 FMSHRC at 955.

Marfork, 29 FMSHRC at 628.

With regard to the first element of the "evading review" doctrine, duration of the challenged action, *i.e.*, a pending civil suit, is under the exclusive control of the mine operator who could ensure that the subject law suit is dismissed prior to a Commission decision on whether the civil action violates the Act. Looking at the facts, Armstrong had the benefit of the intimidating effects of its civil suit for one year after the suit was filed on August 22, 2012. If an operator's withdrawal of an offending civil suit rendered a Commission proceeding moot despite the "capable of evading review" doctrine, mine operators could escape liability for similar violative conduct by withdrawing their baseless suits at an opportune moment to preclude continued litigation before the Commission. Once the subject civil lawsuits were dismissed, Commission proceedings could be settled with beneficial exculpatory terms that the Secretary undoubtedly would be tempted to accept, as in this case, to avoid costly litigation in an era of limited resources.

The second element of the "evading review" doctrine requires a showing that the same complaining party will be subject to the same action if mootness were to apply. It is reasonable to assume the Secretary will again be burdened with the necessity of bringing 105(c)(2) discrimination complaints on behalf of miners who find themselves defendants in civil actions brought by their employers if the legality of such suits is not resolved as a matter of law. In this regard, it is obvious that Armstrong's civil suit was a veiled attempt to intimidate and harass miners in its employ who may wish to engage in protected activities that are disapproved by Armstrong. It would be naive to think that other mine operators would not avail themselves of this tactic if this proceeding does not culminate in a meaningful decision on the merits identifying such civil suits as violations of the Mine Act.

Consequently, in addition to the exculpatory language and penalty reduction terms being contrary to the public interest, approval of the joint settlement motion is also inconsistent with the public interest because such civil suits, absent a Commission finding on the merits with respect to their violative nature, are capable of repetition. Consequently, the parties' Joint Motion for Approval of Settlement shall be denied.[7]

[7] Nothing herein shall be construed as a reflection upon the ultimate disposition of the motion to approve settlement currently before me in Shemwell's section 105(c)(3) private discrimination matter in Docket No. KENT 2012-1497-D.

II. Supplemental Decision on Relief and Civil Penalty

a. *Remedial Measures*

In the Decision on Liability, the parties were instructed to file a joint petition for relief if they could agree on appropriate remedies. In view of the disapproval of the settlement agreement, I view the remedial actions agreed upon by the parties pursuant to their settlement terms as a joint stipulation for relief. While I am not required to impose the relief stipulated to by the parties, the agreed upon remedial actions are reasonable, and will be adopted and incorporated as part of the relief required to be taken in this proceeding. The pertinent remedial actions required of Armstrong are as follows:[8]

> [1.] Provide a copy of the MSHA publication titled "A Guide to Miners' Rights and Responsibilities" to all employees. (MSHA will provide copies of this publication to [Armstrong] for distribution.) A copy of this publication can be found at http://www.msha.gov/S&HINFO/minersrights/minersrights.asp;
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> [2.] Provide two (2) hours of training on miners' rights at each mine operated by Armstrong Coal Company, Inc. (MSHA will provide the topics for the training. Further, MSHA has agreed that the [Armstrong] can provide this training on the same date that it provides its employees with annual retraining. The training on miners' rights, however, shall not reduce the time that is otherwise required for the annual retraining.) Following the training on miners' rights, employees will watch the MSHA video titled "A Voice in the Workplace: Miners' Rights and Responsibilities"; and
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> [3.] Post a miners' rights poster about section 105(c) at each mine that is operated by Armstrong Coal Company, Inc. for a period of (2) years. (MSHA will provide copies of these posters to [Armstrong].)

Mot. at 2.

[8] The subject settlement agreement does not seek any relief with regard to expenses or lost income incurred by Shemwell as a result of this proceeding. On August 27, 2012, Shemwell filed a private section 105(c)(3) discrimination case docketed as KENT 2012-1497-D. A motion for approval of settlement in this private discrimination matter, filed on August 8, 2013, contains settlement terms related to attorney's fees and other monetary relief. The motion for approval of this settlement agreement is pending before me.

b. *Civil Penalty*

The Secretary initially proposed a civil penalty of $70,000.00 for Armstrong's violation of section 105(c), the maximum penalty specified in section 110(a)(1) of the Act. 30 C.F.R. § 820(a)(1). The parties' settlement agreement proposes a reduced civil penalty of $35,000.00. The reduction is based on "the [remedial] actions listed above and the dismissal of the state court action." Mot. at 3. As noted below, Commission judges are not bound by civil penalties proposed by the Secretary in that they assess penalties on a *de novo* basis.

Turning to the issue of the appropriate civil penalty, the Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
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> > [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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600, *citing* 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria *and the deterrent purposes underlying the Act's penalty assessment scheme*." *Id.* at 294 (emphasis added), *cited in Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.,* 19 FMSHRC 1495, 1503 (Sept. 1997).

Addressing the criteria in section 110(i), there is no history of similar previous violations that sought to utilize state tort law as a means of intimidation. With respect to the proportionality of the penalty and Armstrong's ability to continue in business, Armstrong is a relatively large mine operator, and, it has neither been contended nor shown that the $70,000.00 penalty initially proposed in this matter would interfere with Armstrong's continuing operations. With regard to negligence, I view the civil suit as a willful violation. The willfulness is demonstrated by the baseless and retaliatory nature of the Kentucky tort action. Turning to the remaining elements of section 110(i), Armstrong's violation evidences serious gravity, given the chilling effect created during the pendency of the violative civil suit. Finally, Armstrong's conduct in this matter cannot be construed as demonstrating good faith. In this regard, Armstrong has persisted in pursuing its civil case, an action that was flawed even under Kentucky law, which requires Armstrong to have prevailed in Shemwell's discrimination case. Armstrong withdrew its civil suit only after being ordered to cease and desist. The degree of negligence, the degree of gravity and the demonstrable lack of good faith are aggravating factors that support the imposition of a higher civil penalty.

In addition, I am mindful of the deterrent role civil penalties play in discouraging mine operators from engaging in future similar violative conduct. *Black Beauty*, 34 FMSHRC at 1866 (noting that the penalty provisions of the Mine Act are intended to "discourage operators from violating health and safety regulations and laws in the future"). Maximizing the deterrent effect through the imposition of a civil penalty is particularly important in this matter, given Armstrong's assertion that the safety goal of the Mine Act is subordinate to its unfettered right to file a civil action. In this regard, in its Post-Oral Argument Brief, Armstrong contends:

> *No statute and no public interest, no matter how noble (such as the safety goals of the Mine Act)*, can infringe upon [Armstrong's right to file suit]. And regardless of what [the Commission] thinks of the merits of Armstrong's state court lawsuit, one thing is always true: Armstrong has a constitutional right to file it, and by definition it therefore cannot be a violation of the Mine Act (or the Mine Act is unconstitutional).

Armstr. Br. at 1 (emphasis added). This contemptuous attitude towards the important role the Mine Act plays in furthering the public interest illustrates the necessity for a meaningful penalty that hopefully will deter the initiation of future similar misguided civil actions.

Turning to the Secretary's justification for accepting a reduction in civil penalty, I do not view Armstrong's "voluntary" dismissal of its civil action in Kentucky as a mitigating factor. Nor are the agreed upon remedial actions noted above mitigating factors, as such actions are routinely required to alleviate the adverse effects of discriminatory conduct. One cannot image a more serious violation than the egregious lawsuit filed against Shemwell that, if left unchecked, would eviscerate the statutory and enforcement goals of the Mine Act.

Bringing a civil action against a miner whose federal statutory right is protected by the Supremacy Clause, while feigning an inviolate First Amendment right to sue, constitutes egregious conduct. Even imposition of the maximum civil penalty provided by statute may not be an adequate deterrent against such wanton behavior. However, I am constrained to imposing the maximum $70,000.00 civil penalty specified in section 110(a)(1) of the Act.

ORDER

Accordingly, **IT IS ORDERED** that the Joint Motion to Approve Settlement of the captioned proceeding filed on August 8, 2013, **IS DENIED**.

IT IS FURTHER ORDERED that Armstrong comply with the remedial actions noted above with respect to training, the provision to all of its employees of the MSHA publication entitled "A Guide to Miners' Rights and Responsibilities," and the displaying of miners' rights posters detailing the protections afforded under section 105(c) for a period of two years at suitable locations in all of its facilities.

IT IS FURTHER ORDERED that the June 19, 2013, Decision on Liability and this August 19, 2013, Order Denying Joint Motion to Approve Settlement and Supplemental Decision on Civil Penalty and Relief be posted at suitable locations at each of Armstrong's facilities for a period of 90 days.

IT IS FURTHER ORDERED that Armstrong shall pay a civil penalty of $70,000.00 in satisfaction of the subject section 105(c) violation within 40 days of the date of this decision.

IT IS FURTHER ORDERED that upon receipt of timely payment, this discrimination matter in Docket No. KENT 2013-362-D **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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