

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-272
Petitioner	:	A. C. No. 15-16856-03536
v.	:	
KYBER COAL COMPANY,	:	Docket No. KENT 95-276
Respondent	:	A. C. No. 15-16856-03537
	:	
	:	Docket No. KENT 95-280
	:	A. C. No. 15-16856-03538
	:	
	:	Docket No. KENT 95-284
	:	A. C. No. 15-16856-03539
	:	
	:	Docket No. KENT 95-288
	:	A. C. No. 15-16856-03540
	:	
	:	Docket No. KENT 95-689
	:	A. C. No. 15-16856-03544
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	:	Docket No. KENT 95-692
	:	A. C. No. 15-16856-03542
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	:	Docket No. KENT 95-697
	:	A. C. No. 15-16856-03547
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	:	Docket No. KENT 95-701
	:	A. C. No. 15-16856-03545
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	:	Docket No. KENT 95-707
	:	A. C. No. 15-16856-03548
	:	
	:	Docket No. KENT 95-713
	:	A. C. No. 15-16856-03543
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	:	Docket No. KENT 95-715
	:	A. C. No. 15-16856-03546
	:	
	:	Docket No. KENT 95-776
	:	A. C. No. 15-16856-03549
	:	
	:	Elmo No. 5 Mine

ORDER GRANTING MOTION FOR A RULING IN LIMINE
ORDER DENYING MOTION FOR REMAND
ORDER DENYING MOTION FOR LEAVE TO FILE REPLY BRIEF

In these civil penalty cases the Secretary is petitioning for the assessment of civil penalties against Kyber Coal Company for approximately 219 alleged violations of mandatory safety standards for underground coal mines. The matters are part of the Berwind series of cases in which the Secretary alleged that five entities, Berwind Natural Resources Corporation (Berwind), Kentucky Berwind Land Company (Kentucky Berwind), Jesse Branch Coal Company (Jesse Branch), Kyber Coal Company (Kyber) and AA&W Coal Company (AA&W) were liable jointly and severally for numerous violations of mandatory safety standards at the Elmo No. 5 Mine. The cases arose out of an explosion that occurred at the mine on November 30, 1993. The explosion took the life of one miner.

AA&W did not contest the Secretary's assertion of jurisdiction, but the other four companies did. Each of the four argued that they were not operators under section 3(d) of the Mine Act (30 U.S.C. §802(d)) and hence they were not liable for the alleged violations. The cases were assigned to me, and I bifurcated them in order to determine first the jurisdictional questions. Following a ruling on cross motions for summary decision and a hearing on the jurisdictional aspects of the cases, I held that Berwind, Kentucky Berwind, and Jesse Branch were not operators, but that Kyber was (Berwind Natural Resources Corporation, et al., 18 FMSHRC 202 (February 1996)). On appeal, the Commission upheld this result, albeit on the basis of a different rationale (Berwind Natural Resources Corporation, et. al., 21 FMSHRC 1284 (December 1999)). Thus, of the four entities who contested the Secretary's assertion of jurisdiction, only Kyber remained a party subject to potential liability for civil penalties should the Secretary prove her allegations regarding the merits of the alleged violations. Because of this, the Commission remanded the matter to me for further proceedings as to Kyber (21 FMSHRC at 1325).

After receiving the remand, I ordered counsels for Kyber and the Secretary to engage in extensive prehearing discussions on a number of issues and to report the results of their discussions in an on-the-record conference (see Order (January 12, 2000)). In the meantime, Kyber has filed two motions. One motion seeks a ruling in limine that the Secretary improperly proposed assessments based upon a theory of joint and several liability. The motion goes on to request that if violations are found to have existed, civil penalties be assessed against Kyber according to the criteria of section 110(i) of the Act (30 U.S.C. § 820(i)) and according to the Secretary's regulations (30 C.F.R. Part 100) as those criteria and regulations individually apply to Kyber. The other motion seeks a ruling that because the Secretary improperly assessed the proposed civil penalties, the penalties be remanded to the Secretary for recalculation on the basis of the criteria and regulations as they apply individually to Kyber (Kyber Motion For Ruling In Limine and Contingent Motion for Remand (February 8, 2000)).

The Secretary opposes the motions and argues the courts and the Commission long have accepted the concept of joint and several liability in multiple operator situations and that the proposed penalties were assessed properly. The Secretary asserts that the term "operator" in section 110(i) of the Act can refer to joint operators where multiple entities are running a mine

and that the civil penalty criteria enumerated in section 110(i) can be applied to the combined operation of a mine as easily as to separate companies (Sec. Resp. 3-4). Additionally, the Secretary opposes remanding the cases for recalculation of the penalties. She states that “the Commission, as the ultimate determiner of the suitability of penalties, can make a determination de novo on that question at the time of trial” (Id. 5).

The Secretary’s Petitions and The Proposed Penalties

The Secretary’s petitions name Kyber as the Respondent and state that Berwind, Kentucky Berwind, Jesse Branch, Kyber and AA&W each are “jointly and severally liable for the penalties associated with the [alleged] violations” (Petition 2). In Exhibit A of the petitions the Secretary additionally states, “The same proposed assessment was issued jointly and severally to AA&W. . . ., Jesse Branch . . . , [Kentucky] Berwind . . . , and Berwind . . . for the violations alleged” (see e.g., Exhibit A (Docket No. KENT 95-272)). (Exhibit A is a form that “list[s] the alleged violations and the proposed penalties” (29 C.F.R. §2700.28(b)). It contains the Secretary’s evaluation of the civil penalty criteria and reveals how the Secretary determined the proposed assessments.)

A review of the Secretary’s petitions and the exhibits makes clear that the Secretary applied the same penalty criteria to all of the alleged operators. She did so even though most, if not all of the criteria, were based upon AA&W’s operation of the mine. For example, the criterion of the appropriateness of the penalty to the size of the business was based upon the tonnage attributed to AA&W and the operator’s history of previous violations was based upon the prior violations issued to AA&W. The Secretary made no attempt independently to apply the penalty criteria to Kyber or to any other of the Berwind-related entities. In essence, when it came to proposing penalties, Kyber was treated as though it were AA&W.

The Commission found that at all times relevant, Kyber was an operator because “Kyber was substantially involved in the mine’s operation” (Berwind, 21 FMSHRC at 1294) and the Commission agreed that “Kyber’s active participation and its authority to actively participate in the decision-making process regarding the daily development of the mine . . . rendered . . . [Kyber] an operator within the meaning of the Act” (Berwind, 21 FMSHRC at 1295). As an operator, Kyber will be liable, jointly with AA&W, for the penalties assessed for all violations that are found to have existed at the mine.

However, although Kyber and AA&W will be liable jointly, their shared liability should not be confused with their status as operators. Kyber and AA&W are individual, not unitary, operators. In this regard, it is worth noting that they do not possess common management, they do not share common ownership, and one does not have such pervasive control over the other that they should be treated as one (see Berwind, 21 FMSHRC at 1317). Because they are individual operators of the same mine they are entitled to have the Secretary propose penalties on the basis of the penalty criteria as the criteria apply individually to them. Therefore, I conclude the Secretary incorrectly proposed the civil penalties for which she petitioned.

Is A Remand Appropriate

Having found the Secretary erred in proposing the penalties, the question is whether a remand to re-propose them is appropriate. As the parties recognize, the Commission has held that in certain circumstances it has the authority to require the Secretary to re-propose penalties in a manner consistent with the Part 100 penalty regulations. The Commission's goal in ordering the Secretary to do so is to guard against arbitrary agency action (Youghioghney & Ohio Coal Co., 9 FMSHRC 673 (April 1987) (Youghioghney & Ohio Coal Co.)). There are considerations in the subject cases that at first glance seem to call for a remand. The Secretary has, in fact, acted arbitrarily in proposing penalties, and Kyber has objected to the Secretary's action (see Youghioghney & Ohio Coal Co., 9 FMSHRC at 679-680)). In fact, not only has Kyber objected in the motions under consideration, she raised the same objection much early in the proceedings (see Kyber Motion To Stay Further Proceedings (March 22, 1995)). Moreover, it could well be, as Kyber maintains, that re-proposed penalties would make more likely a comprehensive settlement of the cases.

However, the question of a remand essentially is one of discretion rather than of law, and while I recognize that there are factors which well might justify an order requiring the Secretary to re-propose the penalties, I conclude the factors are overshadowed and outweighed by another consideration. An order remanding the cases would not be "intercession by the Commission at an early stage of the litigation" (Drummond Company, Inc., 14 FMSHRC 661, 667 (May 1992)). Rather, these cases, which now have proceeded to the point where the merits of the alleged violations can be adjudicated, are among the oldest, if not the oldest, on the Commission's docket, and they must be resolved. Any further delay, such as that occasioned by a remand, only would make the disappearance of witnesses and the fading of memories more likely than they are already. The public, the industry, miners — and, perhaps above all, the parties — all have an interest in bringing these cases to a conclusion.

Therefore, I will not order these matters remanded for re-proposal of the penalties. In choosing to exercise my discretion in this manner I am mindful of the potential prejudice to Kyber caused by the Secretary's erroneous initial proposed assessments. However, I believe that any prejudice can be "cured" by applying the statutory civil penalty criteria as they relate to Kyber in any independent assessments I make based on the record evidence.

ORDER

For the reasons stated above Kyber's motion for a ruling in limine is **GRANTED**. In addition, Kyber's motion to remand is **DENIED**. Finally, Kyber's Motion for Leave to File Reply Brief also is **DENIED**.

My Order of January 12, 2000, remains in effect. Under the order Kyber and the Secretary have an obligation to confer and to discuss (1) all disputed issues of fact and law, (2) matters that can be subject to stipulations, (3) the validity of the subject citations and order (4) the amount of the penalties, and (5) possible settlement of all or any part of the cases. In view of my ruling on Kyber's motion in limine, when the parties confer and discuss these matters, they are directed to consider the statutory civil penalty criteria and the bearing of the criteria on the cases solely as the criteria relate to Kyber.

The parties are reminded that a prehearing conference will take place at 8:30 a.m., on April 18, 2000, and continuing to April 19, if necessary, to report on the results of the parties discussions and on their preparations for trial.

David F. Barbour
Chief Administrative Law Judge

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