FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 27, 2016

SECRETARY OF LABOR, MSHA, On behalf of **THOMAS MCGARY** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-583-D MORG-CD 2014-15
v.	:	
THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	:	 Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MSHA, On behalf of **RICK BAKER** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-584-D MORG-CD 2014-16
v.	:	
OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	:	 Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, On behalf of **ANN MARTIN** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-585-D MORG-CD 2014-17
v.	:	
HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC.,	:	

AND	:	
MURRAY ENERGY CORPORATION,	:	Harrison County Mine
Respondent.	:	Mine ID: 46-01318
	:	
SECRETARY OF LABOR, MSHA,	:	INTERFERENCE PROCEEDING
On behalf of **RAYMOND COPELAND** and	:	
RON BOWERSOX,	:	
Complainants,	:	Docket No. WEVA 2015-586-D
	:	MORG-CD 2014-18
	:	
v.	:	
	:	
MONONGALIA COUNTY COAL CO.,	:	
CONSOLIDATION COAL COMPANY,	:	
MURRAY AMERICAN ENERGY, INC.,	:	
AND	:	
MURRAY ENERGY CORPORATION,	:	Monongalia County Mine
Respondent.	:	Mine ID: 46-01968
SECRETARY OF LABOR, MSHA,	:	INTERFERENCE PROCEEDING
On behalf of **MICHAEL PAYTON** and **RON**	:	
BOWERSOX,	:	
Complainants,	:	Docket No. WEVA 2015-587-D
	:	MORG-CD 2014-19
	:	
v.	:	
	:	
MARION COUNTY COAL CO.,	:	
CONSOLIDATION COAL COMPANY,	:	
MURRAY AMERICAN ENERGY, INC.,	:	
AND	:	
MURRAY ENERGY CORPORATION,	:	Marion County Mine
Respondent.	:	Mine ID: 46-01433

DECISION ON REMAND

Appearances: Charles Lord, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;

Laura Carr, UMWA, Washington, D.C., for the Complainants;

Thomas Smock and Philip Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Miller

These cases are before me based upon complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation ("Murray Energy"). The cases were brought pursuant to the interference provisions of Section 105(c) of the Federal

Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). The parties presented evidence on the claims at hearing and a decision was issued on November 16, 2015. *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ). The Commission issued a decision after review on August 26, 2016. *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 38 FMSHRC __, No. WEVA 2015-583-D (Aug. 26, 2016). The Commission remanded two issues to me, and I address them here. *See id.*, slip op. at 21.

At issue in each of the cases is a mandatory "awareness meeting" that was held at each of the mines, in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). The parties appeared at a hearing beginning on Tuesday, September 21, 2015, in Pittsburgh, Pennsylvania. Although the parties stipulated to many of the facts and documents to be admitted in the case, each side also provided a list of potential witnesses for the hearing. Just prior to the hearing, Murray Energy filed a complaint in federal district court that named one of the witnesses as a party and included the deposition testimony of two other witnesses from this case in the body of the complaint. As a result, the three witnesses did not want to testify. None of the parties presented testimony, but they did present documents, stipulations and arguments. The parties were also given the opportunity on remand to present additional briefs in support of their positions.

The hearing and evidence addressed in the original decision focused on whether Murray Energy had interfered with the Complainants' rights to make a complaint to MSHA pursuant to Section 103(g) of the Act and therefore violated the interference provision of Section 105(c)(1) of the Act. I determined that Murray Energy and the five mines did violate Section 105(c) by interfering with the miners' rights to make anonymous complaints to MSHA pursuant to Section 103(g) of the Mine Act. 37 FMSHRC at 2605-08. I also addressed the relief sought by the Secretary and the six proposed penalties of $20,000.00 each. 37 FMSHRC at 2608-10. I assessed five of the six proposed penalties, but increased the amounts from $20,000.00 to $30,000.00 for each of the five violations.

Both the Secretary and Respondents appealed the decision to the Commission. The Commission agreed that the operators' actions at all five mines impermissibly interfered with the rights of miners to make anonymous 103(g) complaints to the Secretary. *McGary*, slip op. at 13 (Aug. 26, 2016). The majority also agreed that the sixth claim against the mine was correctly dismissed as being duplicative of the five others. *Id.* at 16-17. Thereafter, the Commission addressed the penalties and specifically directed that the basis for the increased penalty be adequately provided. *Id.* at 17-20. The Commission also suggested that the relief regarding posting of a notice and reading a notice to miners be clarified. *Id.* at 20-21. The issues for remand, then, are the appropriate penalty amount for five interference claims along with a clarification of the statement that the Court ordered to be read at the five mines regarding the interference with the right to make a complaint to MSHA.

For purposes of this decision regarding the penalty and the statement to be made by Murray management, I incorporate the facts and findings as set forth in the original decision. I rely on no further facts but have reviewed the briefs and information that the parties have

provided to address these two issues on remand. As discussed in that first decision, an interference claim requires proof that the operator's conduct interfered with "the exercise of protected rights." 37 FMSHRC at 2604 (quoting *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985)). Here, the right at issue is the right of miners and their representatives to make health and safety complaints directly to MSHA. Under Section 103(g) of the Mine Act, a miner who has reasonable grounds to believe that a violation of the Act or a safety or health standard exists at the mine "shall have a right to obtain an immediate inspection" upon giving notice to the Secretary. 30 U.S.C. § 813(g)(1). The legislative history of the Act explains that this provision was included because of "the Committee's firm belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977). Confidentiality is crucial to the exercise of the 103(g) right. *See UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2109-11 (Aug. 2014). I found that the right to make complaints is fundamental and that interfering with that right is a serious matter. 37 FMSHRC at 2610.

In the original decision, I raised the penalty amount from the $20,000.00 per incident sought by the Secretary to $30,000.00 each. *Id.* I did so based in part on the seriousness of the interference as well as the mine's filing of a complaint against the UMWA based upon information learned during depositions prior to the hearing, thereby chilling the willingness of witnesses to testify. *Id.* at 2609-10. Prior to hearing in this case, the parties presented a list of witnesses and exhibits. Three of the six complainants, Ron Bowersox, Michael Payton and Ann Martin, were named as witnesses for the Secretary. On the Friday prior to the hearing scheduled for Tuesday, September 22, 2015, Respondents filed a complaint in the U.S. District Court against the UMWA and Bowersox. Excerpts from the deposition testimony of Bowersox, Martin and Payton in this case were quoted in the complaint and were part of the basis of that complaint. The case in the district court was subsequently dismissed but was addressed in the Commission decision on appeal. The Commission found that the district court complaint was properly admitted into evidence in this case, but that it was best addressed in a separate case as a separate instance of interference and should not be considered in assessing the penalty in this case. *McGary*, slip op. at 20 (Aug. 26, 2016).

Penalty.

The Secretary has proposed a penalty of $20,000.00 for each of the five penalties assessed in this case. In its brief after remand, the Secretary argues that the $20,000.00 as proposed should be assessed. The mine operator argues primarily that there is no basis in the record to raise the penalty above the proposed amount.

The principles governing the authority of Commission 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 "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 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. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mines have no history of interference violations. The mines and the Murray entities are large operators. The parties have stipulated that the penalties as proposed will not affect Respondents' ability to continue in business. Jt. Stips. ¶¶ 34, 35. With regard to good faith abatement, as of the date of the hearing, the mine had not investigated or disciplined any miners for violating the reporting policy. However, there is no evidence that the mine had taken any steps to rescind the policy, either. I find the gravity of the violation to be serious because a high-ranking official announced the policy in a mandatory meeting, regarding complaints that miners have every right to make. The policy, as addressed in the meetings, carried a number of statements that could be understood as threats to the miners' employment. I also find the negligence to be a factor in the penalty given all of the facts that came to light in this case, including the nature of the interference and the manner in which the policy was presented to the miners. Both the negligence and gravity are discussed throughout the original decision. I find no basis to modify the proposed penalties and therefore, I assess $20,000.00 per violation as proposed by the Secretary.

Posting and Other Relief.

The Secretary asks the court to order the mine to cease and desist from violating Section 105(c), rescind its rule requiring notice to management about 103(g) complaints, and reverse any disciplinary actions issued as a result of the rule or policy. In addition, the Secretary seeks an order requiring a Murray Energy corporate officer to read a notice to all miners regarding the violations and requiring that the notice be mailed to all of the miners and posted at the mine for a period of one year.

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of Section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). In cases involving statutory rights under the National Labor Relations Act, courts have found that it is appropriate to order a management official to read a remedial notice to employees when there is a "particularized need." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929-30 (D.C. Cir. 2005).

On appeal, the Commission discussed the relief granted and noted that the only remaining issues involved "the details of the prepared and approved statement CEO Murray is required to read to miners." *McGary*, slip op. at 21 (Aug. 26, 2016). The Commission further agreed that

the Secretary should clarify its position on the manner in which the statement is to be prepared and approved.

The parties addressed the issue in their briefs. The Secretary proposed language for the notice to be read by Murray, and also asked to have the notice that has been posted, changed. The Secretary's position was supported by the UMWA. Respondents commented on the Secretary's suggestions, indicated that they had posted a notice with input from the Secretary but chose not to propose any language to include in the notice that Mr. Murray will read to the miners.

The mine operator and the Secretary agree that the company did draft and post a notice. However, the original notice was posted without input from the Secretary. The Secretary, upon learning of the notice, advised Murray Energy that the notice did not meet his minimum requirements. Shortly after, Murray drafted and posted a new notice that minimally met the requirements suggested by the Secretary. The Secretary seeks to have that notice amended. However, the Secretary agrees that the posted notice meets the minimal requirements of the order. Therefore, while I find the notice to be different than contemplated by the original order, the notice has been posted and should remain posted for the term of one year in a conspicuous location. However, the statement to be read by Robert Murray is not the same as that posted, and the original order required that it be approved by all parties. Since the parties have not been able to agree on such language, the original order is modified so that the statement that is required to be read is drafted and set forth below. The statement to be read by Mr. Murray to all miners at the five mines is as follows:

> The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded. You have every right to make a complaint to MSHA without notifying any person at the mine.
>
> Section 103(g) of the Federal Mine Act gives you the right to request that the Mine Safety and Health Administration conduct an immediate inspection of a condition or practice that you reasonably believe is an imminent danger or a violation of the Mine Act or its standards. Murray does not, and will not, require that you make the same safety or health complaints to management when you make complaints or reports to MSHA. You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially.
>
> Murray and its mines will not retaliate against or take any adverse action against any miner or other person because they have

made an anonymous or confidential complaint to MSHA. All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint.

Section 105(c) of the Federal Mine Safety and Health Act prohibits Murray and any other mine operator from discriminating against its miners and from interfering with their rights under the Act, including the right to make anonymous complaints to MSHA. If any interference or discrimination or adverse action occurs related to your right to make an anonymous complaint, or any other action protected by the Mine Act, you have the right to immediately file a discrimination or interference complaint with MSHA.

Accordingly, and as set forth in the original decision of November, 2015, Respondents are **ORDERED TO CEASE AND DESIST** from violating Section 105(c)(1) and rescind the rule announced at the awareness meetings requiring miners to give notice to management of 103(g) complaints. In the event that any miner has been disciplined or subject to any adverse action as a result of that rule, that action is **ORDERED** to be rescinded immediately. Robert Murray is **ORDERED** to hold a meeting at each mine within 40 days of the date of this decision in which he shall read the statement set forth above, without comment or elaboration. The statement to be read by Murray shall be sent to each mine and posted along with the notice that is attached as the Secretary's Appendix A for a period of six months. Murray may read the statement through a video conference in lieu of traveling to each mine. All portions of the order contained in the November 2015 decision not addressed here remain as originally ordered.

I assess a penalty of $20,000.00 for each of the five violations as proposed by the Secretary. Each of the five mines is hereby **ORDERED** to pay the sum of $20,000.00 to the Secretary of Labor within 40 days of the date of this order.

Margaret A. Miller
Administrative Law Judge

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