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SOL (MSHA) V. OLD BEN COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 13, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

DOCKET NO. LAKE 83-50-R

OLD BEN COAL COMPANY

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). The question presented is whether an operator that has contested the allegation of violation in a citation is precluded from pursuing that contest by choosing to pay the civil penalty subsequently proposed for the violation. The Commission's administrative law judge concluded that, under the circumstances of this case, Old Ben Coal Company's payment of the proposed penalty extinguished its right to continue its previously filed contest of the citation. On the bases explained below, we affirm.

On January 31, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Old Ben a citation alleging that it violated 30 C.F.R. 77.1401, a mandatory safety standard, by hoisting men with a crane that had an inoperable overwind device. 1/ Old Ben abated the alleged violation within the time required by the inspector.

1/ 30 C.F.R. 77.1401, entitled "Automatic controls and brakes," provides:

Hoists and elevators shall be equipped with overspeed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when fully loaded.

On March 2, 1983, Old Ben filed a notice of contest of the citation pursuant to section 105(d) of the Mine Act. 2/ In its contest, Old Ben denied the violation of 30 C.F.R. 77.1401. The Secretary answered on March 21, 1983, asserting that the citation properly described a violation of 30 C.F.R. 77.1401. The parties submitted the case to the administrative law judge on the basis of stipulated facts and legal briefs; no hearing was held.

On March 23, 1983, pursuant to sections 105(a) and 110(a) of the Mine Act, MSHA's Office of Assessments mailed to Old Ben a notice of proposed assessment of civil penalties for four violations, including the violation at issue here. 3/ A penalty of \$192 was proposed for Old Ben's alleged violation of 30 C.F.R. 77.1401.

2/ Section 105(d) states in part:

If, within 30 days of receipt thereof, an operator of a ... mine notifies the Secretary that he intends to contest the issuance ... of an order issued under section [104], or citation or a notification of proposed assessment of a penalty issued under [section 105] (a) or (b) ..., or the reasonableness of the length of abatement time fixed in a citation ... issued under section [104], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing ..., and thereafter shall issue an order ... affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. 815(d).

3/ Section 105(a) states in part:

If, after an inspection or investigation, the Secretary issues a citation or order under section [104], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section [110(a)] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty ... If, within 30 days from the receipt of notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty ... the citation and the

proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. 815(a).

Section 110(a) states in part:

The operator of a ... mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation.

30 U.S.C. 820(a)

Old Ben did not contest the proposed assessment of penalties. Instead, on April 5, 1983, Old Ben submitted a check to MSHA for the total amount of the penalties proposed. The letter from Old Ben's Law Department that accompanied the check stated that the check was issued "in full payment and settlement of the violations as shown on the voucher ..." (emphasis added). The voucher also read, in part, "In full payment and settlement of the following violations" ... [30 C.F.R.] 77.1401." Subsequently, on May 12, 1982, the Secretary filed a motion to dismiss Old Ben's contest of the citation. Noting that the civil penalty proposed for the alleged violation had been paid in full, the Secretary's motion stated that "such payment of civil penalty moots the notice of contest and constitutes an admission by the [c]ontestant that the conditions alleged in the citation [constituted] a violation ..." Secretary's Motion 1.

In granting the Secretary's motion, the judge relied primarily on section 105(a) of the Mine Act. The judge reasoned that section 105(a) "clearly states that if no formal protest is made of the issuance of the proposed assessment 'the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review.'" Slip op. at 2 (August 30, 2983) (ALJ) (unpublished decision (emphasis in original)). The judge concluded that Old Ben's right to have the citation at issue reviewed on the merits was "forfeited" when it failed to contest the Secretary's proposed assessment within the 30-day period provided by Section 105(a). Id. 4/ Accordingly, the judge granted the Secretary's motion and dismissed the proceeding.

On review, Old Ben argues that section 105(d) of the Mine Act grants operators an immediate right to contest a citation and the right to continue that contest regardless of a later payment of the subsequently proposed penalty. Thus, according to Old Ben, an operator that has contested a citation pursuant to section 105(d) can choose not to contest the proposed penalty, by pay the penalty and continue to pursue its contest of the citation. The Secretary responds that an operator cannot continue its contest of a citation if its pays a proposed penalty. The Secretary argues that payment of a proposed penalty is an admission of the cited violation underlying the penalty. Like the judge, the Secretary relies heavily on the language in section 105(a) of the Act that failure to contest the penalty proposed for the cited violation results in the citation and penalty being "deemed a final order of the Commission ... not subject to review by any court or agency."

In *Energy Fuels Corporation*, 1 FMSHRC 299 (may 1979), the

Commission held that section 105(d) of the Mine Act permits a mine operator to contest an abated citation before the Secretary proposes a penalty for the violation. We recognized that an operator would, in some circumstances, need an immediate hearing with respect to a citation. 1 FMSHRC at 307-09. Analyzing the language of section 105(d) and its relationship

4/ The judge declined to hold that in all circumstances an operator's notice of contest becomes "moot" because a proposed penalty is paid in full. He intimated that if Old Ben had paid the penalty by "mistake," he might have "ruled otherwise." Slip op. at 1.

~208

to section 105(a), we concluded "that the purposes of the Act and the interests of the parties are best served by permitting an operator to contest the citation immediately upon its issuance." 1 FMSHRC at 309. We neither states nor intimated, however, that an operator's right to a hearing on its citation is exercised in a manner wholly divorced from its response to the Secretary's subsequent proposal of a penalty for the cited violation. To the contrary, our decision in Energy Fuels clearly reflects our expectation that an aggrieved operator must also follow the statutory scheme set forth in section 105(a):

Even if [the operator] were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Energy Fuels, *supra*, 1 FMSHRC at 308 (emphasis added). The focus of our concern in Energy Fuels was whether a citation could be contested prior to the proposal of a penalty. The present case poses the further question of whether a contest of a citation can continue after the operator has decided to challenge the proposed penalty. As the language quoted above indicates, Energy Fuels anticipated this question by contemplating the institution of two separate contests with their subsequent consolidation in most circumstances.

Old Ben's suggested severance of the two contests runs directly contrary to the administrative scheme of the Mine Act described in and successfully followed since Energy Fuels, and set forth in the Commission's rules of procedure. Commission Procedural Rules 20 and 22 permit, but do not require, an operator to contest a citation at the time of its issuance. 29 C.F.R. 2700.20 & 22. Rules 25 and 26, however, require that a notification of proposed assessment of penalty be contested within 30 days of receipt of the notification. 29 C.F.R. 2700.25 & .26. Further, Old Ben's suggestion of severance undercuts the Mine Act's enforcement scheme. The allegation of a violation contained in a citation is an initial step in the enforcement of the Mine Act and of its mandatory safety and health standards. The Act requires that the Secretary propose and the Commission assess an appropriate civil penalty for a violation. See generally *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1148, 1149-50 (May 1984); *Tazco, Inc.*, 3 FMSHRC 1895, 1896-98

(August 1981). The validity of the allegation of violation, and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found. The Act requires that the penalty reflect the facts surrounding the violation and correlate with the nature of the violation through consideration of the statutory

penalty criteria contained in section 110(i) of the Act. 5/ See S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), 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 628-29 (1978).

Moreover, under section 105(a) of the Mine Act, an uncontested proposed penalty becomes "a final order of the Commission ... not subject to review by any court or agency." (Emphasis added.) If an operator were permitted to continue its contest of a citation following its payment of the proposed penalty, the Commission would be foreclosed from considering the penalty amount because under the very words of the statute the Commission's jurisdiction would be divested by the operator's failure to contest the proposed penalty within the time specified. The Commission would thereby be deprived of its power to assess penalties in accordance with section 110(i) of the Act.

Finally, as we have repeatedly emphasized in our cases, a penalty under the Mine Act is predicated upon the existence of a violation. See, e.g., *Tazco, Inc.*, supra, 3 FMSHRC at 1896-98; *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980). Therefore, an operator cannot deny the existence of a violation of purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true. See generally *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 977-80 (June 1982).

Therefore, in view of the language of section 105(a) and 105(d), and Congress' intent to tie penalties to the particular facts surrounding a violation, we hold that the fact of violation cannot continue to be contested once the penalty proposed for the violation has been paid. Our holding imposes no burden on operators that have immediately contested a citation. If there is a "burden," it comes from the statute. Old Ben's right to a hearing on its notice of contest would have remained, provided that it had merely indicated within 30 days of receipt of the

5/ Section 110(i) of the Act 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 the violation. In proposed civil penalties under this [Act], the Secretary may rely upon a summary review of the information available and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. 820(i).

~210

Secretary's proposed penalty that it contested the penalty. 6/
In Energy Fuels, we recognized the right of operators to contest immediately a citation or order. We also clearly noted that the Act requires an operator to contest the subsequently proposed civil penalty if it wishes a hearing on that issue. In this regard, there has been no departure from procedures followed under the 1969 Coal Act, 30 U.S.C. 801 et seq. (1976) (amended 1977).

For the foregoing reasons, we affirm the judge's dismissal of Old Ben's notice of contest. 7/

6/ Old Ben did not claim below or argue to us that the penalty was paid by error. In fact, the transmitted documents from Old Ben's legal department indicate that payment of the penalty while its contest of the citation was pending was a deliberate decision. Like the judge, we must rule differently in a case where a penalty was paid by genuine mistake. See note 4, supra.

7/ 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."

Commissioner Nelson, concurring:

I concur in the result reached by my colleagues. I would prefer to decide the case solely on the basis that Old Ben's intentional payment of the Secretary's proposed penalty, in full settlement of the cited violation, constituted an admission of the violation for purposes of Mine Act proceedings and thereby mooted its contest of the citation in this proceeding.

Also, while I agree that an operator cannot pay the penalty proposed by the Secretary and thereafter maintain before the Commission its challenge to the underlying citation, I do not share the view that absent such a payment, an operator must file a notice of contest of the Secretary's subsequently proposed civil penalty in order to continue to press its earlier filed challenge to the underlying citation. Under that scheme, an operator must separately contest a penalty proposed by the Secretary or face an absolute forfeiture of its right to contest the underlying citation.

Requiring the operator to formally contest the Secretary's penalty proposal where the operator has contested the underlying citation does not enhance or advance the proceeding inasmuch as the Commission judge, should he find a violation of the Mine Act, will assess a penalty on the basis of the record evidence and the section 110(i) penalty criteria (30 U.S.C. 820(i)), and not on the basis of the Secretary's proposed penalty. Thus, in a case where the Commission's jurisdiction rests upon the operator's contest of a citation, the Commission judge will assess any penalty on a de novo basis. Accordingly, I do not perceive a need to require the operator to contest any penalty proposed by the Secretary when the operator's earlier filed notice of contest of the underlying citation necessarily placed the penalty amount in issue. In that regard, at the administrative hearing on the validity of the citation, the Secretary will have the opportunity to introduce evidence as to the appropriate penalty and the operator will have the opportunity to rebut that penalty-related evidence. The judge will independently assess any penalty.

Finally, although today's holding imposes no undue burden on operators that have contested a citation pursuant to section 105(d), placing an additional filing burden upon mine operators (as well as this Commission) appears without benefit or statutory requirement. Instead, as stated above, I believe that once an operator contests a citation, that operator need not file a separate notice of contest in response to the Secretary's subsequent penalty proposal. In such

an event, the Secretary's proposed penalty is but part of the case involving the contest of the underlying citation. At the administrative hearing, the Secretary may introduce evidence establishing both the fact of the violation and the appropriate penalty to be assessed by the presiding Commission judge. The operator, in turn, may seek to rebut some or all of the Secretary's case. I believe that this procedure is consistent with the Mine Act and procedurally efficient.

~212

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