FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 7, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-230 A.C. No. 46-01433-366908
v.	Docket No. WEVA 2015-440 A.C. No. 46-01433-372811
CONSOLIDATION COAL COMPANY, Respondent	Mine: Loveridge #22

ORDER DENYING MOTION TO STRIKE

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 815(d), upon two petitions for assessment of civil penalties filed by the Secretary of Labor ("the Secretary") against Consolidation Coal Company ("the Respondent"). The case is scheduled for hearing on October 19-20, 2016.

The Secretary has proposed "specially assessed" penalties for the violations at issue in Docket No. WEVA 2015-440. The Respondent has filed a "Motion to Strike, and Motion in Limine to Exclude, the Secretary's Proposed Special Assessment Amount in WEVA 2015-440."

Legal Framework

The Commission holds the authority to assess all civil penalties for violations of the Mine Act, but the Secretary may make proposals as to the penalty amount. 30 U.S.C. § 820(i). The Secretary has promulgated regulations governing penalty proposals at 30 C.F.R. Part 100. Normally, MSHA applies the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3 to calculate the amount of a proposed penalty. However, the Secretary permits MSHA to waive the regular assessment process if MSHA "determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a), (b). MSHA calculates special assessments by applying what it refers to as the "General Procedures," a method and formula published on its webpage. *See* Respondent's Motion, Ex. B.

The Commission has repeatedly emphasized – most recently in *American Coal Company*, 38 FMSHRC _, Nos. LAKE 2011-701 et al., slip op. at 7 (Aug. 26, 2016) – that its administrative law judges assess penalties *de novo* and are not bound by the Secretary's proposed penalties or by the regulations in 30 C.F.R. Part 100. However, substantial deviations from the Secretary's proposed penalties must be explained. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983) (reaffirmed in *Am. Coal Co.*, slip op. at 8).

Parties' Positions

The Respondent contends that MSHA's General Procedures substantively amend 30 C.F.R. Part 100 in that they add binding rules that narrowly constrain MSHA's discretion by implementing a points formula which is very similar to the regular assessment formula, but which was not subjected to notice-and-comment procedures despite involving larger amounts of money, rendering it invalid under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. Because the special assessment amounts at issue in this case were calculated pursuant to the General Procedures, the Respondent argues they should be stricken from the record, citing *Drummond Company*, 14 FMSHRC 661 (May 1992). The Respondent further argues that the proposed penalty amounts are irrelevant to the judge's *de novo* penalty determination and are therefore inadmissible. To the extent that judges need a baseline penalty in order to explain substantial divergences under *Sellersburg*, *supra*, the Respondent contends that the regular assessment formula should be used. Alternatively, the Respondent suggests that the case should be remanded so MSHA can properly explain the proposed penalty.

The Secretary requests permission to respond to the Motion to Strike in his post-hearing brief. He contends that the issue presented in the Motion is non-dispositive and premature because, as a matter of course, issues pertaining to penalties are addressed after hearing.

Discussion

As noted above, Commission administrative law judges possess independent authority to assess all contested penalties *de novo* pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i); *Am. Coal Co.*, slip op. at 6. Issues pertaining to penalties are best considered and addressed when the judge is determining the appropriate penalty amount based on the evidence and the criteria set forth in section 110(i) after the case has been heard. Accordingly, I agree with the Secretary that the issues presented in the Respondent's Motion to Strike are not dispositive and need not be decided at this stage.

The Respondent relies on *Drummond* to support its argument that I should strike the proposed penalty amounts or remand them to MSHA for recalculation. In *Drummond*, the Commission remanded to MSHA a proposed penalty that had been calculated pursuant to a Program Policy Letter (PPL) that added a new category of violations to the violation history to enhance certain penalties. 14 FMSHRC at 668. This was an interim rule that had not yet been subjected to notice-and-comment rulemaking, and its method of calculating penalties conflicted with the method set forth in the Secretary's existing regulations. *Id.* at 691 ("We conclude that the civil penalties proposed in this matter are inconsistent with the existing Part 100 regulations, and constitute arbitrary enforcement action.").

By contrast, the Secretary now uses 30 C.F.R. § 100.5 as the sole basis for calculating special assessments. Section 100.5 was promulgated through notice-and-comment rulemaking in accordance with the APA. The provision is broad and leaves discretion to MSHA, but this is as Congress intended. *See* 30 U.S.C. § 820(i); *Am. Coal Co.*, slip op. at 4-6 (describing Secretary's plenary discretion in proposing penalties). The only requirements for special assessments are that a narrative must accompany the special assessment and the Secretary must justify the

increased penalty at trial. 30 C.F.R. § 100.5(b); *Am. Coal Co.*, slip op. at 7. Although the special assessment is not binding, *Sellersburg* renders it relevant. I will not use the special assessment as a baseline and will consider all of the parties' arguments as to the appropriate penalty, but if my independent penalty calculation deviates substantially from the Secretary's proposal, I must and will explain why pursuant to *Sellersburg*.

For the reasons discussed above, the Respondent's Motion to Strike is **DENIED**. The parties are free to revisit the pertinent issues raised in the Motion at hearing and in their post-hearing briefs.

Priscilla M. Rae
Administrative Law Judge

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