CCASE:
MSHA V. HOBET MINING
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May 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 91-65

HOBET MINING, INCORPORATED

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners(Footnote 1)
DECISION
BY THE COMMISSION:
This 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 Hobet Mining, Inc. ("Hobet"). 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 conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

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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.; Drummond Co., Inc., 14 FMSHRC , 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

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.(Footnote 3) 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 William Fauver denied the motion to remand filed by Hobet. 13 FMSHRC 711 (April 1991)(ALJ). The judge based his decision upon his determination that the Commission lacked subject matter jurisdiction over Hobet's challenge to the Secretary's civil penalty proposal scheme. 13 FMSHRC at 715-17.

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, and we reverse Judge Fauver's holding to the contrary. We also 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 reverse the judge's decision 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 11 citations to Hobet between July 19, 1990, and September 10, 1990, alleging violations of various mandatory safety or health standards. The Secretary then filed penalty assessment petitions for the citations, calculating penalties for seven of the citations according to the provisions of the PPL, and including, as part of Hobet's history, single penalty and other violations for the previous two years. Four other proposed penalties were based on the existing Part 100 regulations. H. Br. at 2; H. Motion to Remand at 1.

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3 The operators' challenge in these seven proceedings is not to the merits of the excessive history program. Hobet, however, moved to supplement the record with a letter dated January 15, 1992, from officials of the United Mine Workers of America and the Bituminous Coal Operators' Association to the

Assistant Secretary for Mine Safety and Health. The Secretary has not filed an opposition to this motion. In the letter, the officials express their concern that the excessive history program targets a group of mines that are safer than the mines not so targeted. We hereby grant Hobet's motion to supplement the record. See Fed. R. App. P. 28(j).

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Hobet objected to MSHA's use of the PPL in proposing the penalties in issue and filed a motion with the judge to remand the penalties to the Secretary for recalculation. Judge Fauver denied the motion and certified his interlocutory ruling to the Commission pursuant to 29 C.F.R. • 2700.74(a)(1). 13 FMSHRC at 717.

In his decision, the judge concluded that the Commission lacked subject matter jurisdiction to consider the validity of the Secretary's procedures for proposing penalties. The judge interpreted the Commission's decision in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987)("Y&O"), to stand for

the narrow proposition that the Commission has only limited authority to review prehearing challenges involving claims that the Secretary failed to comply with the Part 100 regulations when proposing penalties. 13 FMSHRC at 716. The judge explained that in Y&O, the Commission did not hold "that it has authority to determine the validity of the Secretary's regulations or rules for proposing civil penalties" but, rather, that "it has a limited scope of review of objections that the Secretary has failed to comply with Part 100 of her regulations in proposing a penalty." 13 FMSHRC at 716-17. The judge distinguished the present case from the circumstances presented in Y&O on the basis that this case does not involve the question of whether the Secretary complied with the Part 100 regulations. 13 FMSHRC at 717. Rather, the judge reasoned, the issue is "whether [the PPL] is valid as being in compliance with the Court's remand order and with the rulemaking requirements of the APA." Id. (emphasis in original). The judge then held that such issues lie outside the jurisdiction of the Commission and are vested instead with the Courts of Appeals. 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 or 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 "nonbinding" 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 ~720 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 reverse the judge's conclusion that the Commission lacks jurisdiction to review the validity of the PPL in the context of this civil penalty proceeding. We also reverse the judge's holding here that our decision in Y&O is not applicable to the present case.

Although the judge did not reach any other issues in this case after finding that the Commission lacked jurisdiction to review Hobet's challenge, we summarize our conclusions as to the remaining relevant issues, given our holding that Commission jurisdiction attaches. In Drummond I, we concluded

that the PPL goes beyond the Court's interim mandate in Coal Employment Project I because it requires consideration of an operator's significant and substantial ("S&S") as well as non-S&S violations and because it establishes a new schedule of penalties based on that history.(Footnote 4) 14 FMSHRC at , slip op. at 19-20. In addition, we rejected the Secretary's attempts 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 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

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4 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).

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 squarely within the special assessment provisions of section 100.5(h). 14 FMSHRC , slip op. at 29-30.

In Drummond I, we further concluded that the civil penalties 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.

Given our other dispositions in Drummond I, we did not resolve the 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.

In the present case, the facts relevant and necessary to final disposition are undisputed. In the interest of judicial economy, we will resolve the PPL-related issues without remand to the judge. We conclude for the same reasons set forth in Drummond I, that the PPL, as an invalidity issued substantive rule, can be accorded no legal effect. The penalties proposed against Hobet 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.
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III.
For the foregoing reasons, we reverse the judge's order. The seven penalties proposed pursuant to the PPL 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. The judge may proceed with the remaining four non-PPL based civil penalties, as he deems appropriate.
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner