FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 27 2015

LAWRENCE PENDLEY, Complainant, v. HIGHLAND MINING CO. AND JAMES CREIGHTON, Respondent.	DISCRIMINATION PROCEEDING Docket No. KENT 2013-606-D MSHA Case No.: MADI-CD 2010-07 & 11 Mine: Highland No.9 Mine ID: 15-02709

DECISION ASSESSING CIVIL PENALTIES AGAINST HIGHLAND MINING CO. AND JAMES CREIGHTON AND ORDER TO PAY

This case is before me upon a complaint of discrimination brought by Lawrence Pendley ("Complainant"), a miner, against Highland Mining Co. and James Creighton, ("Respondents"), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).

On February 12, 2015, I issued a decision finding that Pendley had been discriminated against by the Respondents. Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of the decision was sent to the office of the Regional Solicitor for assessment of civil penalty.[1] On May 27, 2015, the Secretary Petitioned for assessment of civil penalties in the amount of $20,000.00. The Respondent timely answered on June 26, 2015.

On August 1, 2015, James Creighton filed an Answer to the Petition for Assessment of Civil Penalty. In his Answer, Creighton stated that he retired on September 21, 2013 after having been found disabled by the Social Security Administration. He further stated that he has not worked any job since that time, and that due to his retirement and disability, "a monetary penalty would have an extreme hardship on my family and myself." He moved this Court to reconsider the monetary penalty assessed by the Secretary.

[1] The decision was sent to the wrong office of the Solicitor in error, which led to a delay in the Secretary's assessment of civil penalty.

The Secretary submitted a Brief in Support of Civil Penalty Assessment and Opposition to Joint and Several Liability and Motion to Amend the Pleadings on August 27, 2015. In this pleading, the Secretary moved to amend the pleadings to clarify that it was assessing a penalty of $19,500.00 against Highland Mining Co. and $500.00 against James Creighton. It argued that the penalty assessed against Highland was appropriate under the criteria set forth in Section 110(i) and Commission precedent. However, since there was no case law concerning the application of Section 110(i) criteria to individuals, it suggested applying the criteria set forth under Section 110(c) and Commission case law interpreting that Section. Applying the 110(c) analysis, the Secretary argued that the penalty assessed against Creighton was appropriate.

On September 01, 2015, Highland submitted its brief opposing the penalty assessment. It argued that the penalty assessed against Highland should be substantially reduced because (1) the theory of liability was based upon the conduct of an hourly employee, (2) the Complainant was not an employee, (3) the Complainant placed himself in the area where Creighton was working, and (4) the mine is no longer in operation.

For the following reasons, I find that a civil penalty of $19,500.00 against Highland is appropriate, but reduce the penalty assessed against Creighton to $250.00.

The Civil Penalty of $19,500.00 Against Highland is Appropriate

The principles governing the authority of the Commission's administrative law judges 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 and its judges the 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), 820(a). The Act requires that in assessing civil monetary penalties, the Commission and its judges shall consider the six statutory penalty criteria listed in §110(i) of the Act:

> [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 on 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.

30 U.S.C. § 820(i). *MSHA obo Perry Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315 (Aug. 1996) (Applying 110(i) criteria to Respondent in discrimination case.)

In the instant case, the Secretary seeks civil penalties from Highland in the amount of $19,500.00. Given all of the evidence, as well as my findings contained in the underlying Decision, I find that this penalty is appropriate.

In assessing a $19,500.00 penalty, I have given full consideration to the Section 110(i) criteria. With regards to Highland's history of previous violations, according to MSHA's Mine Data Retrieval System, in the 15 months prior to the violation date of March 30, 2009, Highland

had 618 violations over 977 inspection days. Furthermore, in addition to the instant case, Pendley filed two separate discrimination complaints with the Commission, on February 25, 2010 and March 25, 2010, which resulted in a finding of discriminatory acts by Highland.

In 2009, when the acts relevant to this matter took place, the size of the operator's business can be considered large. The 2009 production totals for the mine were 3,676,615 tons of coal, and the controller produced 28,356,573 tons of coal. These figures place both the mine and the operator in the largest category of the tables provided in 30 C.F.R. §100.3(b).

In the instant case, Highland exhibited negligence in its failure to act or cease interference with Pendley's rights. As detailed in the underlying Decision, Superintendent Millburg knew of the contentious history between Pendley and Creighton, and was informed of Creighton's conduct, and he chose to do nothing to stop it. While it is true that he watched security footage of the interaction, he did not take the next step of instructing Creighton not to interfere with Pendley's rights.

With regards to the operator's ability to continue in business, there is nothing in the record that indicates that such a fine would adversely affect its ability to stay in business.

I further find that the gravity of the conduct by Highland was serious and supports the Secretary's proposed penalty. As described in more detail in the underlying Decision, miners' representatives serve an important function in ensuring a safe and healthy environment for miners. I found significant interference with Pendley's rights by management—when Creighton's conduct was ignored, as well as withholding of materials from Pendley. I find that such conduct demonstrated a disregard for miners' representative rights, and were sufficiently serious to support the Secretary's proposed penalties. Furthermore, there was no evidence of good faith abatement in the record.

Based on these reasons and the underlying Decision, I find that a penalty of $19,500.00 against Highland is appropriate.

<u>The Civil Penalty of $500.00 Against Creighton is Reduced to $250.00</u>

Though there is no Commission caselaw concerning the criteria to use when assessing a penalty against an individual in a discrimination case, the Commission has provided guidance for assessing individual penalties in the 110(c) context:

> The Supreme Court has held that, in interpreting a single enactment, courts should give the statute "the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Interpreting sections 110(c) and 110(i) harmoniously, we hold that, in keeping with our prior holding that "findings of fact on the statutory penalty criteria *must* be made," *Sellersburg,* 5 FMSHRC at 292 (emphasis added), Commission judges must make findings on each of the criteria as they apply to *individuals.* The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in

> keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Sec'y v. Sunny Ridge Mining Company, Inc. & Mitch Potter & Tracy Damron, employed by Sunny Ridge Mining Company, Inc., 19 FMSHRC 254, 272, (Feb. 1997). The goal of statutory harmony, deterrent purposes of penalties, and general reasoning employed by the Commission in *Sunny Ridge Mining*, applies equally to penalties assessed against individuals in the discrimination context. Based on an application of the 110(i) criteria by analogy, I find that the appropriate penalty assessed against Creighton is $250.00.

As detailed in the underlying decision, as well as Judge Barbour's decision in *Sec'y obo Pendley v. Highland Mining*, 34 FMSHRC 3406 (Dec. 27, 2012) (ALJ), Creighton had a long history of issues with Pendley that go back as far as 2005. These allegations of discrimination included threats, destruction of property, and physical violence. For one individual, this conduct represents a long history of previous violations.

In the underlying decision, I found that Creighton purposefully interfered with Pendley's rights as a miners' representative. Therefore, he exhibited a total absence of any standard of care. Furthermore, Creighton's actions were intended to interfere with Pendley's walkaround rights, which are essential for ensuring health and safety in the mine. Therefore, the level of gravity was high. And there was no good faith abatement of the conduct by Creighton. Up until the date of the hearing, Creighton continued to construct elaborate excuses for how his conduct was appropriate.

However, in spite of Creighton's egregious conduct, there is one factor that counsels a reduction in penalty. Creighton retired from mining on September 21, 2013, and has not worked any job since that time. He has been found disabled by the Social Security Administration. Creighton has stated that due to his limited income, "a monetary penalty would have an extreme hardship on my family and myself." Based upon this information, I find that a $250.00 penalty would reasonably serve as a deterrent.

Therefore, it is hereby **ORDERED** that Respondent Highland Mining pay a civil penalty in the amount of $19,500.00 for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.[2]

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[2] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

It is further **ORDERED** that Respondent James Creighton pay a civil penalty in the amount of $250.00 for his violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.[3]

Upon receipt of these payments, this case is hereby **DISMISSED**.[4]

Kenneth R. Andrews
Administrative Law Judge

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/mzm

[3] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

[4] Following the two prior Decisions on February 12, 2015 and September 21, 2015, this constitutes the final Decision of the ALJ in this matter.