# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2017

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| R. ALEXANDER ACOSTA, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | CIVIL PENALTY PROCEEDING |
| Petitioner | Docket No. KENT 2017-0183 |
| v. | A.C. No. 15-17741-433281 |
| KENAMERICAN RESOURCES, INC., | Mine: Paradise #9 |
| Respondent | |

**ORDER DENYING MOTION TO REMAND FOR REASSESSMENT**

Before: Judge McCarthy

This case is before me on a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1994). Currently pending are Respondent's Motion to Remand for Reassessment, the Secretary's Response (Opposition), and Respondent's Reply. For the reasons set forth below, Respondent's Motion to Remand for Reassessment is denied.

## I. Background

This matter arises from three violations issued under section 104(d)(1) of the Mine Act. Citation No. 9044780 alleges a significant and substantial ("S&S") violation of 30 C.F.R. § 75.400.[1] Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183. Order No. 9044781 alleges that the mine examiner performed an inadequate on-shift examination of a head drive and tailpiece in violation of 30 C.F.R. § 75.362(b).[2] The Secretary

[1] Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400.

[2] Section 75.362(b) requires, in relevant part, that, "[a] person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure

designated the alleged violation as S&S, reasonably likely to result in injuries resulting in lost workdays or restricted duty for one person, and the result of Respondent's high negligence. The Secretary also designated the violation in Order No. 9044781 as an unwarrantable failure to comply with section 75.362(b). *Id.*; *see also* Narrative Findings for a Special Assessment, Order No. 9044781, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183. Order No. 9049726 alleges that the pre-shift examinations of the No. 9 entry were not accurately recorded for two days in violation of 30 C.F.R. § 75.360(g).[3] The Secretary designated the alleged violation as S&S, reasonably likely to result in injuries resulting in lost workdays or restricted duty for two miners, and the result of Respondent's high negligence. The Secretary designated the violation in Order No. 9049726 as an unwarrantable failure to comply with section 75.360(g). Ex. A; *see also* Narrative Findings for a Special Assessment, Order No. 9049726, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183.

The Secretary proposed the following civil penalties: $4,623 for Citation No. 9044780; $12,300 for Order No. 9044781; and $55,200 for Order No. 9049726. The proposed civil penalty for Citation No. 9444780 was calculated according to the Secretary's Criteria and Procedures for Proposed Assessment of Civil Penalties. *See* 30 C.F.R. Part 100. Pursuant to section 100.5, however, the Secretary elected to waive the regular penalty assessments in favor of special assessments for Order Nos. 9044781 and 9049726.[4] *Id.* Both orders were specially assessed using the Secretary's General Procedures for Special Assessments ("General Procedures"), which have not been published in the Code of Federal Regulations. Secy's Response at 2; *see* U.S. Dep't of Labor, Mine Safety and Health Administration, General Procedures, https://arlweb.msha.gov/PROGRAMS/assess/SpecialAssess/assessment%20procedures.PDF (last accessed Aug. 29, 2017).

KenAmerican filed its Motion to Remand for Reassessment contesting the special assessment process and seeking an Order remanding the two proposed special assessments for reassessment without reference to or reliance upon the Secretary's General Procedures. Motion to Remand for Reassessment at 1. Respondent argues that the General Procedures remove all

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compliance with the respirable dust control parameters specified in the approved mine ventilation plan." 30 C.F.R. § 75.362(b).

[3] Section 75.360(g) provides, in relevant part:

> A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination, and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

30 C.F.R. § 75.360(g).

[4] Section 100.5 deals with determinations of penalty amounts and special assessments. 30 C.F.R. § 100.5

meaningful discretion, and as a result, the General Procedures are substantive or legislative rules under the Administrative Procedure Act's ("APA") formal notice and comment rulemaking requirements. *See* 5 U.S.C. §§ 551-584; Mot. at 2. KenAmerican is not, however, challenging the Secretary's discretion under section 100.5 to decide whether to regularly assess or specially assess a particular violation. Mot. at 2.

In his Response, the Secretary asserts that the General Procedures are a general statement of policy exempt from notice and comment. *See* 5 U.S.C. § 553(b)(3)(A); Resp. at 4-7. In particular, the Secretary contends that he maintains significant discretion in determining penalty assessments because the General Procedures account for varying facts and circumstances. Resp. at 5-7.

## II. Jurisdiction

The Commission possesses jurisdiction to rule on the validity of the General Procedures. The Commission has previously concluded that it had jurisdiction to "require the Secretary to re-propose his penalties" in limited circumstances. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 679 (April 1987). When the "Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings." *Id.* at 680.

The Commission held in *Drummond* that while section 101(d) of the Mine Act vests exclusive jurisdiction over challenges to the validity of promulgated "mandatory safety and health standards" to the Courts of Appeal, section 101(d) does not state or imply that this exclusive jurisdiction extends to non-binding agency pronouncements. 30 U.S.C. § 811(d); *Drummond Company, Inc.*, 14 FMSHRC 661, 673-74 Fn.14 (May 1992) (the Commission examined both the language of the statute and Congressional intent). In addition, the Commission emphasized that section 101(d) confers exclusive jurisdiction only when a mandatory standard is promulgated under section 101 of the Act. *See Brody Mining*, 36 FMSHRC 2027, 2035 (Aug. 2014).

In cases where the operator contests the Secretary's proposed civil penalty under section 105(d), the Commission has held that "where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues . . . to dispose fully of cases committed to Commission jurisdiction." *Drummond*, 14 FMSHRC at 674. Section 105(d) of the Mine Act also authorizes the Commission to direct "other appropriate relief," which includes declaratory relief in contest proceedings. *Id.*

As the General Procedures are not mandatory safety and health standards promulgated under section 101 of the Mine Act, they are outside the exclusive jurisdiction of the Courts of Appeal. Further, it is appropriate for the Commission to determine whether the General Procedures conform to section 100.5 in order to fully dispose of this matter. As a result, the Commission has jurisdiction over the Respondent's Motion to Remand for Reassessment.

## III. Procedure

While the Commission and its judges have jurisdiction over challenges to informal procedures, the Commissions has limited the timeframe in which such challenges may appropriately be considered. In *Youghiogheny & Ohio Coal Co.*, the Commission deemed it appropriate for an operator, prior to a hearing, to have an opportunity to "establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations." 9 FMSHRC 673, 679-80 (1987). The Commission in *Drummond* further clarified that it would be inappropriate to require the Secretary to re-propose a penalty "where a hearing on the merits of the penalty had already been held before a Commission judge." 14 FMSHRC at 677. Thus, the most suitable time to seek an order remanding for reassessment is before a hearing on the merits of any alleged violation and the appropriateness of the proposed penalty.

The Respondent filed its Motion to Remand for Reassessment on June 20, 2017, the same day it filed its Answer to the Secretary's Petition for the Assessment of Civil Penalty. Since the Motion to Remand for Reassessment was included within its initial filings and this matter has not yet been set for hearing, I conclude that the Commission may appropriately address Respondent's Motion.

## IV. Legal Principles and Analysis

Legislative rules are subject to a notice and comment process before promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. As defined in the Administrative Procedure Act (APA),

> "[r]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). While the definition of "rule" appears expansive, there are several exceptions to the notice and comment requirements:

> Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C § 553(b)(3).

Courts commonly consider the distinction between a legislative rule and a general statement of policy to be "enshrouded in considerable smog." *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Friedrich v. Sec'y of Health & Human Servs.*, 894 F.2d 829 (6th Cir. 1990); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984). An agency's expressed intentions may help distinguish between a legislative rule and a general statement of policy. This analysis entails the "consideration of three factors: (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-07 (D.C. Cir. 2006). While agency labels are indicative, it is the substance of what the agency has "purported to do and has done which is decisive." *Drummond*, 14 FMSHRC 661, 683 (May 1992).

Another consideration that helps clarify the difference between a legislative rule and a general statement of policy is whether agency action creates a binding norm. Courts consider the effects of agency actions, and determine whether the agency pronouncement (1) imposes any rights and obligations or (2) genuinely leaves the agency and its decision makers free to exercise discretion. *Center for Auto Safety*, 452 F.3d at 806; *Drummond*, 14 FMSHRC at 684 (legislative rules "foreclose alternative courses of action or conclusively affect rights of private parties"). A statement will likely "be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates." *Dyer v. Sec'y of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989). Thus, the distinction between legislative rules and general statements of policy "turns on an agency's intention to bind itself to a particular legal policy position." *U.S. Tel. Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

An agency creates no binding norm when it is free to consider individual facts. *National Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009). Similarly, when the whole context of a general statement of policy "is in a subject area controlled by individual case-by-case discretion, the [statement] is by its very nature not a binding rule." *Id.* at 1372-73. A court should pay particular attention to the language used in the agency's pronouncement in determining whether the agency action is mere discretionary policy or a binding legislative rule. *See Brody Mining, LLC*, 36 FMSHRC 2027, 2049 (Aug. 2014); *Center for Auto Safety,* 452 F.3d at 806.

In the instant matter, the Secretary characterizes the General Procedures as a general statement of policy that is discretionary in nature and exempt from notice and comment under the APA. *See* 5 U.S.C. § 553(b)(3)(A); Resp. at 4-7. Further, the General Procedures are not published in either the Federal Register or the Code of Federal Regulations.

The General Procedures also fashion no binding norms. No additional obligations or rights are created, and target penalties, which can fluctuate significantly (±25% or more), preserve prosecutorial discretion. Gen. Proc. at 2. Because they are the exception

to the norm, special assessments are inherently discretionary. *See* 30 C.F.R. § 100.5. As a result, the decision to apply a special assessment, rather than a regular assessment, is based upon individual case-by-case discretion that extends into the determination of the penalty amount. While the General Procedures provide guiding charts and tables, the General Procedures also state that MSHA is free to adjust the special assessment based on "unique facts and circumstances." Gen. Proc. at 2. The Secretary is not bound to a specific norm or rule. There are many courses of action available.

KenAmerica argues that *U.S. Telephone Association* provides guiding precedent. I disagree. While the penalty schedule at issue in *U.S. Telephone Association* has some similarities to the General Procedures, the FCC abandoned its traditional case-by-case approach for assessing forfeitures and adopted a base forfeiture schedule as a percentage of maximum fines for each category of licensee that violated the Communications Act. 28 F.3d 1232, 1233 (D.C. Cir. 1994). The instant case, by contrast, involves special assessments, which are inherently discretionary and assessed on a case-by-case basis. Further, the court in *U.S. Tel. Ass'n* went to great lengths to show that the FCC had rigidly applied their allegedly discretionary penalty schedule in 299 out of 300 instances. *Id.* at 1235. There is no such evidence here.[5]

Similarly, the Respondent's reliance on *Drummond* is misplaced. In that case, Drummond asserted that the Secretary unlawfully enforced a substantive program policy letter ("PPL"), which outlined an interim excessive history program, without following the necessary APA notice and comment process. The Secretary claimed that the penalty proposals under the PPL fell within section 100.5 special assessments. The Commission rejected the Secretary's argument, but emphasized that "[s]pecial assessments are based on the condition surrounding the violation and 'neither the nature nor the seriousness of a particular violation will automatically result in a special assessment.'" 14 FMSHRC at 690, citing 47 Fed. Reg. 22292 (1982). The Commission went on to state that "[a]lthough Secretarial discretion is a cornerstone of the section 100.5 special assessment program, the PPl creates a rigid formula for the proposed assessment of all excessive history cases." 14 FMSHRC at 690. The *Drummond* PPL outlined a mathematical formula that "allowed no room for maneuver either with respect to the existence or consequences of an excessive history." 14 FMSHRC at 687, 690. Conversely, the General Procedures not only maintain the discretion to apply a regular or special assessment, but they also provide substantial flexibility in the proposed penalty. Unlike the *Drummond* PPL, the General Procedures are not determinative in nature.

On the surface, the General Procedures may appear mechanical, but in reality, they are non-binding pronouncements that do not create obligations or bestow benefits. Because the Secretary retains significant discretion in proposing special assessment penalties, I conclude that the General Procedures are not legislative or substantive rules subject to notice and comment under the APA.

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[5] It is unreasonable to infer any broad conclusions based only on the two special assessments at issue.

## V. Order

**WHEREFORE**, Respondent's Motion to Remand for Reassessment is **DENIED**.

Thomas P. McCarthy
Administrative Law Judge

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