FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 22, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-39-M
Petitioner	:	A. C. No. 30-02851-05504
v.	:	
	:	Seymour Road Pit
DOUGLAS R. RUSHFORD TRUCKING,	:	
Respondent	:	

DECISION

Appearances: Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Thomas M. Murnane, Esq., Stafford, Trombley, Owens & Curtin, PC, Plattsburgh, New York for Respondent.

Before: Judge Melick

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," is before me upon remand by the Commission for reconsideration of the $3,000.00 civil penalty imposed on Douglas R. Rushford Trucking (Rushford) for its violation of the standard at 30 C.F.R. § 56.14104(b)(2). Pursuant to the remand, hearings were held on August 24, 2000, to take supplemental evidence on issues not previously litigated.

Background

Rushford operates the Seymour Road Pit in Clinton County, New York. On August 28, 1998, when Rushford employee Nile Arnold attempted to inflate a tire on a fuel truck, the wheel rim exploded and struck Arnold in the head. At the time, Arnold was not using a stand-off inflation device nor was there such a device available on the mine site. On August 30, 1998, Arnold died as a result of the injuries he sustained. After conducting an investigation, the Department of Labor's Mine Safety and Health Administration (MSHA) charged Rushford with violating 30 C.F.R. § 56.14104(b)(2). That standard requires that stand-off inflation devices be used "to prevent injuries from wheel rims during tire inflation." Following hearings the violation was sustained as well as the associated "significant and substantial" and "unwarrantable failure" findings and Rushford was ordered to pay a civil penalty of $3,000.00.

On review before the Commission the Secretary presented a new theory not previously raised in her pleadings or at trial, that she failed to conduct inspections at the subject mine during relevant times because of Rushford's failure to file quarterly reports and that therefore Rushford's lack of a history of violations could not properly be considered as a mitigating factor in the penalty assessment. The Commission accepted review of the Secretary's new theory and remanded the issue for further proceedings. But See Section 113(d)(2)(A)(iii) of the Act; Commission Rule 70(d), 29 C.F.R. § 2700.70(d); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (August 1992). Within the constraints of the Commission's directive however, the record was accordingly reopened and additional evidentiary hearings held to enable the Secretary to produce evidence on this issue not previously litigated. The Commission also requested further explanation regarding application of the "Section 110(i)" criteria.

Evaluation of the Civil Penalty Criteria

Section 110(i) of the Act requires that "in assessing civil monetary penalties, the Commission shall consider" the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Analysis of the evidence in this case relevant to the above criteria follows hereafter:

Operators' History of Previous Violations

At the initial hearings, the Secretary introduced into evidence a document entitled "R-17-Assessed Violation History Report-Detailed Violation Listing" (Gov't Exh. No. 6). That report was offered by the Secretary to represent Rushford's history of violations for the period August 28, 1996, through August 27, 1998, and reflected that no violations had been committed during the stated period. The Secretary acknowledges that, because of its age, a July 2, 1988, 11 year-old violation (Gov't Exh. No. 12) should not be considered as part of Rushford's history for purposes of these proceedings. At no time, either in her pleadings, at hearings or in her post-hearing brief did the Secretary even suggest that her evidence in this regard was not credible or should be given less than full weight. In the initial decision in this case, significant reliance and weight was accordingly placed upon the Secretary's own uncontradicted evidence showing the absence of any history of violations.

On review before this Commission, the Secretary, for the first time argued, and the Commission agreed, that her own evidence of Rushford's lack of a history of violations could not properly be considered as a mitigating factor for a penalty assessment if that lack of history was due to the company's failure to meet a reporting requirement. While the legal authority for this argument has never been disclosed it presumably arises under the doctrine of equitable estoppel. On review the Secretary argued that since Rushford admittedly did not file quarterly reports with

MSHA between 1993 and 1998, as required under 30 C.F.R. § 50.30, she was not aware that Rushford's mine was active during this period.

In her initial brief following remand the Secretary argued that if a mine that is categorized as "closed" by MSHA, files a quarterly report the mine is recategorized as an "open" or "active" mine in MSHA's database. According to the Secretary, when that database is thus amended the mine is returned to the list of "active" mines required to be inspected by MSHA.

The credible evidence shows however that the facts are different from those argued before this Commission. The credible evidence shows that MSHA had incorrectly through its own fault listed the Seymour Road Pit in its records as "closed." It is undisputed that on May 13, 1993, Rushford provided to MSHA inspector Phil Freese, at that inspector's request, a written notice that the subject mine was "open" (Gov't Exh. No. 9). According to the credible testimony of Rushford bookkeeper Mary Pelke, Inspector Freese told her that MSHA had "closed" the Seymour Road Pit on their records in error and that Freese asked her to prepare the notice so that he could correct MSHA's records and confirm that the mine was "open" and continuing to operate. MSHA Field Office supervisor, Carl Onder, testified at the hearings on remand that this notice was sufficient to inform MSHA that the Seymour Road Pit was indeed an "open" mine. It is indeed undisputed that the mine had in fact continued to be "open" and operating during the entire period 1993 through 1998. It is clear therefore that MSHA's failure to have classified this mine as "open" was its own error and not Rushford's.

MSHA supervisor Onder testified that the MSHA Denver Office maintains a "mine reference list" of all mines that are "open." According to Onder, the source of this information is the mine operator himself (Tr. 32-33). The mine operator notifies the MSHA field office which notifies the MSHA District office which, in turn, notifies the Denver office (Tr. 33). The Denver office maintains the master list for the entire country. Each quarter, mines that are listed as "open" on the MSHA master list are sent Quarterly Mine Employment and Coal Production Report (quarterly report) forms (Gov't Remand Exh. No. 1). In this way each "open" mine is reminded by MSHA each quarter of the need to file its quarterly report.

In this case then, since Rushford did properly report itself as "open" and indeed had never reported itself as "closed," it should have continued to receive the quarterly report forms from MSHA, thereby notifying Rushford of the need to file its quarterly reports. It was therefore also MSHA's error that caused MSHA's cessation of mailing quarterly report forms to Rushford. Indeed Rushford bookkeeper Mary Pelke testified that when she stopped receiving those blank quarterly report forms from MSHA, she assumed it was not necessary to file such reports.

However, in spite of MSHA's own negligence, according to the undisputed evidence, if Rushford had continued to file the required quarterly reports whether it was listed as "open" or "closed" on the Denver office master list, eventually the MSHA field office would have been notified of the need to conduct an inspection. Thus, regardless of the lack of intent or serious negligence on the part of Rushford in failing to file the quarterly reports, according to the

Commission's holding, Rushford's lack of a history of violations cannot be considered as a mitigating factor in the assessment of a penalty. The increase in penalty herein reflects that holding.

It should also be noted that the Secretary acknowledges that her allegations that Rushford committed at least 20 paperwork violations for failing to file quarterly reports should not be considered as part of Rushford's prior history. Those alleged violations have never been cited nor litigated. The Secretary is correct in acknowledging that such allegations should not be considered herein in determining a history of "violations."

The Appropriateness of the Penalty to the Size of the Business of the Operator Charged

It is generally accepted that within the framework of this criterion and with the other criteria being equal, a small size mine operator should not pay as large a penalty as a medium or large size operator. In other words the penalty should be proportionate to the size of the operator. It has been stipulated that indeed this operator is small in size.

The credible record shows that Rushford typically had only three employees working in the mine only one day a week in mining activity. The record also shows that Rushford and, its employees performed significant non-mining activity such as pipe laying, asphalt paving and hauling -- activities that were subject to OSHA not MSHA jurisdiction. The Secretary acknowledges that such non-mining activity should not be considered when evaluating the size of a mine operator. I find that the operator was therefore very small in size with intermittent mining activity. Significant weight has been placed upon this factor in assessing the civil penalty in this proceeding. [1]

Whether the Operator was Negligent

The findings below that the instant violation was the result of high negligence and gross negligence are not disputed by the Secretary. While these findings are warranted under the facts of this case I have also noted that such negligence was the result of Douglas Rushford's self-imposed ignorance of the requirements of the cited standard rather than any intentional non-compliance. It is therefore at least arguable that the violation was in fact not the result of unwarrantable failure. I have also noted that although Rushford's facilities had previously been inspected by MSHA there is no evidence that Rushford had previously been cited for failure to comply with the instant standard or with comparable OSHA standards. While these factors certainly do not excuse the violation they nevertheless warrant, and were given, due consideration in determining the appropriate civil penalty herein.

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[1] It should also be noted, to clarify a suggestion made in her brief on remand, that the Secretary acknowledges that an operator's size should not be measured by its "gross profits."

The Effect on the Operator's Ability to Continue in Business

Rushford acknowledges in its brief on remand that even a penalty as large as that proposed by the Secretary, i.e., $25,000.00, would not cause it to cease operations - - but only claims that it would create hardship to its operation. It contends that the imposition of a "greater penalty" would affect its "ability to operate." In light of these admissions and the absence of specific proof that the penalties herein would indeed affect its ability to continue in business, it is presumed that there would be no such adverse affect . *See Sellersburg Stone Co.*, 5 FMSHRC 287 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

The Gravity of the Violation

It was stated in this regard in the decision below as follows:

> The failure to use a wheel cage or other restraining device or a stand-off inflation device under the circumstances of this case resulted in Arnold's fatal injuries. There can be no question on the facts of this case that the violation was therefore "significant and substantial."

The violation herein was therefore one that not only was reasonably likely to cause reasonably serious injuries but in fact was found to have caused fatal injuries. The question, in effect, raised by the Commission on remand is whether such a violation causing a fatality should be characterized as of "low," "medium," or "high" gravity. As suggested by the Commission, without such a finding, a decision lacks the precision necessary for appellate review. Accordingly my finding is that the violation herein, which admittedly caused the death of Nile Arnold, was of high gravity.

The Demonstrated Good Faith of the Person Charged in Attempting to Achieve Rapid Compliance after Notification of a Violation

The Secretary has acknowledged that the operator demonstrated good faith in achieving rapid compliance after notification of the violation herein (Tr. 412, 418). The record shows that the citation at issue was terminated on September 24, 1998, after the operator obtained a stand-off inflation device and posted signs at the shop and pit requiring employees to use the device when inflating tires. (Gov't Exh. No. 5). These factors were given considerable weight in assessing the civil penalty herein.

The Secretary's Proposed Penalty

The Commission has held that a judge's assessment of a penalty may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation for that divergence. *See Unique Electric*, 20 FMSHRC 119, 1123 n.4 (October 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (March 1983). This holding necessarily presumes however that the

Secretary's penalty proposal was itself based on a reasoned analysis of the statutory criteria and was not arbitrary and capricious.

In this regard it is significant to note that a penalty in this case calculated under the Secretary's objective and uniform criteria set forth in 30 C.F.R. § 100.3, would have resulted in a proposed penalty of $317.10. In particular, Rushford would have been chargeable with no penalty points for its size and history of violations, possibly the maximum 25 penalty points for negligence, 10 penalty points for "severity," and one penalty point for "persons potentially affected." In addition, under 30 C.F.R. § 100.3(f) a 30% reduction would have been given for good faith abatement.

In this case, of course, the Secretary elected to waive her uniform and objective analysis under Section 100.3 and applied a subjective "special assessment" for which there is little or no considered analysis. Indeed, the pleading entitled "Narrative for Special Assessment" is basically a form letter used in special assessment cases in which bald assertions are anonymously made that:

> MSHA has carefully evaluated the conditions cited, the inspector's relevant information and evaluation, and the information obtained from the Report of Investigation. The proposed penalty reflects the results of an objective and fair appraisal of all the facts presented.

The Secretary was unable to furnish any information underlying her purported penalty analysis in this case. There is indeed no explanation for the extreme divergence between the Secretary's objective standard civil penalty of $317.10 calculated under her Section 100.3 formula and her subjective inadequately substantiated proposal of $25,000.00, in this case. Without an adequate explanation for such a divergence, the credibility of her "special assessment" is indeed jeopardized by the appearance of arbitrariness and should not properly be considered as a benchmark or guideline for an appropriate *de novo* penalty assessment by the Commission and its judges.

In her brief on remand the Secretary also argued that the penalty should be of an amount sufficient to make it more economical for an operator to comply with the Act's requirements than it would be to pay the penalties assessed and continue to operate while not in compliance (Brief p. 2). While this argument is outside the scope of the civil penalty criteria considered for the penalty herein it is nevertheless addressed. It is not disputed that the cost of the standoff inflation device which Rushford purchased to abate the citation at issue was no more than $60.00. A penalty of $4,000.00 is more than 66 times this amount and is clearly sufficient to address the Secretary's concerns in this regard. A penalty of $25,000.00 as proposed by the Secretary is over 400 times the cost of a standoff inflation device and is clearly disproportionate.

In any event it is apparent that the Secretary's proposed penalty of $25,000.00, is without adequate analytical support and is disproportionate to an appropriate consideration of the penalty

criteria as discussed herein. Accordingly such a proposed penalty is not credible and should not be utilized as any benchmark or guideline for evaluating an appropriate *de novo* penalty assessed by the Commission or its judges.

ORDER

Douglas R. Rushford Trucking is hereby directed to pay a civil penalty of $4,000.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

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