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

v. Docket No. LAKE 91-2

ZEIGLER COAL COMPANY

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 Zeigler Coal Company ("Zeigler"). 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

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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 91-125, etc.; Texas Utilities Mining Co., 14 FMSHRC , No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC , Nos. WEST 90-320, etc.; Hobet Mining, Inc., 14 FMSHRC , No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC , Nos. WEST 91-44, etc.

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. 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 Chief Administrative Law Judge Paul Merlin granted the motion for remand filed by Zeigler. 13 FMSHRC 367 (March 1991)(ALJ). The judge based his decision in this case on his decision in Drummond Co., 13 FMSHRC 339, No. SE 90-126 (March 1991)(ALJ). In that decision, the judge concluded, inter alia, that the PPL had been invalidly implemented and remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. Id.

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 Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposal.

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 one citation to Zeigler alleging a violation of 30 C.F.R. • 75.400. The Secretary then filed a penalty assessment petition for the citation, calculating the proposed penalty from the regular penalty formula in 30 C.F.R. 100.3, according to the provisions of the PPL. The PPL provides fo percentage increases in penalty amounts based on the presence and degree of an

excessive history of violations. See Drummond I, 14 FMSHRC at
, slip op. at 7. Included in Zeigler's history were single penalty and other violations occurring during the previous two years. The penalty proposal for the violation was increased by 20% for alleged excessive history.
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Zeigler objected to MSHA's augmentation of the proposed penalty pursuant to the PPL and filed a motion with the judge to remand the proposed penalty to the Secretary for recalculation. Judge Merlin granted the motion, based on his determinations in Drummond I.
In his decision in Drummond I, Judge Merlin concluded that the Commission has jurisdiction to consider the issues involved. 13 FMSHRC at 344-46. The judge relied on the Commission's decision in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987)("Y&O"), in which the Commission held, in
part, that in "certain limited circumstances" it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 344-46. In considering the validity of the method employed by MSHA to calculate the proposed penalties, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 346-48. The judge then considered whether the PPL could "stand on its own without reliance upon the court's interim mandate." 13 FMSHRC at 348-49. The judge determined that the resolution of that question would turn on whether the Secretary was required by the APA to engage in notice-andcomment
procedures when issuing the PPL. The judge concluded that notice-andcomment procedures were required and that, until they were followed by MSHA, the PPL could not be applied. 13 FMSHRC at 354. The judge explained that although "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice" are excepted from notice-and-comment procedures by virtue of 5 U.S.C. • 553(b)(3)(A), the provisions of the PPL constituted substantive rules subject to the notice-and-comment process. 13 FMSHRC at 351. The judge additionally rejected the contention that noticeand-
comment rulemaking could be excused on the basis of the "good cause" exception in 5 U.S.C. • 553(b)(3)(B). 13 FMSHRC at 353-54. The judge also rejected the Secretary's argument that the PPL was justified because it accomplished the result ordered by the Court in Coal Employment Project I. He found that the PPL exceeded the Court's instructions. 13 FMSHRC at 354. Based on the foregoing determinations, the judge granted Drummond's motion to remand.
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 "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
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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 , 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 hold that the Commission

possesses subject matter jurisdiction under the Mine Act and consistent with Commission precedent to consider the validity of the PPL in this civil penalty proceeding. We affirm the judge's determination of jurisdiction.

The validity of the PPL turns on two major issues: whether the PPL is justified by the Court's interim mandate in Coal Employment Project I; and whether the PPL qualifies as an exception to the APA's notice-and-comment requirements.

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-significant and substantial ("S&S") violations in assessing single penalties and in

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assessing regular penalties for S&S violations.(Footnote 3) 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 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 also 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 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, 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.

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.

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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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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 penalty proposed against Zeigler pursuant to the PPL conflicts with the Part 100 regulatory scheme and constitutes 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 the proposed penalty 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 penalty in this matter is 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