CCASE:
MSHA V. UTAH POWER & LIGHT
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TTEXT:
May 28, 1992

SECRETARY OF LABOR,	Docket Nos. WEST 90-320
MINE SAFETY AND HEALTH	WEST 90-321
ADMINISTRATION (MSHA)	WEST 90-322
	WEST 90-323
v.	WEST 90-324

UTAH POWER AND LIGHT COMPANY,
MINING DIVISION

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 Utah Power and Light Company, Mining Division ("UP&L"). 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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2 The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC , No. SE 90-126; Drummond Co., Inc., 14 FMSHRC , No. SE 90-125, etc.; Zeigler Coal Co., 14 FMSHRC , No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC , No. CENT 91-26; Hobet Mining, Inc., 14 FMSHRC , No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC , Nos. WEST 91-44, etc.

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 this and two other proceedings.

In the present case, Commission Administrative Law Judge Michael Lasher denied the motion for remand filed by UP&L. 13 FMSHRC 511 (March 1991) (ALJ).

The judge based his holding upon a determination that the PPL had been validly implemented, and that the Secretary had not acted arbitrarily in proposing penalties in accordance with the PPL. 13 FMSHRC at 517-19.

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 adopted in contravention of the APA. Accordingly, we affirm Judge Lasher's determination that the Commission possesses jurisdiction, but reverse the remainder of his order 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, focusing on the evolution of the Secretary's excessive history program. 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 22 citations to UP&L alleging significant and substantial ("S&S") violations of various mandatory safety or health standards, and eight citations alleging non-S&S violations from January through May 1990.(Footnote 3) The Secretary then filed penalty assessment petitions for the citations, calculating the proposed penalties according to the provisions of the PPL and including, as part of UP&L's history, single penalty and other violations occurring during the previous two years. The penalty proposals for the 22 citations alleging S&S violations were derived from the regular penalty

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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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formula in 30 C.F.R. • 100.3, with a percentage increase in that amount for excessive history. The penalty proposals for the eight non-S&S violations were derived from the regular formula set forth in section 100.3, rather than under the single penalty assessment set forth in 30 C.F.R. • 100.4, based upon an alleged history of violations.

UP&L objected to MSHA's reliance on the provisions of the PPL in proposing the penalties, and filed a motion with the judge to remand the proposed penalties to the Secretary for recalculation. Judge Lasher denied the motion. The judge rejected the Secretary's argument that the Commission lacked jurisdiction to review UP&L's challenge. 13 FMSHRC at 513. The judge determined that such jurisdiction attached pursuant to Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679-80 (April 1987)("Y&O"), in which the Commission held that, in certain circumstances, it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 514.

The judge concluded, however, that, in this case, the Secretary's proposal of penalties according to the PPL was not arbitrary within the meaning of Y&O. Id. The judge stated:

> There is no reason to conclude that MSHA's promulgation and application of the PPL was instigated by any consideration other than the [D.C.] Circuit Court's mandate [in Coal Employment Project I]. The increases in UPL's 30 assessments here result from the Court's instructions to MSHA.

13 FMSHRC at 516. (emphasis in original). The judge accepted the Secretary's argument that anomalous results would obtain if only mines with excessive histories of non-S&S violations received higher civil penalties, while mines with excessive histories of S&S violations did not receive higher penalties. 13 FMSHRC at 517. The judge further found the Secretary's conduct consistent with the Court's general concern in Coal Employment Project I that proper weight must be given to an operator's history of violations, and that civil penalties serve a deterrent purpose. Id.

The judge rejected UP&L's argument that the special history assessments did not fall within the special penalty assessment provisions of 30 C.F.R. □ 100.5. 13 FMSHRC at 518. He determined that, as provided by section 100.5 the Secretary had elected to waive the regular assessment formula of section 100.3 and the single penalty assessment formula of section 100.4, and that the violations for which the disputed penalties were proposed fell within the category described in section 100.5(h) as "other unique aggravating circumstances." 13 FMSHRC at 518-19.

Finally, the judge concluded that, even assuming that the notice-andcomment

provisions of the APA applied to the PPL, the PPL fell within the "good cause exception" of section 553(b)(3)(B) of the APA. The judge found good cause for the Secretary not to follow notice-and-comment procedures because the Secretary was attempting to fulfill the D.C. Circuit's mandate when she issued the PPL. 13 FMSHRC at 519.

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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 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 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 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.

On the basis of our decision in Drummond I, we hold that the Commission has subject matter jurisdiction to review the validity of the PPL in the context of this consolidated civil penalty proceeding. In his order, Judge Lasher noted that the D.C. Circuit has retained jurisdiction over the Secretary's compliance with its remand directives in the Coal Employment Project case. 13 FMSHRC at 515. In Drummond I, we stated:

Our decisions in these seven excessive history cases do not purport to, nor, in our opinion, do they intrude upon the Court's jurisdiction in the Coal Employment Project case. These cases have been

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instituted as civil penalty proceedings within the Commission's delineated statutory authority....

14 FMSHRC at , slip op. at 12 n. 10. We consider only whether the proposed penalties in these civil penalty proceedings were inconsistent with, or a departure from, the existing Part 100 regulations and, therefore, constituted arbitrary enforcement action within the meaning of Y&O.

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 her 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. We accordingly affirm the judge's holding here 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 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 reverse the judge's conclusion in this case that the Court's

directive to the Secretary in Coal Employment Project I validated the Secretary's proposal of penalties against UP&L in accordance with the PPL's excessive history provisions.

In Drummond I, we also 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

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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. Consequently, we reverse the judge's conclusions that the PPL may be justified by application of the APA's good cause exception and that the enforcement actions taken by the Secretary were a valid form of special assessment under section 100.5. In Drummond I, we concluded that the "PPL creates a rigid formula for the proposed assessment of all excessive history cases." 14 FMSHRC at , slip op. at 30. Accordingly, we held that the "PPL is not a valid form of special assessment under existing regulations, and the Secretary's interpretation of section 100.5 to that effect is unreasonable." Id. (citation omitted).

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.

Finally, given our other dispositions in Drummond I, we did not resolve retroactivity issues raised by the operators. However, we noted the retroactive nature of the PPL's excessive history procedures and signalled our concern. 14 FMSHRC at , slip op. at 32.

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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 UP&L 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 determination that the Commission possesses jurisdiction in this matter, but reverse the remainder of his order. The proposed penalties 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