CCASE:
JIM WALTER RESOURCES V. SOL (MSHA)
DDATE:
19930525
TTEXT:

May 25, 1993

JIM WALTER RESOURCES, INC.	:	
	:	
v.	:	Docket No. SPECIAL 92-01
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), Jim Walter Resources, Inc. ("JWR") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order seeking to reopen certain uncontested civil penalty assessments in which JWR had paid in full the penalties proposed by the Secretary of Labor. As the basis for its motion, JWR cites Rule 60(b), Federal Rules of Civil Procedure ("Fed. R. Civ. P."), and principles of equity.

This is the lead case in a group of 19 special proceedings in which similar notices of contest and motions for relief from final orders were filed by mine operators (Docket Nos. SPECIAL 92-02 through -16; and 93-01 through -03). The operators contend that the penalties in dispute were invalidly augmented on the basis of 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 Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. The operators seek refunds of those portions of paid penalties attributable to augmentations under the PPL.

The Commission granted the motions of the American Mining Congress ("AMC") and National Coal Association ("NCA") to participate as amici curiae and heard oral argument. For the reasons that follow, we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that JWR's request does not meet the requisite criteria under Fed. R. Civ. P. 60(b) or principles of equity for the grant of such relief. Accordingly, we deny JWR's motion to reopen and we dismiss this proceeding.

I.

Background

A. General Legal and Regulatory Background

The Mine Act establishes a bifurcated civil penalty system in which the Secretary proposes and the Commission assesses, based on specified criteria,(Footnote 1) all civil penalties for violations of the Act, of mandatory safety and health standards, and of other regulations issued under the Act. 30 U.S.C. 815(a) & (d), 820(a) & (i); see, e.g., Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Section 105(a) of the Act states in pertinent part that, after the Secretary has issued a citation or withdrawal order to a mine operator for an alleged violation, he "shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation...." 30 U.S.C. 815(a). Section 105(a) allows the operator 30 days within which to contest a proposed penalty and further provides that, if the operator does not contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id.

The Secretary, acting through the Department of Labor's Mine Safety and Health Administration ("MSHA"), promulgated regulations at 30 C.F.R. Part 100 to implement the proposal of penalties.(Footnote 2) Two methods were provided for calculating proposed penalties, regular and special assessment. In 1982, MSHA added a "single penalty" assessment of $20 for a timely abated non-significant and substantial ("non-S&S") violation.(Footnote 3) See Drummond, 14 FMSHRC at 663-64.

_____

1 Section 110(i) of the Act provides in relevant part:

> 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 a violation.

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

_____

2 The civil penalty regulations were adopted pursuant to section 508 of the Mine Act. 30 U.S.C. 957. See Drummond, 14 FMSHRC at 663.

_____

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).

In Coal Employment Project v. Dole, 889 F.2d 1127, 1136-38 (D.C. Cir. 1989), the D.C. Circuit found that the Secretary's procedure for assessing single penalties failed to take into account violation history, one of the Mine Act's penalty criteria. The Court remanded the case to MSHA "for appropriate amendment of the regulations." 889 F.2d at 1128. The Court ordered MSHA, in the interim, to consider an operator's history of non-S&S violations in proposing single penalties and to include an operator's history of single penalties in proposing regular assessments. 889 F.2d at 1138, 1139.

Issuance of the PPL was one of the actions taken by MSHA in response to the Court's interim remand. See Drummond, 14 FMSHRC at 678. The Secretary did not publish the PPL in the Federal Register but sent it to all operators on May 29, 1990. In addition to incorporating single penalties in the violation history scheme, the PPL augmented penalty assessments by specified percentage amounts, depending on the degree of "excessive history."(Footnote 4) On December 28, 1990, the Secretary published proposed rules, "Criteria and Procedures for Proposed Assessment of Civil Penalties," which generally incorporated the provisions of the PPL. 55 Fed. Reg. 53482, 53483. See Drummond, 14 FMSHRC at 667-68.

B. The Drummond Litigation and Related Developments

The Secretary began proposing civil penalties based on the PPL in May 1990. The Commission docketed 2,803 contests from mine operators contending that the proposed penalties were improper because they were not based on the Part 100 penalty regulations alone but, instead, were increased in accordance with the PPL's interim excessive history program, which, the operators argued, had been unlawfully issued outside the notice-and-comment rulemaking process required by the Administrative Procedure Act, 5 U.S.C. 551 et seq. (1988) ("APA"). The operators also moved to have the proposed penalties remanded to the Secretary for recalculation without reference to the PPL. The Commission granted seven petitions for review of decisions by its administrative law judges and, while these cases were pending on review, proceedings in the other excessive history contests were stayed. The petitions for review resulted in Drummond and related decisions.(Footnote 5) See Drummond, 14 FMSHRC at 661-62, 669-70.

_____

4 The PPL provided that non-S&S violations, if associated with excessive history, would no longer be eligible for a single penalty but would be assessed under the regular assessment formula. PPL at 2. S&S violations associated with excessive history would receive a regular assessment augmented by a percentage increase of 20%, 30% or 40%. Violations specially assessed would receive a similar percentage increase for excessive history. Id.

_____

5 Also issued the same date were a second Drummond decision, 14 FMSHRC 695 (May 1992), as well as: Cyprus-Plateau Mining Corp., 14 FMSHRC 702 (May 1992); Utah Power and Light Co., Mining Div., 14 FMSHRC 709 (May 1992); Hobet Mining, Inc., 14 FMSHRC 717 (May 1992); Texas Utilities Mining Co., 14 FMSHRC 724 (May 1992); and Zeigler Coal Co., 14 FMSHRC 731 (May 1992).

In Drummond, the Commission determined that it possessed subject matter jurisdiction to review the validity of the PPL and to require the Secretary to propose penalties in a manner consistent with the Part 100 penalty regulations. 14 FMSHRC at 673-78. It further determined that the PPL exceeded the Coal Employment Project interim mandate. 14 FMSHRC at 678-80. The Commission determined that, under established APA precedent, the PPL could not be regarded as an interpretative rule, policy statement, or agency procedure excepted from notice-and-comment rulemaking (see 5 U.S.C. 553(b)(3)(A)) (14 FMSHRC at 684-88), and that it did not otherwise qualify for exception from that process (14 FMSHRC at 689-90). The Commission held that the PPL was an "invalidly issued substantive rule" that could not be "accorded legal effect." 14 FMSHRC at 692. Accordingly, the Commission remanded the proposed penalties in Drummond and the related matters to the Secretary for recalculation in accordance with the existing Part 100 regulations, without use of the PPL. The 2,779 other pending penalty matters were also remanded to the Secretary for reproposal in accordance with Drummond.

By letter dated June 3, 1992, the Department of Labor's Associate Solicitor advised the Commission's Chief Administrative Law Judge that the Secretary had decided that he would not appeal Drummond. The Associate Solicitor also stated, in effect, that new penalties would be proposed for S&S violations with excessive history, i.e., to rescind penalty augmentations, but not for non-S&S violations with excessive history.

While Drummond was pending on review, certain final Part 100 rules were published, containing, as relevant here, the final version of MSHA's interim action in response to the Coal Employment Project order to include single penalties in an operator's history of violations. 57 Fed. Reg. 2968-71 (January 24, 1992). That same day, the Secretary published a revised proposed penalty rule. 57 Fed. Reg. 2972-77. On January 29, 1992, MSHA also issued Program Policy Letter No. P92-III-1 ("PPL-II"), which superseded the PPL and mirrored the new proposed penalty rule. PPL-II, like the earlier PPL, was not published in the Federal Register. Drummond, 14 FMSHRC at 668.

A final penalty rule, taking into account an operator's history of violations in determining eligibility for a single penalty assessment, was issued by the Secretary on December 21, 1992, completing MSHA's response to the Coal Employment Project order.(Footnote 6) 57 Fed. Reg. at 60690-97. The penalty system underlying the final rule continues to incorporate the Mine Act's penalty criteria, including violation history. The final rule, however, is significantly different from MSHA's two PPL's and the two proposed rules in that it does not provide for percentage augmentations of penalties based on excessive history.

_____

6 The Coal Employment Project Court had retained jurisdiction over its remand to MSHA. 889 F.2d at 1138, 1139. Upon receiving the Secretary's Notification of Completion of Rulemaking, the Court issued an order removing the case from its docket on January 19, 1993, thus terminating its jurisdiction in the case.

C. JWR's Motion

Relying on Drummond's invalidation of the PPL, JWR filed its Notice of Contest and Motion for Partial Relief from Final Order on June 29, 1992. Eighteen similar pleadings from other operators followed. In all these matters, the operators had failed to contest, within the time provided by section 105(a) of the Act, the proposed penalties and, instead, had paid the penalties in full. The Commission heard oral argument on January 28, 1993.

II.

Disposition of Issues

Two major issues are presented: (1) whether, in view of the language in section 105(a) of the Mine Act, the Commission possesses jurisdiction to reopen these final orders; and (2), if the Commission does have such jurisdiction, whether JWR has satisfied appropriate criteria for such reopening. We answer the first question in the affirmative and the second in the negative.

A. Commission Jurisdiction

1. Parties' arguments

JWR and the amici (hereafter, the "operators") do not seek refund of the basic penalty amounts nor do they contest the underlying citations. Rather, they request reduction of the penalties by the amount attributable to augmentation under the PPLs. They assert that Fed. R. Civ. P. 60(b) ("Rule 60(b)"), which the Commission has invoked frequently to reopen final orders such as default judgments, may serve as the basis for reopening these matters, which have become "final orders of the Commission" by operation of section 105(a). The operators point to case law under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1988)(the "OSHAct"), permitting Rule 60(b) relief, notwithstanding analogous "final order" language in section 10(a) of that statute, 29 U.S.C. 659(a). See, e.g., J.I. Hass Co. v. OSHRC, 648 F.2d 190, 192-95 (3rd Cir. 1981). The operators also note that section 105(a) specifically precludes "agency" but not "Commission" review and, thus, does not bar this Commission's review of these matters.

The Secretary contends that the Commission is without jurisdiction to consider JWR's challenge because JWR failed to timely contest the penalty proposals as provided in section 105(a) of the Mine Act. He relies on the language in section 105(a), which provides that a final order of the Commission is not subject to review "by any court or agency." 30 U.S.C. 815(a). Thus, by operation of the statute, these matters are final and ma not be reopened for review by the Commission.

2. Disposition

In construing the Act, the Secretary, this Commission, and the Courts of Appeals must give effect to the "unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

In general, the Commission also is required to accord "weight" to the Secretary's interpretations of the statute and his implementing regulations. S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977)("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978)("Legis. Hist."). However, as the Commission stated in Drummond, "we perceive no indication in the statute or its legislative history, or in sound policy, that [Commission] deference to the Secretary's views of Commission jurisdiction is required." 14 FMSHRC at 674 n.14.

The Secretary argues that the language of section 105(a), "not subject to review by any court or agency," is unambiguous and precludes the Commission itself from reopening its final orders. We disagree. In our view, section 105(a) merely sets forth a general principle of finality covering the procedure for the contest of citations and proposed penalties. The Commission has recognized that, in appropriate circumstances, it may grant various forms of relief from final Commission orders. See generally, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988); M.M. Sundt Const. Co., 8 FMSHRC 1269, 1270-71 (September 1986). In reopening final orders, the Commission has found guidance in, and has applied, "so far as practicable," Rule 60(b), dealing with relief from judgments or orders.(Footnote 7) See Commission Procedural Rule 1(b), 29 C.F.R. 2700.1(b).

The legislative history indicates that Congress enacted section 105 to end the lengthy and repetitive procedure of penalty assessment and collection under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("1969 Coal Act"). UMWA v. Ranger Fuel Co., 12 FMSHRC 363, 372-73 (March 1990). Under the 1969 Coal Act, operators had the right to seek de novo review of those penalties in United States District Courts. See S. Rep. at 16, 44, 45, reprinted in Legis. Hist. at 604, 632, 633. The legislative history makes clear that the "not subject to review" language was intended to abolish this cumbersome process by preventing collateral attacks on penalty determinations. See, e.g., S. Rep. at 34, 45-46, reprinted in Legis. Hist. at 622, 633-34; see also Legis. Hist. at 89

_____

7 In relevant part, Rule 60(b) provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ...
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) ... and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

(remarks of Sen. Williams introducing S. 717, the bill upon which the Mine Act was based). There is nothing in the legislative history to suggest that Congress intended to bar the Commission itself from granting Rule 60(b) type post-judgment relief in appropriate circumstances.(Footnote 8)

The Commission's view of section 105(a) is supported by analogous case law. Section 10(a) of the OSHAct, 29 U.S.C. 659(a), also provides that an uncontested citation or proposed penalty "shall be deemed a final order of the [Occupational Safety and Health Review] Commission and not subject to review by any court or agency." In J.I. Hass, the Third Circuit held that section 10(a) of the OSHAct cannot be reasonably construed to prohibit all late-filed notices of contest:

> The Secretary contends that the final clause of section 10(a) is jurisdictional and must be read literally to prohibit review of citations if an employer files no timely notice of contest. Under this interpretation of section 10(a), once any employee of the employer signs the certified receipt for the citations, no circumstances would permit a late notice of contest. Thus, if an employee signed for citations and then was killed while returning from the post office, and the letter destroyed, an employer with a meritorious defense could still get no relief if 15 working days elapsed before he learned of the citations. We do not believe that Congress intended such a harsh result.

648 F.2d at 194. See also Capital City Excavating Co. v. Donovan, 679 F.2d 105, 109-10 (6th Cir. 1982).

_____

8 Amicus AMC argues that section 105(a) precludes review only by other agencies and courts but does not explicitly preclude Commission review. AMC Reply at 7. The Secretary argues that Commission Procedural Rule 25, 29 C.F.R. 2700.25, which stated that section 105(a) orders were not subject to review by the Commission or a court, precludes relief. Procedural Rule 25 first appeared in Rule 23 of the Interim Procedural Rules published on March 10, 1978, prior to the assumption of office by Commission members. 43 Fed. Reg. 10320, 10324 (1978). No explanation of the Interim Rule was provided. Id. When the Commission adopted its Procedural Rules in 1979, Interim Rule 23, which departed from section 105(a) of the Mine Act, was substantially retained in Rule 25, without comment. 44 Fed. Reg. 38227, 38229 (1979). The Commission has published new final Procedural Rules, which took effect on May 3, 1993, and, in a number of instances, has revised the text of rules to conform to the statute. 58 Fed. Reg. 12158-74 (March 3, 1993). Revised Rule 27, which replaces prior Rule 25, conforms the earlier rule to the language of section 105(a) of the Mine Act, "not subject to review by any court or agency." (Emphasis added.) 58 Fed. Reg. 12167. In any event, we construe the prior rule in a manner consistent with the language of the Mine Act and the analysis set forth in this decision.

For the foregoing reasons, we hold that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b).

B. Whether JWR Meets Criteria for Post-Judgment Relief

1. Parties' arguments

JWR invokes Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would ensure that justice is served. JWR alleges that, in proposing the penalties, the Secretary misrepresented his actions by stating that the proposals had been calculated pursuant to 30 C.F.R. Part 100, when, in fact, that was not the case. Only when the Commission in Drummond found the PPL to be invalid, did JWR realize that it had paid invalidly determined penalties. The operators argue that it is unfair to require the payment of illegally proposed penalties and contend on separate equitable grounds that they should be relieved from these final orders.

The Secretary responds that the criteria of Rule 60(b) have not been satisfied. The Secretary points out that the penalty proposals stated on their face that the penalties had been increased under the excessive history program. (See Attachment A to JWR's Notice of Contest.) He also notes that the PPL was disseminated to all regulated operators and, in light of such notification, the operators cannot claim misrepresentation as to the penalty calculations. He further argues that these motions are essentially attempts to change litigating positions in light of subsequent legal developments, and that neither Rule 60(b) nor other equitable relief is appropriate under such circumstances.

2. Disposition

Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. See, e.g., Randall v. Merrill Lynch, 820 F.2d 1317, 1320-21 (D.C. Cir. 1987).(Footnote 9) However, discretion in this regard is not open-ended. As the Court stated in Randall: "Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which ... courts are to use sparingly...." 820 F.2d at 1322. See also Ronald Tolbert v. Chaney Creek Corp., 12 FMSHRC 615, 619 n.1 (April 1990).

We reject JWR's Rule 60(b)(3) claim alleging misrepresentation by the Secretary. In a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 11 Wright & Miller, Federal Practice and Procedure: Civil 2860 (1973), and authorities cited. The Secretary's notifications to JWR and other operators of the proposed penalties stated expressly that the penalties were augmented by the excessive history program. As to the invalidity of the PPL, a conclusion subsequently reached in

_____

9 Because we dispose of JWR's motion on substantive grounds, we do not reach issues of time limitation.

Drummond, we do not regard this as a "fact" that the Secretary would be obligated to disclose in proposing penalties. Rather, it is a legal conclusion that was reached following timely challenges to penalty proposals. Accordingly, we discern no misrepresentation for Rule 60(b)(3) purposes.

We are similarly unpersuaded by the operators' Rule 60(b)(6) arguments. Rule 60(b)(6) provides for relief for "any other reason justifying relief," but cannot be used to relieve a party from the duty to take legal action to protect its interests by challenging dubious enforcement actions. See, e.g., Ackermann v. U.S., 340 U.S. 193, 199-202 (1950); McNight v. U.S. Steel Corp., 726 F.2d 333, 336 (7th Cir. 1984); Wright & Miller, supra 2864. Nor does Rule 60(b)(6) obviate the general principles of finality of judgments. Here, JWR chose to pay certain penalties rather than to contest them. JWR now attempts to rely on the litigation efforts of other operators who questioned and successfully contested penalties augmented under the PPL. Many operators questioned the validity of the excessive history program and pursued their rights under Mine Act review procedures.

As noted in Parks v. U.S. Life and Credit Corp., 677 F.2d 838 (11th Cir. 1982):

> An unsuccessful litigant may not rely on appeals by others and share in the fruits of victory by way of a Rule 60(b) motion. ...
>
> The strong interest in the finality of litigation demands rejection of appellant's suggestion. During the pendency of an appeal, the parties recognize the possibility of reversal; thus, modification of a judgment being appealed impacts not at all on finality concerns. "There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." [Ackermann v. United States,] 340 U.S. 193, 198, 71 S.Ct. 209, 211, 95 L.Ed. 207 [(1950)].

677 F.2d at 840-41.

The operators argued that a large operator such as JWR must regularly process hundreds of notifications of proposed penalties. Its decisions to contest are largely administrative and cannot realistically be characterized as deliberate litigation choices. Tr. Oral Arg. 20, 23-26, 32-34. Under the Mine Act, however, JWR is required to make such deliberate choices and its failure to contest proposed penalties as provided in section 105 is at its peril.

As to the equity principles invoked, the Commission is not a court of general equity. Cf. Kaiser Coal Corp., 10 FMSHRC 1165, 1169-71 (September 1988). In any event, it is a fundamental premise that equity aids those who have vigilantly pursued their rights. E.g., 27 Am. Jur. 2d Equity 130 (1966). JWR was less than vigilant.

We conclude that the operators have failed to make a clear and convincing demonstration of justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.(Footnote 10)

C. Res Judicata and Sovereign Immunity

The Secretary argues that the paid penalties have a res judicata effect, precluding JWR's attempt at relitigation. He further contends that sovereign immunity has not been waived by the United States as to recoupment of these penalties and, accordingly, any refund is barred, and that the proper forum for monetary claims is the Court of Claims or a United States District Court. The operators argue that res judicata is inapplicable under the circumstances and contend that, notwithstanding sovereign immunity, the Commission possesses ample power under the Act to direct relief. Given our preceding disposition, we need not rule on the Secretary's res judicata and sovereign immunity arguments.

D. Merits of the Requested Refunds

Although we are constrained to deny JWR's motion, we express our disapproval of the Secretary's actions regarding attempted compliance with the Coal Employment Project mandate. The Secretary has pursued a confusing course of action, issuing proposed rules for comment at the same time as he issued and implemented PPLs outside the aegis of the APA. See Drummond, 14 FMSHRC at 678-90. A joint industry and labor comment received during the rulemaking process "contended that the proposed excessive history criteria and program were inherently flawed because they did not target the appropriate [i.e., higher fatality rate] mines." 57 Fed. Reg. at 60693 (preamble to final rule). Based on further substantive analysis, the Secretary deleted from the final rule percentage augmentations of penalties based on excessive history.

_____

10 Amicus AMC also argues that Rule 60(b)(4) relief is justified in that the underlying section 105(a) final orders are "void" pursuant to the principles announced in Drummond. We decline to reach this issue. JWR premised its motion only on Rule 60(b)(3) and (b)(6) and on equitable principles. Absent exceptional circumstances, not shown here, an amicus cannot expand the scope of an appeal beyond the issues raised by the parties. E.g., Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991); Christopher M. v. Corpus Christi Ind. Sch. Dist., 933 F.2d 1285, 1292 (5th Cir. 1991).

The Secretary has argued that making the requested refunds would be administratively chaotic, because thousands of cases would have to be reopened and approximately $1,500,000 refunded. Sec. Opp. at 19. However, following the Commission's remand of penalty cases in accordance with Drummond, the Secretary recalculated thousands of penalties that had been proposed pursuant to the PPL and reduced the assessments involved by $859,038. Letter from Secretary's Counsel to Commission (in response to Commission's written inquiries) at 2 (February 4, 1993)("Sec. Letter").(Footnote 11) The Secretary further argues that he is barred from granting refunds, relying, in part, on a Comptroller General opinion issued more that fifty years ago in matters that are not analogous. Sec. Surreply Br. at 8-10 & n.7. The Secretary, however, has not requested the Comptroller General's opinion as to the legality of refunds in these matters nor did the Secretary seek such opinion on the refunds he made voluntarily. See Oral Arg. Tr. at 38-39; see also Sec. Letter at 2. The Secretary has informed the Commission that, as of February 4, 1993, he had refunded to operators $249,513 in excessive history penalty overpayments based on "retroactivity considerations." Sec. Letter at 1-2. These refunds were made by MSHA to remove any "doubt as to the fairness and consistency of [MSHA's] Assessment policies and procedures." Notification to Mine Operator[s], Attachment C to JWR's Notice of Contest.

In not appealing Drummond, in reproposing many penalties in accordance with Drummond, and in modifying the final penalty rule, the Secretary has implicitly recognized that percentage augmentations based on excessive history were misplaced. In other cases involving the excessive history program, the Secretary has undertaken penalty recalculations and has made refunds on a broad scale. We urge the Secretary to evaluate further the legality and feasibility of providing refunds in these matters and to reconsider his position.

_____

11 We note that, in addition to those reproposals for S&S violations, the Secretary has agreed, based on Drummond, to reduce penalty proposals for non-S&S violations with excessive history. See JWR Citation of Supplemental Authority (Letter of May 21, 1993).

III.

Conclusion

For the foregoing reasons, JWR's motion for relief is denied and this proceeding is dismissed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner