FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

May 9, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WEST ALABAMA SAND & GRAVEL, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2009-870-M A.C. No. 01-02738-194100 Mine: West Alabama Sand & Gravel

ORDER TO SHOW CAUSE

Before: Judge Feldman

The single citation at issue is 104(d)(1) Citation No. 6511548, issued to West Alabama Sand & Gravel, Inc., ("West Alabama"), alleging a violation of 30 C.F.R. § 56.15005, which provides that "[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . ." The violation concerns the failure of a contract haul truck driver to wear a restraining device while securing his truck's load. The Secretary proposes a civil penalty of $15,971.00 for the cited violation in 104(d)(1) Citation No. 6511548. The Commission, in its remand in this matter, has vacated the initial decision's deletion of the unwarrantable failure designation and directed that I reconsider the issues of negligence and unwarrantable failure consistent with their decision. 37 FMSHRC 1884, 1891 (Sept. 2015).

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).

2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of "high" negligence level.

West Alabama's Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Thus, the only remaining issue is the appropriate civil penalty to be assessed for 104(d)(1) Citation No. 6511548. Consequently, on February 17, 2016, the parties were requested to specifically identify any aggravating or mitigating factors with respect to the civil penalty criteria in 30 U.S.C. § 820(i). The parties' responses to the February 17 Order are under consideration.

The Secretary's response to the Order asserted, in part:

> It is also notable that Respondent continues to consistently violate safety standards and essentially stopped paying assessed penalties in approximately January 2010, according to the Mine Data Retrieval System ["MDRS"].

Sec'y Resp., at 12 (Mar. 9, 2016).

Consistent with the above assertion, the MDRS reflects that of the $27,890.00 civil penalties assessed for the 59 citations and orders issued to West Alabama during the period June 2010 to November 2015, West Alabama has paid $200.00 in satisfaction of two citations. The MDRS further reflects that West Alabama is delinquent in its payment of the $27,690.00 total civil penalty for the remaining 57 citations and orders. Thus, with the exception of two citations, West Alabama has been delinquent in its payment of assessed civil penalties for approximately six years.

With respect to delinquency as it relates to the imposition of civil penalties, in the past, the Commission has narrowly construed the civil penalty criteria in section 110(i). In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), the Commission stated: "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Id.* at 850.

However, in *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012), the Commission departed from its narrow interpretation of section 110(i) by emphasizing the role of deterrence as a proper consideration in assessing civil penalties.[1] In this regard, the Commission noted:

> Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, and it explicitly called for consideration of the protection of the "public interest" - which includes such compliance - before a [penalty is assessed]. Consequently, it is eminently appropriate for a Judge to acknowledge the need for deterrence in [considering the appropriate civil penalty], with the understanding that the [ultimate civil penalty], consistent with fundamental principles underlying the penalty provisions of the Mine Act, discourage operators from violating health and safety regulations and laws in the future.

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[1] Although *Black Beauty* concerned the propriety of considering deterrence in the context of approving settlements of civil penalties, it is clear that deterrence is also an appropriate consideration in determining civil penalties in contested cases. *See Black Beauty*, 34 FMSHRC at 1865-66.

Id. at 1866. In sum, the Commission stated:

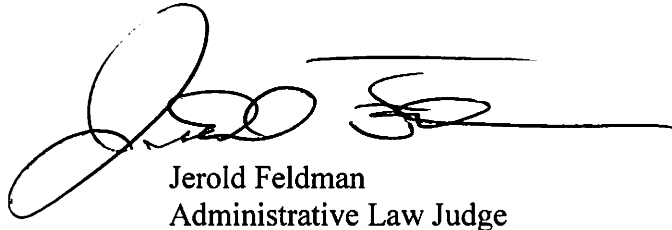
> Simply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties - to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties.

Id. at 1869.

In the final analysis, the imposition *and* payment of civil penalties is the statute's principal means of achieving the deterrence necessary to further the Mine Act's goal of promoting health and safety.

ORDER

In view of the above, West Alabama **IS ORDERED TO SHOW CAUSE on or before May 31, 2016**, why its delinquent payment history should not be considered an aggravating factor in determining the appropriate civil penalty to be assessed in this matter. If the Secretary elects to file a written response to West Alabama's submission, such response should be filed **on or before June 14, 2016**.



Jerold Feldman
Administrative Law Judge

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