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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. COMMONWEALTH MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2015-621 A.C. No. 33-04642-387266 Mine: Tinsley Branch HWM 61

AMENDED ORDER DENYING MOTION FOR SUMMARY DECISION

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act").

Procedural Background

At issue in this proceeding is a single citation that was issued to Commonwealth Mining, LLC ("Commonwealth") under section 104(d)(1) of the Mine Act after a fatal accident occurred at its mine. On April 13, 2016, the case was stayed at the parties' request pending resolution of a related criminal proceeding against a foreman who was involved in the fatal accident. After the foreman entered a guilty plea in August 2016, the stay was lifted and this civil penalty proceeding was scheduled for hearing on March 28-29, 2017.

On November 25, 2016, before discovery had been completed, the Secretary filed a Motion for Summary Decision asking me to find that Commonwealth violated the Mine Act as set forth in the citation and to assess a penalty of $126,800.00 for the violation. The Secretary contends that summary decision is appropriate because, based on the entire record, there is no genuine issue of material fact and he is entitled to summary decision as a matter of law. At this stage in the proceedings, the record consists of the parties' pleadings and the materials submitted by the parties on summary decision, including a copy of the plea agreement from the related criminal case, which is the primary basis for the Secretary's Motion for Summary Decision.

Commonwealth opposes the Motion for Summary Decision. Commonwealth argues that material facts remain in dispute, including facts pertaining to the unwarrantable failure and flagrant designations and to the six statutory penalty criteria upon which I am required to make findings pursuant to 30 U.S.C. § 820(i), and that the record has not yet been developed on these issues. Commonwealth contends that the plea agreement in the related criminal case has no preclusive effect in this proceeding and asserts it is entitled to a hearing.

Legal Principles Governing Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

Discussion and Conclusions of Law

On October 7, 2014 a fatal accident occurred at Commonwealth's Tinsley Branch HWM 61 mine when miner Justin Mize entered into the highwall mining hole to retrieve a cutter-head chain in violation of 30 C.F.R. § 77.1502.[1] The foreman on duty was Anthony Cornett. The violation was assessed as significant and substantial (S&S), an unwarrantable failure and flagrant.

On August 25, 2016, Cornett entered a guilty plea in the United States District Court for the Eastern District of Kentucky – Southern Division at London. The plea agreement crafted by the U.S. Attorney and counsel for Cornett included an unsworn statement upon which Cornett was adjudged guilty. The statement simply said he "knowingly and willfully" permitted Mize to enter the mining hole. Sec.'s Mot. Ex. B. Cornett was sentenced to a term of two years' probation and $25.00 in costs. *Id.*

From these two words, "knowingly and willfully," used in the context of an unsworn statement entered as a proffer to support a guilty plea between the United States attorney and Mr. Cornett, the Secretary argues all of the elements charged in the instant violation have been established. Without the benefit of a trial, the Secretary argues that he has met his burden of proof, viewing the "facts" most favorable to the non-moving party, establishing that Commonwealth has committed a violation of the Mine Act that is significant and substantial, an unwarrantable failure and flagrant. The Secretary also asserts that the proposed penalty is appropriate. There being no material issue of fact remaining, he argues, he is entitled to summary decision.

[1] 30 C.F.R. § 77.1502 provides: "No person shall be permitted to enter an auger hole except with the approval of the MSHA Coal Mine Safety and Health District Manager of the district in which the mine is located and under such conditions as may be prescribed by such managers."

As Commonwealth correctly sets forth in its brief in opposition, there are numerous major flaws with this unusual theory of the Secretary's. The most obvious ones are that there are no "facts" of record and the parties to the Federal District Court criminal proceeding are different than those involved in this civil matter. The criminal matter was not an adjudication, no evidence was produced and the Court made no findings of fact. The unsworn statement of Mr. Cornett was the sole basis for the finding of guilt. The Secretary has provided nothing in addition to Cornett's guilty plea to constitute a record in this matter such as submission of deposition transcripts, responses to interrogatories or admissions, or sworn affidavits upon which to support a finding of facts, disputed or otherwise. Commonwealth has not stipulated to any facts at this point in the proceedings.

The only legal bases upon which the facts adduced at a prior court proceeding would be binding upon a later proceeding would be if the doctrines of res judicata or collateral estoppel applied. The doctrine of res judicata applies to prevent the re-litigation of claims in a "second suit involving the same parties or those in privity with them, based upon the same claim." *Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (quoting *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)). If the two actions are not identical, res judicata does not apply. In *Faith*, the company was charged with several roof support violations. The foreman involved had pled guilty previously in criminal court to a roof control violation under the Mine Act and was awarded probation with the proviso that he engage in no further serious unwarrantable violations of the Act. *Id.* at 1363. Following a subsequent violation, the magistrate held an evidentiary probation revocation hearing at which two MSHA inspectors testified and the magistrate issued a memorandum of findings concluding that the defendant had violated probation by committing "serious life threatening violations." *Id.* In the civil matter before the Commission, the Secretary argued that the magistrate's findings prohibited the operator from contesting the roof control violations before the ALJ. However, the Commission found res judicata did not apply as the magistrate's memorandum of findings did not indicate that he found the defendant had committed the specific violations that were before the ALJ. *Id.* at 1365-66.

The Commission similarly rejected the application of res judicata in a discrimination hearing where the complainant had previously filed a discrimination suit with the West Virginia Coal Mine Safety Board of Appeals. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 987 (June 1982). The board had issued a decision stating that "the dispute between Mr. Bradley and his superior did not involve safety matters and at no time did the matter of the individual safety of the miner arise." *Id.* at 985. Pending appeal from that decision, Bradley filed a discrimination action under the Mine Act which the respondent sought to dismiss under the doctrines of res judicata and collateral estoppel. The Commission rejected the res judicata argument, finding that the claims were not identical. The Mine Act, it found, may create entirely different rights and duties and address different wrongs arising out of the same set of facts. *Id.* at 986-89. Additionally, the decision of the State board was "extremely brief and conclusory" and "contain[ed] no findings of fact, credibility resolutions, or explanations for the conclusions reached" and therefore did not preclude litigation of the matter before the Commission. *Id.* at 989.

The Commission in *Bradley* also rejected the application of collateral estoppel, which precludes re-litigation in a second suit of issues that were actually litigated and necessary to the

outcome of the earlier suit. The Commission made clear that the party asserting the doctrine must specifically raise collateral estoppel and show that the precise issues involved in the second action were actually and necessarily decided in the first. *Bradley*, 4 FMSHRC at 990.

Neither the doctrine of res judicata nor collateral estoppel applies here. The Secretary has not specifically raised the doctrine of res judicata but makes a vague argument that the facts have been established by virtue of Cornett's guilty plea thus attributing them to Commonwealth as admissions of fact. Apparently, the Secretary confuses the legal authority for imputing the negligence of a foreman to the operator on an agency theory with being able to impute imprecise words used in a plea proffer to Commonwealth for the purposes of establishing all elements of the violation charged in this civil matter by MSHA against Commonwealth. This simply does not work. The parties involved in the criminal matter are not identical to, or in privity with, the parties in the instant civil matter. It can hardly be argued that Commonwealth had any involvement in the abbreviated criminal proceeding involving the U.S. Attorney, Cornett and his counsel that would have satisfied its due process rights to confront witnesses against it or raise defenses on its behalf. It also cannot be shown that the two actions are identical, one being a criminal proceeding against an individual and the other being a civil matter against the company involving issues of negligence, gravity and appropriate civil penalties. Res judicata does not apply.

Similarly, collateral estoppel cannot be used to support the Secretary's position here. Aside from the fact that the Secretary did not specifically raise the issue in his motion before me, the Commission has recognized that "[u]nder the doctrine of collateral estoppel, **a judgment on the merits** in a prior suit may preclude the relitigation in a subsequent suit of any issues **actually litigated and determined** in the prior suit." *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (emphasis added). Because Cornett's unsworn statement supporting his guilty plea does not constitute a judgment on the merits of an issue actually litigated, it does not support application of the doctrine of collateral estoppel.

Assuming the federal court had issued findings of fact with respect to Cornett's involvement in a "willful and knowing" violation of the Mine Act, such findings still would not involve litigation of any of the salient issues at trial here, making both res judicata and collateral estoppel unavailable to the Secretary. Without delving into an extensive discussion of case law regarding unwarrantable failure or flagrant violations, the words "willful and knowing" used by Cornett for the purposes of supporting a guilty plea cannot be twisted to fit the elements necessary to find the negligence or gravity involved in this violation charged by MSHA against Commonwealth. The Secretary attempts to rely on dictionary definitions of these two words to satisfy the elements necessary for a finding of unwarrantable failure and a flagrant violation under the Mine Act. There are elemental problems with this. When analyzing an unwarrantable failure assessment, the ALJ must examine the circumstances of the case and make detailed findings as to the extent of the violation and length of time it existed, whether it was obvious or posed a high degree of danger, whether the operator had been placed on notice that greater effort was needed at compliance and whether the operator had made attempts to abate the condition before the violation was issued. The ALJ must also determine the weight to be assigned to each of these factors. *See Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009); *San Juan Coal Co.*, 29 FMSHRC 125 (Mar. 2007); *Martin County*

Coal Corp., 28 FMSHRC 247 (May 2006); *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Jan. 1997). No interpretation of these two words can address any of these factors.

With regard to the flagrant assessment, the Commission has stated that the gravamen of a flagrant violation as opposed to an S&S one is the language "repeated or reckless failure to make reasonable efforts to eliminate a known violation." *American Coal Co*., 38 FMSHRC 2062, 2070 (Aug. 2016). The statute focuses more forcefully on violations that are known to the operator and what it has done to address the violations. "These factors, and not the degree of danger posed by a violation, are what distinguish the flagrant provision." *Id.* In analyzing the meaning of the word "repeated" as it applies to this issue, the Commission in *American Coal* found that the term does not have a plain meaning and that dictionary definitions are not dispositive in this context. *Id.* at 2073. There is nothing in the use of the words "willfully and knowingly" in the proffer, even considering any plain meaning or dictionary definition of those words, that would establish the element of "repeated or reckless failure to make reasonable efforts to eliminate a known violation" that is necessary to make a finding with regard to the flagrant assessment here.

Turning briefly to the penalty issue, the Secretary makes the argument that based upon the R-17 Assessed Violation History attached to his brief, the mine is small but its controller is large and therefore the penalty appears to be appropriate for its size. He also states that the burden rests on the operator to "introduce evidence" demonstrating that the penalty would adversely affect its ability to remain in business. The Commission has been quite clear in its directive that its judges must consider and make specific findings *de novo* on all statutory penalty factors contained in 110(i) of the Act. *Sellersburg Stone Co. v. Fed. Mine Safety & Health Review Commission,* 736 F.2d 1147, 1150-52 (7th Cir. 1984); 29 C.F.R. § 2700.30(a). It is extremely difficult to determine how Commonwealth could introduce evidence of an inability to pay the proposed penalty without the benefit of a hearing. Certainly, the criminal court did not address it with Mr. Cornett. Likewise, there is no other record addressing any of the 110(i) factors nor are there any stipulations by Commonwealth. There are no facts established by the record, uncontested or immaterial, to support a finding that the proposed penalty is appropriate.

For all the reasons set forth above, I find that summary decision is inappropriate in this matter. Accordingly, the Secretary's motion for summary decision is **DENIED.**

Priscilla M. Rae
Administrative Law Judge

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