FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 27, 2001

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, on behalf of Petitioner;
Thomas M. Murnane, Esq., Stafford, Trombley, Owens & Curtin, PC, Plattsburgh, New York, on behalf of Respondent.

Before: Judge Melick

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.,* the "Act," is before me upon remand by the Commission for reassessment of a civil penalty against Douglas R. Rushford Trucking (Rushford) for its violation of the standard at 30 C.F.R. § 56.14104(b)(2).[1]

Rushford operated 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

[1] The initial decision of the trial judge, 22 FMSHRC 74 (January 2000), will be noted as "*Rushford ALJ-I*," the trial judge's decision following remand, 22 FMSHRC 1127 (September 2000) as "*Rushford ALJ-II*," the first decision by the Commission on review, 22 FMSHRC 598 (May 2000) as "*Rushford Review I*" and the second decision on review, 23 FMSHRC 790 (August 2001) as "*Rushford Review II*."

used "to prevent injuries from wheel rims during tire inflation." As indicated, the matter has been remanded for reassessment of a civil penalty.

As the Commission has noted, the initial findings of "gross negligence" and "unwarrantable failure" by the trial judge in *Rushford ALJ-I* were not remanded and became the law of the case. In *Rushford Review-I* the matter was remanded for further explanation of the application of the civil penalty criteria and, in particular, the findings of "gross negligence." Cognizant of the law in this regard and of the specific terms and limits of the remand order, a discussion was provided in *Rushford ALJ-II* for the purpose of explaining where the facts of this case fit into the framework of such "gross negligence" findings. "Gross negligence" is not, of course, a monolithic concept but includes many gradations of severity. The discussion provided in *Rushford ALJ-II* was presented to comply with the Commission's remand order and to explain that the "gross negligence" herein was not at the highest end of the "gross negligence" continuum. The findings of "gross negligence" were not, in fact, reduced to "simple negligence" and no order to that effect was issued. Moreover, no modification of the "unwarrantable failure" findings was made and no order to that effect was issued. In addition, the civil penalty on remand was not decreased, but rather was increased from $3,000.00 to $4,000.00. That increased penalty incorporated the findings of "gross negligence."[2]

In considering whether the civil penalty assessed herein is supported by "substantial evidence" reference to the objective formula set forth in the Secretary of Labor's own regulations at 30 C.F.R. Part 100 may provide a useful comparison. While the Commission and its judges are, of course, not bound by those regulations, they nevertheless provide an objective standard for measuring an appropriate civil penalty by assigning numerical weight to the relevant "Section 110(i)" criteria and then by applying a standardized formula.

Reference to this objective standard, rather than to the Secretary's arbitrary, subjective and secretive "special assessment," removes the process from possible taint due to passion, prejudice or other unlawful motivation. In addition, the factual basis for deriving a penalty under the Part 100 formula is transparent and exposed for all to see. The secretive "special assessment" in this case was made without full disclosure of any considered analysis of the statutory penalty criteria. There is no way to know, therefore, whether the penalty proposed by the Secretary herein was based upon improper considerations and/or erroneous assumptions of fact. Indeed, as we now know, the proposed penalty was in fact based upon erroneous assumptions. In addition there is evidence that the Secretary may have also relied upon improper considerations in that she has argued that certain factors outside the scope of the "Section 110(i)" criteria should be considered in assessing a civil penalty herein.

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[2] The use in *Rushford ALJ-II* of the maximum 25 penalty points for negligence (the equivalent of "reckless disregard" under 30 C.F.R. § 100.3(d)), to compute and compare a penalty under the Secretary's Part 100 formula is likewise inconsistent with any reduction of such "gross negligence" findings to "simple negligence." See 22 FMSHRC at p.1132.

It should also be noted that the Secretary's pleading entitled "Narrative for Special Assessment" which purports to provide a "considered analysis," is nothing more than a form letter used in special assessment cases in which bald assertions are anonymously made that:

> MSHA has carefully evaluated the condition 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.

As noted, 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 $3,234.00 calculated under her Section 100.3 formula and the 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 further 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.

Applying the factual findings in this case, which have now been affirmed by the Commission in *Rushford Review-II*, to the objective formula set forth in 30 C.F.R. § 100.3, would result in a civil penalty of $3,234.00, for the violation herein. Under that formula, Rushford would receive 0 penalty points for its small size, 20 penalty points for its history of violations, 25 penalty points for "gross negligence," 10 penalty points for the fact that the event had "occurred," 10 penalty points for severity in causing the fatality and 1 penalty point for the one person affected by the event. In addition, under 30 C.F.R. § 100.3(f), a 30% reduction would be given for good faith abatement.

Under the circumstances, considering the criteria under Section 110(i) of the Act, and considering that the underlying premise for the remand in *Rushford Review-II* was incorrect, I find that a civil penalty of $4,000.00 is indeed appropriate for the violation at issue herein.

ORDER

Douglas R. Rushford Trucking is hereby directed to pay civil penalties of $4,000.00, for the violation charged herein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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