FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 29, 1995

KELLYS CREEK RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 92-122-R Citation No. 3380190; 1/7/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 92-123-R Citation No. 3380191; 1/7/92
	:	Docket No. SE-92-124-R Citation No. 3380192; 1/7/92
	:	Docket No. SE-92-125-R Citation No. 3380193; 1/7/92
	:	Docket No. SE-92-126-R Citation No. 3380194; 1/7/92
	:	Docket No. SE-92-127-R Order No. 3380195; 1/7/92
	:	Docket No. SE-92-128-R Citation No. 3380196; 1/7/92
	:	Docket No. SE-92-129-R Order No. 3380197; 1/7/92
	:	Docket No. SE 92-130-R Order No. 3380198; 1/7/92
	:	Docket No. SE 92-131-R Order No. 3380199; 1/7/92
	:	Docket No. SE 92-147-R Order No. 2805080; 1/10/92
	:	Docket No. SE 92-148-R Order No. 2804581; 1/10/92
	:	Docket No. SE 92-150-R Order No. 2804583; 1/10/92
	:	Docket No. SE 92-171-R Order No. 339509; 1/21/92

	:	
	:	Mine No. 78
	:	ID No. 40-02934
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-322
Petitioner	:	A.C. No. 40-02934-03529
v.	:	
	:	Docket No. SE 92-339
KELLYS CREEK RESOURCES, INC.,	:	A.C. No. 40-02934-03530
Respondent	:	
	:	Docket No. SE 93-584
	:	A.C. No. 40-02934-03540
	:	
	:	Mine No. 78

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner.
G. Christopher Van Bever, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky, for the Respondent.

Before: Judge Weisberger

I. History of these cases

These Contests and Civil Penalty Proceedings are before me based on Notices of Contest filed by Kellys Creek Resources Inc., ("Kellys Creek") challenging the issuance by the Mine Safety and Health Administration (MSHA) of 44 citations and/or orders alleging violations of various mandatory safety standards. The Secretary of Labor ("Secretary") filed three Proposals for Assessment of Civil Penalty alleging violations of various mandatory standards. Pursuant to Notice, these cases were heard on January 18 and 19, 1995.

The parties stipulated to the facts of the violations, including the degree of negligence and gravity, and the findings of significant and substantial and unwarrantable failure as set forth in the citations and orders at issue. The Secretary stipulated to the good faith exhibited by Kellys Creek in attempting to achieve compliance after notification of the violations at issue.

In its brief, Kellys Creek challenges the issuance of one of the citations[1], and two of the orders[1] at issue on the ground

[1]Citation No. 3380194

that the Secretary issued multiple citations for multiple violations of the same standard in violation of MSHA policy. Also, Kellys Creek also it is argued that the imposition of penalties would violate the Double Jeopardy Clause of the Fifth Amendment. Further, Kellys Creek argues that penalties were erroneously assessed by the Secretary using criteria and procedures not in effect at the time of the accident at issue. Lastly, Kellys Creek seeks a reduction in penalties, and requests that the Secretary be directed to recalculate the penalties taking into consideration its financial status. These arguments are considered below.

II. Discussion

A. Whether the Secretary, in violation of his policy, erroneously issued multiple citations for multiple violations of the same standard.

In January 1992, Kellys Creek was engaged in retreat mining, i.e., the removal of coal pillars from areas of the mine that had previously been mined. The sequence in which various pillar blocks were to be cut was governed by Kellys Creek's Roof Control Plan ("Plan") on January 1, 1992, a roof-fall occurred, fatally injuring two miners, and seriously injuring a third. MSHA Inspector Daniel Johnson issued one citation and two orders based upon the failure of Kellys Creek to follow the sequence set forth in the Plan. Citation No. 3380194 sets forth a failure to follow the proper sequence in mining pillar block No. 3. Order No. 3380195 sets forth the failure to follow the proper sequence in mining pillar block No. 4, and Order No. 3380196 sets forth a failure to follow the proper sequence in mining pillar block No. 6. Approximately 20 feet separated the pillar blocks designated as Nos. 3, and 4, and approximately 60 feet separated the pillar blocks designated as Nos. 4 and 6. Johnson indicated that the pillar blocks designated as Nos. 3, 4, and 6 were in the "same general area" of the mine (Tr. 57) and in the same section, i.e., third left.

Kellys Creek argues that the citation and orders at issue were improperly issued as they all cited a violation of 30 C.F.R. ' 75.220 in the same area of the Mine. In support of its position, Kellys Creek relies on the following language in MSHA's Program Policy Manual ("PPM"):

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[1]Order Nos. 3380195 and 3380196

> However, where there are multiple violations of the same standards which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued. (Resp. Ex. 2, P. 15).

Johnson indicated that all three cited acts occurred in the same general area of the mine and that the same standard was violated. I note, however, that in his testimony Johnson explained that there was not only one violation covering all three pillars at issue because "these are three separate and distinct areas of being violated (sic)" (Tr. 46).

On cross-examination, Johnson testified as follows relating to the cited situations: "Pillars 3, 4 and 6 were three separate, distinct acts (sic). They were mining in three different places, not complying with the roof control plan in three different locations at the same time." (Tr. 70).

The Plan, as supplemented in September 1991, provides a detailed cutting sequence for the removal of coal from pillar blocks (Government Exhibit No. 18). The removal of coal from each pillar block constitutes a separate and distinct operation. I thus find that, although the three cited pillar blocks were in the same general area, the operation at each block was distinct, and hence each pillar block constituted a "distinct area." Thus, the issuance of three separate citations/orders by Johnson was consistent with the PPM. Although the PPM precludes the issuance of multiple citation of violations of the same standard relating to "the same area of the mine," it mandates that, "separate citations shall be issued for: ... identical violations in distinct areas of a mine" (Resp Ex. 2, P. 15). Further, Johnson's action herein was fully consistent with Section 110(a) of the Federal Mine Safety and Health Act of 1977 ("the Act") which provides, as pertinent, as follows: "[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

I conclude that it was not improper for Johnson to have issued three citations/orders herein.

B. Assessment of penalties by the Secretary based on criteria not in effect at the date of the accident at issue

The accident that precipitated the assessment of the civil penalties in question occurred on January 1, 1992. On Friday, January 24, 1992, MSHA published a final rule setting forth new

procedures for proposing civil penalties under the Act, and increasing the maximum penalty from $10,000 to $50,000 (57 Fed. Reg. 2968, January 24, 1992). The effective date for the new penalty assessment criteria was set for March 1, 1992.

Essentially it is Kellys Creek's position that the Secretary's assessment of penalties herein in excess of $10,000, was based on a retroactive application of the final rule, and as such was in error. Kellys Creek seeks an order directing the Secretary to recalculate the penalty assessments in accordance with the regulatory limit of $10,000 that was in effect on the date of the accident (30 C.F.R. ' 100(3)(g)(1991)).

I find Kellys Creek's argument to be without merit, and the requested relief is denied for the reasons that follow. Under the Act, the Secretary proposes and the Commission assesses civil penalties for violations of the Act. (See 30 U.S.C. ' 815(a) & (d) and 820(a) & (i)). If an operator contests the Secretary's proposed assessment, the Commission's jurisdiction attaches and, pursuant to Section 110(i) of the Act, the Commission is authorized to assess civil penalties.

Assessment of penalties by the Commission is strictly de novo. See Youghiogheny & Ohio Coal Co., ("Y & O"), 9 FMSHRC 673, 678 (April 1987) . In Y & O, supra, at 678-679, the Commission elaborated as follows:

> We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1986); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In Y & O, supra, the Commission held that once a hearing has been held, a determination by a Commission Judge that the Secretary did not comply with Part 100 in proposing a penalty "... does not require affording the Secretary a further opportunity to propose a penalty. Rather, in such circumstances the appropriate course is for the Commission or its judges to assess an appropriate penalty based on the record." Y & O, supra, at 679.

In Y & O, supra, at 679, the Commission set forth the basis for its holding as follows:

> The Commission possesses explicit, statutory authority to independently assess an appropriate penalty assessed on the record evidence pertaining to the statutory criteria specified in section 110(i), 30 U.S.C. ' 820(i), developed before it. The record developed in an adversarial proceeding concerning the statutory penalty criteria invariably will be more complete, current and fairly balanced than the information that is normally available to the Secretary at the pre-hearing stage when he must unilaterally determine and propose a penalty. Further, because the Commission is itself bound by proper consideration of the statutory criteria and its penalty assessments are themselves subject to judicial review under an abuse of discretion standard, no compelling legal or practical purpose would be served by requiring the Secretary to undertake again to propose a penalty where a preferable record already has been developed before the Commission.

I conclude that this rationale and the holding of the Commission in Y & O, supra, applies with equal force to the case at bar. I find that a proposed assessment by the Secretary based on a retroactive application of a final rule does not mandate reassessment, nor does it preclude a de novo assessment of a penalty after a hearing.

C. Penalty

1. Docket No. SE 93-584

As a consequence of a roof fall on January 1, 1992, which resulted in two fatalities, MSHA issued five citations under Section 104(a) of the Act, one Section 104(d)(1) citation, and five Section 104(d)(1) orders. Kellys Creek does not contest the violations. Also, Kellys Creek does not contest the findings of significant and substantial, gravity, unwarrantable failure, and level of negligence set forth in these citations and orders.

a. Citation Nos.. 3380190, amd 33801991, and Order No. 3380194

On their face, Citation Nos. 3380190, 3380191 and 3380194 appear to cite violative conditions that could have been most directly responsible for the roof fall that caused two fatalities. Accordingly, these violations were of the highest

level of gravity. Further, I note that Kellys Creek has not contested the findings of high negligence relating to Citation No. 3380190, and reckless disregard relating to Citation No. 3380194. In assessing a penalty for these violations, considering the fact that two miners were killed as a result of these violations, the elements of gravity and negligence are accorded the most weight.

However, the penalties to be assessed, however, are reduced a slight degree due to their effect on the ability of Kellys Creek to continue in business.[3] In this connection, although there is no evidence that Kellys Creek has dissolved, the Secretary has stipulated that the former has ceased operations (Secretary's Brief p.31 n.3). Kellys Creek had net revenue of $843,200 in the fiscal year ending May 31, 1994, but a loss of $45,749.[4] More importantly, at the end of fiscal year 1993 Kellys Creek's assets were only $47,306. In April 1995, Kellys Creek had assets of less than $5,000 and liabilities in excess of $130,00.

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[3]Kellys Creek alleges error on the part of the Secretary iin not considering the impact of proposed penalites on its ability to continue in business. Kellys Creek requests an order directing the Secretary to properly recalculate the proposed penalty . This request is denied for the reasons set forth above, (II(B), infra).

[4]According to Kellys Creeks' tax return, the loss amounted to $60,717. However, I find that this loss should be reduced by $14,923, the accumulated depreciation taken as a deduction from income.

Considering all the above, I find the following to be the proper penalties for the following citations/orders: 3380190-$45,000, 3380191-$45,000 and 3380194-$45000.[5]

b. Citation Nos. 3380192 and, 3380193, Order Nos. 3380195, 3380196, 33801197, 3380198, 3380199, and Citation No. 3380442.

Based on the levels of gravity and negligence set forth in these citations and orders not contested by Kellys Creek, and considering the impact of a penalty on the ability of Kellys Creek to continue in business, I find that the following penalties are appropriate for the violations established by the following citation/orders: 3380192-$4,500, 3380193-$2,700; 3380195-$4,500, 3380196-$4,500, 3380197-$2,700, 3380198-$2,700, 3380199-$2,700, and 3380442-$20.

2. Docket No. SE 93-322

These citations and orders were not issued as a result of the fatal roof fall on January 1, 1992. Based on the levels of gravity and negligence set forth in these citations and orders not contested by Kellys Creek, and considering the impact of a penalty on the ability of Kellys Creek to continue in business, I find that the following penaltiles are appropriate for the violations established by the following citation/orders: 2804581-$200, 2804583-$200, 2805080-$200, 3395509-$200, 39511-$150, and 3395712-$150.

3. Docket No. SE 92-339 (Order No. 3395715)

This order was not issued as a result of the fatal roof fall on January 1, 1992. Based on the levels of gravity and negligence set forth in this order, not contested by Kellys Creek, and considering the impact of a penalty on the ability of

[5]My authority to make a de novo assessment of a penalty in excess of $10,000 for an established violation is based on the Omnibus Reconciliation Act of 1990, effective November 5, 1990 (Pub.L. 101-508, title III, ' 3102) which amended 30 U.S.C. ' 820(a).

Kellys Creek to continue in business, I find that a penalty of $200 is appropriate for this violation.

D. Whether the imposition of penalties for the cited violations are precluded by the Double Jeopardy Clause of the Fifth Amendment

On July 23, 1992, the United States Attorney for the Eastern District of Tennessee issued a three count Bill of Information charging that Kellys Creek and Hollis Rogers, as president, violated certain mandatory health and safety standards for underground coal mines. Kellys Creek subsequently plead guilty to the three count Bill of Information and received a penalty of $5,000. The $5,000 penalty was comprised of a $2,000 penalty for Count 1; a $2,000 penalty for Count 2; and a $1,000 penalty for Count 3. Essentially, it is Kellys Creek's position that since the Bill of Information encompasses Citation/Order Nos. 3380192, 3380193, 3380195, and 33801198, that the Secretary's attempt to impose penalties for these citations/orders violates the Double Jeopardy Clause by subjecting Kellys Creek to a punishment for the same conduct for which it was previously punished in a prior criminal proceeding. Kelly Creek relies solely on United States v. Halper, 490 U.S. 435 (1989), which held as follows: "[U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (490 U.S., supra, at 448-449).

For the reasons that follow, I find that U.S. v. Halper, supra, is not applicable to the Commission's authority under Section 110(i) of the Act to assess civil penalties where violations of the Act have been established in Commission proceedings.

In U.S. v. WRW Corp., 986 F.2d 138 (6th Cir. 1993), the Sixth Circuit was presented with the issue of whether the imposition of civil penalties under Section 110 of the Act following criminal convictions under Section 110 of the Act was a violation of the Double Jeopardy Clause. The Court took cognizance of Halper, supra, but followed the previously established framework to determine whether a Civil Proceeding was punitive or remedial.[6] The Court referred to United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-63, where the

[6]Kennedy v. Mendoza Martinez, 372 US 144 (1963) first set forth the factors to be assessed in determining whether a sanction is civil or criminal.

Court applied the following test for determining whether a civil proceeding is criminal and punitive, or civil and remedial:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other... . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. (quoting United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980)) (citations omitted).

In WRW, supra, the Court applied this test to penalties imposed under Section 110 of the Act as follows:

> In this case, it is obvious that Congress has intended the penalties under 30 U.S.C. ' 820(a) to be civil. Not only is the statute so labeled, but the civil provisions are somewhat broader in scope than the criminal provisions. Whereas "willful" violations can be "punished" by a criminal fine or imprisonment under 30 U.S.C. ' 820(d), civil penalties may be assessed regardless of fault. 986 F.2d, supra, at 141.

The Court, in WRW, supra, next analyzed the purpose of the civil penalties provided for in Section 110(i) of the Act, and concluded that it is remedial, rather than a form of punishment. In reaching this conclusion, the Court, in 986 F.2d, supra, at 141-142, stated as follows:

> We emphasize that the civil penalty imposed does not involve an affirmative disability or restraint, has not been historically regarded as a punishment, and does not require a finding of scienter. The defendants argue that the imposition of a civil penalty promotes the aims of retribution and deterrence, given the various factors used to determine the amount of the civil penalty. However, even though the application of these factors to a given case may result in a penalty which is punitive, we conclude that imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety. Although the defendants further argue that their behavior was

> already a crime under 30 U.S.C. ' 820(d), as pointed out above the civil penalty provisions cover a broader range of conduct than the criminal provisions under the Act and are not co-extensive with the criminal provisions. Moreover, it is clear that "'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.'" One Assortment of 89 Firearms, supra, 465 U.S. at 365, 104 S.Ct. at 1106-1107 (quoting Helvering v. Mitchell, 303 U.S. 391 399, 58 S.Ct.630, 633, 82 L.Ed. 917 (1938)).

Finally, in WRW, supra, the Court analyzed whether the civil penalty appeared excessive in relation to a remedial purpose[7] Specifically, the Court analyzed whether the civil penalty was excessive in relation to the Government's expenses. In support of this analysis, the Court, in WRW, 986 F.2d, supra, at 142, quoted from Halper, supra, at 449 as follows:

> [T]he precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain ... . Similarly, it would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. In other words, ... the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice.

In the instant case, according to the Affidavits filed with the Secretary's Brief, costs for the hours worked by inspectors, investigators and attorneys on the respective civil and criminal cases, and the costs for their respective meals, lodging and travel during the course of these investigations, inspections, and hearings amounts to $47,149.50. This figure does not reflect the total costs to the government, which also included the use of government vehicles, the costs of assessing the penalties, the costs of clerical and other support staff within MSHA, the Office of the Solicitor or the United States Attorney's Office in Chattanooga, Tennessee, and does not include any amounts for the

[7]This analysis is the last of the factors set forth in Mendoza v. Martinez, supra. It also was the focus of the court's attention in Halper, supra.

ancillary cost of benefits, e.g., retirement and health insurance, paid to the employees involved.

Based on the holding and rationale set forth in WRW, supra, I find that the penalty provisions set forth in Section 110(i) of the Act are remedial and civil in nature, and not criminal. Further, I find that the costs to the government exceed the total penalty of $16,200, which I found to be proper for the violations established for Citation No. 3380192 and Order Nos. 3380193, 3380195, 3380198[8], which, in essence, correspond to the acts pleaded to in the Bill of Information. I thus conclude that the assessment of a penalty, infra, for these orders/citation does not subject Kellys Creek to a second punishment in violation of the Double Jeopardy Clause.

ORDER

It is ORDERED that Kellys Creek pay a total penalty of $160,420 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

[8]II(C)(1)(b), infra.

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