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MSHA V. CYPRUS-PLATEAU MINING
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SECRETARY OF LABOR,	Docket Nos. WEST 91-44
MINE SAFETY AND HEALTH	WEST 91-45
ADMINISTRATION (MSHA)	WEST 91-46
	WEST 91-91
v.	WEST 91-118

CYPRUS-PLATEAU MINING CORPORATION

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners(Footnote 1)
DECISION
BY THE COMMISSION:
This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Cyprus-Plateau Mining Corporation ("Cyprus"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.(Footnote 2)
In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. • 551 et seq. (1988)("APA"). Following hearings on the motions, the judges reached

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1 Chairman Ford did not participate in the consideration or disposition of this matter.

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The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC , No. SE 90-126; Drummond Co., Inc., 14 FMSHRC , Nos. SE 90-125, etc.; Zeigler Coal Co., 14 FMSHRC , No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC , No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC , Nos. WEST 90-320, etc.; and Hobet Mining, Inc., 14 FMSHRC , No. WEVA 91-65.

conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary. The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989)("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in three of the seven proceedings.

In the present case, Commission Administrative Law Judge John J. Morris granted the motion for remand filed by Cyprus. 13 FMSHRC 719 (April 1991) (ALJ). Relying on this Commission's decision in Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679 (April 1987)("Y&O"), the judge concluded that the

Commission has jurisdiction to consider whether the Secretary acted outside the Part 100 regulations when proposing penalties in this case. 13 FMSHRC at 726. The judge then determined that the PPL had been invalidly implemented and, further, that it had an impermissibly retroactive effect. 13 FMSHRC at 725-27. Accordingly, he remanded the proposed civil penalties to the Secretary for recalculation without reference to the PPL.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC , No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we affirm Judge Morris' decision herein and remand to the Secretary for recalculation of the civil penalty proposals.

I.

Drummond I summarizes the general legal and regulatory background common to all seven cases. See 14 FMSHRC at , slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA")

issued 15 citations to Cyprus alleging significant and substantial ("S&S") violations of mandatory safety or health standards and three citations alleging non-S&S violations between April 23, 1990, and September 4, 1990.(Footnote 3) 13 FMSHRC at 724-25. The Secretary then filed penalty assessment petitions for the citations calculating the proposed penalties according to the

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3 The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. • 814(d)(1).

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provisions of the PPL and including, as part of Cyprus' history, single penalty and other violations for the previous two years. The penalty proposals for the citations alleging S&S violations were derived from the regular penalty formula in 30 C.F.R. • 100.3, with a 20% increase in that amount for excessive history. The penalty proposals for the citations alleging non-S&S violations were calculated in accordance with the formula in section 100.3, rather than in accordance with the single penalty formula in 30 C.F.R. • 100.4, based upon an alleged excessive history of violations.

Cyprus objected to MSHA's use of the PPL in calculating the proposed penalties and filed with the judge a "Motion to Strike or, in the Alternate to Remand" to the Secretary for recalculation of the proposed penalties. Judge Morris denied Cyprus' motion to strike because he determined that an order "striking allegations" would not reach the crux of the issues presented in the case and, instead, granted Cyprus' motion to remand. 13 FMSHRC at 728. The judge reached this conclusion based on his interpretation of Y&O to afford the Commission subject matter jurisdiction over the case. 13 FMSHRC at 726. In considering the validity of MSHA's penalty assessments, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 725. The judge also concluded that the PPL was fatally defective under the APA in that the Secretary was required to undertake notice-and-comment procedures for its proper issuance. 13 FMSHRC

at 726-27. Finally, the judge found the excessive history provisions of the PPL to be impermissibly retroactive. 13 FMSHRC at 727. The judge explained that some of the citations for which disputed penalties were proposed had been issued prior to the PPL's effective date. Id. He stated that the "PPL adds considerably to the detriment an operator unknowingly incurred when it chose not to contest earlier single penalty assessments and other violations." 13 FMSHRC at 727. The judge noted that the Supreme Court had held in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988), that statutes and administrative rules cannot be construed to have a retroactive effect unless their language requires such a result. Id. The judge concluded that nothing in the Mine Act or Coal Employment Project I permitted the retroactive imposition of the disputed penalties. Id.

II.

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary argues that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon

United States Courts of Appeals. In Drummond I, we concluded that section 101(d) does not prohibit the Commission's consideration of the operators' challenge to the PPL in these contest proceedings. 14 FMSHRC at , slip op. at 13-16. We recognized that section 101(d) "clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals." 14 FMSHRC at , slip op. at 13. We observed, however, that neither the PPL nor the Secretary's Part 100 penalty regulations are mandatory standards promulgated under section 101 of the Mine Act. Id. The Secretary characterizes the PPL as a "non-binding" agency pronouncement issued as an extension of her Part 100

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regulatory scheme, which was promulgated pursuant to section 508 of the Act, 30 U.S.C. • 957. In Drummond I, we concluded that section 101(d) neither states nor implies that its provision for exclusive judicial review extends to regulations adopted pursuant to section 508 of the Act, or to challenges to non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. • 815(d). 14 FMSHRC at , slip op. at 14. In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We also noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at , slip op. at 14-15, citing 30 U.S.C. • 823(d)(2)(A)(ii)(IV) & (B). We stated that the "reason the Commission was created by Congress and equipped with broad remedial powers and

policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC at , slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at , slip op. at 15-16.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at , slip op. at 17.

On the basis of our decision in Drummond I, we affirm Judge Morris'

conclusion that the Commission has jurisdiction to review the validity of the PPL in the context of these consolidated civil penalty proceedings. We also affirm the judge's holding that our decision in Y&O is applicable to the present case.

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. As discussed in Drummond I, the Court's interim mandate required the Secretary to consider an operator's history of non-S&S violations in assessing single penalties and in assessing regular penalties for S&S violations. 14 FMSHRC at , slip op. at 19. The Secretary's PPL, however, takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations

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and because it establishes a new schedule of penalties based on that history. 14 FMSHRC at , slip op. at 19-20. We determined that the PPL addresses not only the Court's immediate, interim concerns, but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. 14 FMSHRC at , slip op. at 19. Accordingly, we affirm the judge's holding here that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I.

In Drummond I, we rejected the Secretary's attempt to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC

at , slip op. at 21-30. We held that the PPL is a binding norm of present effect and that it constrains the Secretary's discretion and infringes upon substantial private interests. Id. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at , slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good cause exception of the APA. 14 FMSHRC at , slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at , slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall within the special assessment provisions of section 100.5(h). 14 FMSHRC at , slip op. at 29-30.

In Drummond I, we further concluded that the civil penalties at issue were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at , slip op. at 31. We remanded

the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O. Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. • 815(d). Id.

In the present case, Cyprus argued that the excessive history provisions of the PPL were improperly applied retroactively because nine of the eighteen citations in question were issued before the PPL's May 29, 1990, effective date, and because the history of violations includes violations that occurred before issuance of the PPL. As noted, Judge Morris found that the PPL had improper retroactive effect. 13 FMSHRC at 727.

In Drummond I, we noted the Supreme Court's admonition in Bowen that retroactivity is not favored in the law. 14 FMSHRC at , slip. op. at 31-32. We observed that the PPL considers violations that occurred before the issuance of the PPL and may include some that an operator chose not to challenge because the violations would not be considered as part of its history. 14 FMSHRC at , slip. op. at 32. We did not resolve whether the PPL is impermissibly retroactive, but expressed concern that justification for the retroactive nature of the PPL's excessive history procedures is not readily apparent. Id. We express that concern here as well, although, as in Drummond I, we do not reach the issue.

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For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalties proposed against Cyprus pursuant to the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we affirm the judge's decision. The proposed penalties in this matter are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner