

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. 6TH FLOOR
WASHINGTON D. C. 20006-3868

September 29, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-370
Petitioner	:	A . C. No. 48-00977-03525
	:	
v.	:	
	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Merlin

On September 5, 1997, the Commission remanded this case for a reassessment of civil penalties. The parties have waived the filing of briefs.

A citation dated February 22, 1994, issued under section 104 (a) of the Mine Act charged the operator with a violation of 30 C.F.R. ' 40.4 for refusing to post a form designating two officials of the United Mine Workers who were not employees of the operator, as miner representatives under section 103(f) of the Mine Act.¹ The abatement time allowed by the citation was 15 minutes, and an order under section 104(b) of the Act for failure to abate was issued on the same day as the citation. However, MSHA did not begin to assess a daily penalty until March 27, 1994, two days after a Commission judge had denied the operator's request for temporary relief. The operator sought temporary relief from the Commission and did not abate the violation until 13 days later when the Commission denied relief.

In its decision the Commission found that the judge's failure to assess a penalty for the initial violation set forth in the citation amounted to legal error that necessitated a remand. Section 110(i) of the Act, 30 U.S.C. ' 820(i), identifies six factors which must be taken into account in determining the appropriate amount of penalty. Four of these factors are the subject of stipulations which have been accepted by the Commission. Accordingly, I find that the operator is large in size, imposition of a penalty will not affect its ability to continue in business and the violation was non serious. I also find that the history of violations for the two years preceding

¹The operator's argument that non employees cannot serve as a miner representatives was eventually rejected by the Court of Appeals for the Tenth Circuit. Thunder Basin v. Fed. Mine Saf. and Health Rev. Com.,56 F.3d 1275 (1995).

issuance of the citation consisted of 23 violations and no violation of the cited regulation. The assessment sheet for the citation shows that the operator had 32 inspection days in the two year period and less than one violation per inspection. Considering the operator's large size this is a good history.

The record shows that the citation was given after the operator had requested issuance of a citation so that its refusal to accept non employees as miner representatives could be adjudicated and resolved. As the Solicitor's brief to the Commission acknowledges, in issuing the citation the Mine Safety and Health Administration was cooperating with the operator in attempting to move the matter through the administrative and judicial review process as expeditiously as possible. Clearly, the operator knowingly and intentionally violated the Act by refusing to post the names. An intentional violation usually connotes high negligence. However, in this instance the citation was issued as a result of an agreement between the parties to obtain a prompt ruling on the issue presented. Under these limited circumstances the operator's degree of negligence is mitigated and I find negligence was moderate with respect to the issuance of the citation.

The remaining factor is whether or not the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. Abatement required only the posting of the designation. The 15 minutes allowed was sufficient to post the names. I find there was no good faith abatement. The circumstances relating to the failure to abate are set forth more below in the analysis of the withdrawal order.

Turning to the withdrawal order, I again accept the stipulations of the parties and in accordance therewith find that the operator was large in size, imposition of a penalty will not affect its ability to continue in business, the violation was non serious and history of previous violations was good.

Evaluation of negligence with respect to the order involves circumstances very different from those attendant upon issuance of the citation. There is no dispute that the operator could have abated within the time allowed. However, it intentionally chose not to do so and instead sought temporary relief. The operator knew from the outset that MSHA did not agree to its refusal to abate. The MSHA district manager wrote the operator that he intended to recommend a daily penalty unless abatement occurred by March 1, 1994. However, the operator pursued its application for temporary relief which was denied on March 25, 1994, by a Commission judge. Two days after the judge's denial of relief, the MSHA Director of Assessments wrote the operator that a penalty of \$2,000 per day was being imposed until the violation was abated. Nevertheless, the operator appealed the denial of temporary relief to the Commission. Only when the Commission denied relief thirteen days later did the operator abate. Accordingly, the operator's failure to abate was intentional and its course of conduct was taken with the full knowledge that MSHA did not approve.

There is no question that the operator had the right to seek temporary relief afforded by the statute and regulations. 30 U.S.C. ' 815(b)(2), 29 C.F.R. ' 2700.46. However, the existence of that right does not mean it can be exercised without consequences, particularly when the

course of action selected by the operator poses a conflict with the fundamental statutory scheme. The Mine Act vests enforcement in the Secretary. Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 879 (June 1996). Under Sections 104(b) and 110(b), 30 U.S.C. ' ' 814(b), 820(b), the Secretary is given the authority to set times for abatement, determine whether there has been abatement, issue withdrawal orders and propose civil penalties to obtain abatement. The use of these powers, which are critical to proper enforcement, cannot be compromised or inhibited by an operator's decision to pursue adjudicative or judicial avenues of relief. Otherwise, operators, and not the Secretary, will decide the times and terms of enforcement.

In light of the foregoing, I conclude that the operator's intentional and knowing refusal to abate constituted high negligence. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991); Mettiki Coal Corporation, 13 FMSHRC 760, 770 (May 1991); See Also, Tanglewood Energy, Inc., 18 FMSHRC 1315, 1319-1320 (August 1996). The same considerations compel the conclusion that the operator intentionally and knowingly failed to abate the violation in a timely manner.

I take careful note that the Secretary's proposed penalty is \$2,000 per day. The Secretary's regulations state that the formula used to determine proposed penalty amounts is based upon the six factors of section 110(i). 30 C.F.R. ' 100.3. Special assessments also take into account the six factors. 30 C.F.R. ' 100.5. However, the Secretary is not required to explain how she arrives at a proposed penalty. Therefore in this case there is no way to know how the Secretary viewed and weighed each of the six criteria. 30 U.S.C. ' 820(i); See Also, Conf. Rep. No. 461, 95th Cong., 1st Sess. 58, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1336 (1978); Redland Genstar Incorporated, 19 FMSHRC 442, 446 (February 1997).

In any event, it is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary's proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-29 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock, Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881 (June 1996). As the Commission stated in its remand order in this case, Commission judges are accorded broad discretion in assessing penalties under the Act and these assessments must reflect proper consideration of the six criteria set forth in section 110 (i).

As set forth herein, I have considered and made findings with respect to the six criteria. It is my reasoned judgment that a penalty of \$350 is an appropriate penalty for the underlying violation. I believe this amount is consistent with lack of gravity, moderate negligence and good history. In addition, in reaching this amount I have taken into account the operator's large size and ability to continue in business. Finally, I am cognizant of the operator's failure to timely abate, a factor that also is central to reaching an appropriate penalty amount for the order.

Upon a review of the six criteria it is my reasoned judgment that a daily penalty of \$1,000

per day is suitable for the violation cited in the 104(b) order. In my view this amount recognizes the non serious nature of the violation and the operator's good prior history. However, it also is premised on the finding of high negligence. I further believe this fine is consistent with the operator's large size and ability to continue in business. Finally, the failure to timely abate after issuance of the order has been weighed in the balance. The substantial penalty being assessed is sufficient to have the desired deterrent effect.

ORDER

It is **ORDERED** that a penalty of \$350 be assessed for Citation No. 3589040.

It is further **ORDERED** that a penalty of \$1,000 a day be assessed for the operator's failure to comply with Order No. 3589101 for a total penalty of \$13,000.

It is further **ORDERED** that the operator pay these penalties within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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