CCASE:
SOL (MSHA) V. PYRO MINING
DDATE:
19840924
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 24, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 84-151

PYRO MINING COMPANY

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). On August 24, 1984, we directed review of this case, sua sponte, to consider "the question of whether the judge erred in determining an appropriate civil penalty for [order] # 2338185 based on criteria not included in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 820(i)." We conclude that the judge erred in lowering the penalty amount because of his belief that this Commission's action in lowering certain penalty amounts the same judge had assessed in an unrelated case reflected a general dissatisfaction with his penalty assessments. We conclude further that in the present case a higher penalty is warranted for the violation cited in order No. 2338185, and we assess a penalty totalling $1,500 for that violation. 1/

The main features of the factual background and procedural history in this proceeding may be summarized briefly. On January 24, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspecting Pyro Mining Company's No. 9 Slope underground coal mine, issued two withdrawal orders to Pyro pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. $ 814(d)(1). The orders alleged that Pyro had failed to comply with its roof control plan in violation of 30 C.F.R. $ 75.200, a mandatory safety standard requiring operators, inter alia, to follow their approved roof control plans, and that the violations were significant and substantial and caused by the operator's unwarrantable failure to comply with the cited standard. The withdrawal order that is the subject of the matter before us (order No. 2338185) stated:

_____

1/ In our direction for review of this case, we stayed the briefing schedule. As discussed in the text, the focus of our concern with

the judge's decision is narrow and involves considerations of our own judicial administration. Under these circumstances, we do not deem it necessary to order the submission of briefs by the parties. Accordingly, we have proceeded to decide this case on an expedited basis.

~2090

The approved roof control plan ... was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby spad No. 1380, #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

Pyro filed notices of contest concerning both orders, and an expedited hearing on these contests was held before a Commission administrative law judge on February 28, 1984. At the time of the hearing, the Secretary of Labor had not filed a proposal for the assessment of penalties with respect to the two violations, but the judge consolidated penalty issues with the contests. At the hearing, Pyro stipulated that the two orders properly alleged violations of section 75.200 and that the violations were significant and substantial. The operator limited its contest to a challenge of the inspector's special findings that the violations were caused by an unwarrantable failure to comply with the standard. Following a bench decision rendered at the conclusion of the hearing, the judge issued a written decision on May 15, 1984. 6 FMSHRC 1319 (May 1984)(ALJ). In his decision, the judge sustained the unwarrantable failure finding in order No. 2338185. However, he vacated the unwarrantable finding in the other order and modified that order to a citation under section 104(a) of the Mine Act, 30 U.S.C. $ 814(a), with associated significant and substantial findings. Although the judge had taken evidence at the hearing relevant to penalties, he severed all penalty issues involving the two violations because of his determination that the operator had not had the opportunity to participate in the Secretary's procedures for review of citations and orders set forth at 30 C.F.R. $ 100.6. 6 FMSHRC at 1328-32. Neither party sought review of the judge's decision with this Commission.

After the hearing, the Secretary filed his proposal for assessment of penalties and the severed civil penalty case was assigned to the same judge on June 27, 1984. The Secretary proposed the assessment of a $1,000 penalty for each of the two violations. In a decision issued on July 26, 1984, the judge assessed a penalty of $1,000 for the violation cited in order No. 2338185, and a penalty of $25 for the other violation. 6 FMSHRC 1789 (July 1984)(ALJ). 2/ We

subsequently directed review, sua sponte, limited to the subject of the penalty assessed for the violation cited in order No. 2338185.

_____

2/ The Secretary's proposal for assessment of penalties also included a penalty proposal for a third violation not tried in the original hearing involving the contest of the two orders issued on January 24, 1984. The judge severed that matter (6 FMSHRC at 1789 90), and in a separate decision issued September 12, 1984, approved the parties' agreed penalty and settlement of that aspect of this proceeding.

~2091

In assessing a $1,000 penalty for order No. 2338185, the judge reviewed the evidence developed at the hearing relevant to penalty issues and the six penalty criteria contained in section 110(i) of the Mine Act. 30 U.S.C. $ 820(i). Concerning the criterion of gravity of the violation, the judge concluded:

> The testimony of the inspector and two of Pyro's witnesses shows that the roof was very hazardous in the crosscut where Pyro's section foreman had failed to have the warning devices installed. In view of the evidence showing that the violation was very serious, I believe that a penalty of $1,000 should be assessed under the criterion of gravity. Since, however, the Commission majority in [United States Steel Corporation, 6 FMSHRC 1423 (June 1984)] ..., have indicated that they think my assessment of civil penalties is excessive, I shall reduce that amount to $500.
>
> Inasmuch as a large operator is involved, a total penalty of $1,000 does not appear to be excessive, bearing in mind that an amount of $500 is being assigned under the criterion of negligence and an additional amount of $500 is being assigned under the criterion of gravity.

6 FMSHRC at 1794 (emphasis added). We are not troubled by the judge's findings and conclusions with regard to the other five statutory criteria, but we find his discussion of the penalty assessed for the gravity of the violation troublesome and plainly erroneous.

Under the Mine Act, this Commission and its administrative law judges exercise a primary and de novo role at each stage of an adjudicative proceeding involving the assessment of civil penalties. We have described that role recently in Sellersburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. As we

held recently, "While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by this Commission." United States Steel Corp., 6 FMSHRC 1423, 1432 (June 1984).

In discussing the gravity of the violation in this case, the judge indicated that he believed an assessment of $1,000 under that criterion was appropriate. The only basis offered by the judge for not assessing that amount, and for assessing $500 instead, was his observation that, "[T]he Commission majority in the U.S. Steel case [supra], have indicated that they think my assessment of civil penalties is excessive...." 6 FMSHRC at 1794. There is no statutory basis for this proffered reason.

~2092

It must be emphasized that our judges and we are obliged to decide each case on its own merits. In the U.S. Steel case, we affirmed this judge's conclusions on all substantive issues pertaining to liability and on most penalty issues. We reduced two penalties because of our determination that the evidence and statutory penalty criteria did not support the judge's findings with regard to two of the penalty criteria. 6 FMSHRC at 1431-32, 1434. We did not state, nor did we imply, that the judge's assessment of civil penalties was, in general, "excessive."

Our decision in U.S. Steel was based on the facts of that case, just as the judge's decision in this proceeding should be based on the facts of this case. A judge's dissatisfaction or disagreement with this Commission's decision of a case on review is not a statutory criterion for declining to assess an appropriate penalty in another case.

We have reviewed the record and the judge's findings here. The roof control violation cited in order No. 2338185 involved a failure to danger off an area of unsupported roof containing abnormal formations which posed a danger of falling. We find that this violation was of a serious nature and could have exposed miners to serious injury. We conclude that, as the judge himself tentatively opined, $1,000 is an appropriate amount to be assessed under the criterion of gravity for this violation. We have also reviewed the judge's other findings with respect to the penalty criteria and find them supported by the record and consistent with those criteria. Accordingly, we increase the penalty amount assessed under gravity from $500 to $1,000, and assess a penalty totalling $1,500 for this violation. As modified herein, the judge's decision is affirmed. 3/

Rosemary M. Collyer, Chairman

Richard V. Backley,

Commission

L. Clair Nelson, Commissioner

3/ The terms of office of our former colleagues, Commissioners Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

~2092

Distribution

William M. Craft
Asst. Director of Safety
Pyro Mining Company
P.0. Box 267
Sturgis, Kentucky 42459

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

Darryl A. Stewart, Esq.
Office of the Solicitor
U.S.Department of Labor
280 U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Administrative Law Judge Richard Steffey
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041