CCASE:
MSHA V. TAZCO
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 4, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VA 80-121

TAZCO, INC.

DECISION

In this civil penalty case arising under the 1977 Mine Act, 30 U.S.C. $801 et seq. (Supp. III 1979), the Secretary contests a judge's power to impose, in effect, a $0.00 penalty by suspending payment of the actual penalty assessed. The judge assessed and then suspended a $400 penalty against Tazco, Inc., in a November 17, 1980, decision issued in response to the parties' settlement motion. 2 FMSHRC 3299. For the reasons set forth below, we hold that the Commission and its judges lack the power to suspend penalties in whole or in part. We therefore affirm the judge's decision only insofar as it approved the settlement and reverse it with regard to the penalty suspension.

The underlying facts are undisputed. In January 1980, Tazco was cited for failing to drill roof bolt test holes at 20-foot intervals. Four days after the first citation, Tazco was cited for an unwarrantable failure (section 104(d)(1) of the Mine Act) to comply with the same roof control provision. The second citation is the subject of this case.

MSHA initially assessed for the second violation a $500 penalty which Tazco contested. However, before the hearing, the parties agreed to a settlement of $400. The Secretary moved for approval of this settlement in his Motion For Decision And Order Approving Settlement. To justify the $100 reduction, the motion stated that: Tazco had reinstructed its foremen respecting the 20-foot test hole requirement after the initial citation; immediately after receiving the second citation, Tazco discharged the particular foreman who was apparently responsible for both violations; and Tazco alleged that the roof was sound, and the Secretary had no information to the contrary.

In his decision, the judge undertook an "independent evaluation and de novo review of the circumstances and the amount of the penalty

warranted." 2 FMSHRC at 3299. The sole fact he discussed was Tazco's discharge of the offending foreman, which, he concluded, warranted suspension of the stipulated penalty. Id. Accordingly, he ordered
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"that for the violation found the operator pay a penalty of $400, with payment to be suspended." Id. at 3300. He then dismissed the case. 1/

A suspended penalty is virtually the same as assessing no penalty despite a violation. Both actions are contrary to the Mine Act's mandatory penalty structure to which we have alluded in previous cases. See, for example, Island Creek Coal Company, 2 FMSHRC 279, 280 (1980); Cf R.M. Coal Company, 7 IBMA 64, 67-68 (1978) holding that 1969 Coal Act mandated assessment of penalties). This case provides an appropriate occasion to elaborate on the Mine Act's mandatory penalty assessment scheme.

Section 110 contains the Mine Act's major penalty provisions. In mandatory terms, section 110(a) directs the Secretary, who has enforcement responsibility under the Mine Act, initially to assess a penalty for each violation; section 110(i) similarly provides that the Commission, which has adjudicative responsibility, "shall have authority to assess all civil penalties provided in [the] Act." 2/ The language of the

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1/ We treat the judge's decision as approving the settlement, assessing a $400 penalty, and then suspending its payment. The Secretary cast his motion as one for settlement approval. The judge recited only this characterization of the motion in his opinion, leading us to believe he accepted that characterization. Because he discussed disapprovingly only a single factor, we can conclude only that he tacitly accepted the remaining recitations in the motion. Thus, his treatment is in line with settlement approval where the judge's duty is to assure that the settlement was not reached for an improper reason violative of the Mine Act's objectives. Davis Coal Co., 2 FMSHRC 619 (1980).

2/ Section 110(a) provides in relevant part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation....

Section 110(i) provides:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to

the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.
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two subsections--indeed the language of all of section 110--is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels.
The Mine Act's legislative history also shows that Congress intended a mandatory penalty structure. Congress consistently described penalties as mandatory without entertaining any distinction between the assessment of a penalty at the Secretarial or Commission level. 3/ For example, Senator Williams, chief architect and a sponsor of the Senate bill, described the proposed Act as continuing the concept of "mandatory civil penalties [which] have been a feature of the enforcement of the Coal Mine Health and Safety Act since 1970." Leg. Hist. 88. The Senate report on the Senate bill states: "The Committee specifically rejects the suggestion that the imposition of civil penalties be discretionary rather than mandatory. ... [T]he Committee has adopted the civil penalties as they exist in the current Coal Act." S. Rep. 95-181, at 41, reprinted in Leg. Hist. 629. Further, in both houses, amendments which sought to make penalties discretionary were offered and rejected. Senate vote, Leg. Hist. 828, 1063; House vote, Leg. Hist. 1183, 1233. The debates which preceded the rejections did not draw any distinction between assessment at the Secretarial or Commission level. Views were again expressed simply that penalties should be mandatory. Leg. Hist. 1008.
In sum, both the text and legislative history of section 110 make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found.
As previously noted, while in a strict legal sense, a $0.00 penalty and a $400 penalty with payment suspended are not identical remedies, their practical effect is the same. To allow the judge to accomplish de facto by penalty suspension what he cannot do directly strikes us as an incongruous result. It allows the judge to thwart the congressional intent that at least some penalty be assessed for each violation found. Thus, consistency with that intent weighs against a judge's power to suspend a penalty.
In addition, nothing else in the Mine Act confers a power to

suspend penalties. Administrative law judges are subordinate to, and draw their powers from, their controlling agency and its organic statute. Administrative Procedure Act $7(b), 5 U.S.C. $556(c); Attorney General's Manual on the Administrative Procedure Act 74 (1947). Thus, it is axiomatic that an administrative law judge's power is limited by the limits on his agency's powers. The Mine Act does not expressly grant the Commission the power to suspend payment of penalties. Consequently, if the power is not otherwise inherent or implied by the broad grant of power given the Commission to "assess all civil penalties," the Commission and its judges lack the power. As discussed above, since the power to suspend is in opposition to the Mine Act's mandatory penalty structure, we cannot conclude that such implied power exists.

3/ In general, see Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong.. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 85, 88, 375-376, 600-601, 629, 910, 1167, 1211 12, !364 65 (1978) ("Leg. Hist.").

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Furthermore, by way of analogy, the majority state rule and the federal rule are that even trial judges have no inherent authority to suspend the execution of sentences in criminal cases. Ex parte U.S., 242 U.S. 27, 42 (1916); see generally 73 ALR 3d 474 (1976). They gain the right to suspend sentences only by a statutory grant. Again, we stress the absence of a similar grant in the Mine Act.

Therefore, the Commission and its judges do not have the power to suspend penalties either in whole or in part. If it is found in a given case that a low penalty is warranted, a low penalty may, of course, be assessed. 4/ Similarly, if a judge disagrees with a stipulated penalty amount in a settlement, he is free to reject the settlement and direct the matter for hearing.

For the foregoing reasons, we affirm the judge insofar as he approved the settlement and assessed a $400 penalty; we reverse insofar as he suspended payment of the $400 assessed penalty. Our decision therefore reinstates the $400 penalty to which the parties stipulated.

4/ We note, however, that this case does not require us to pass on the propriety of nominal penalties.

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Distribution

Nancy S. Hyde, Esq.
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Paul Merritt, Esq.
Tazco, Inc.
P.0. Box 367
Doran, Virginia 24612
Administrative Law Judge Joseph Kennedy
FMSHRC
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041