

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

MAY 17 2016

UNITED MINE WORKERS OF AMERICA :  
(UMWA), on behalf of MARK A. FRANKS :  
v. : PENN 2012-250-D  
EMERALD COAL RESOURCES, LP :  
UNITED MINE WORKERS OF AMERICA :  
(UMWA), on behalf of RONALD M. HOY :  
v. : PENN 2012-251-D  
EMERALD COAL RESOURCES, LP :  
SECRETARY OF LABOR :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : PENN 2013-305  
: PENN 2013-306  
EMERALD COAL RESOURCES, LP :

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

**DECISION APPROVING SETTLEMENT**

BY: THE COMMISSION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). They involve complaints of discrimination and interference filed by the United Mine Workers of America (“UMWA”) on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). After a hearing on the merits, an Administrative Law Judge concluded that Franks and Hoy demonstrated that they

had been discriminated against as a result of their participation in activities protected by the Mine Act and in violation of section 105(c). 35 FMSHRC 1696 (June 2013) (ALJ).<sup>1</sup>

Emerald then petitioned the Commission for review of the Judge's decision, which the Commission granted. On review, a majority of the Commission affirmed the Judge's decision in result. 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the decision to the United States Court of Appeals for the Third Circuit. For the reasons articulated below, the Third Circuit vacated the Commission's decision and remanded the cases to the Commission for further analysis.<sup>2</sup>

The Commission's decision to affirm the Judge's decision, in result, was a split decision. Commissioners Young and Cohen voted to affirm on the grounds that substantial evidence supported the Judge's conclusion that Emerald *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. *Id.* at 2089-2103. Chairman Jordan and Commissioner Nakamura voted to affirm the Judge's decision in result after concluding that Emerald *interfered* with the protected statutory rights of the miners in violation of section 105(c). *Id.* at 2104-2119. Commissioner Althen voted to vacate the decision of the Judge. *Id.* at 2120-2144.

The Third Circuit concluded that the two opinions affirming the Judge's decision presented "conflicting rationales" to support the finding that Emerald violated section 105(c) of the Mine Act, and therefore, the Commission failed to provide a majority rationale that was "amenable to review." *Emerald Coal Res. LP, v. Hoy*, 620 Fed. Appx. 127, 129, 132 (3rd Cir. 2015) (citation omitted). However, the Court further concluded that because "four of five [Commissioners] agreed that the Mine Act was violated and relief was appropriate, [it] believe[d] the agency should have a chance to explain its reasoning." *Id.* at 133. Therefore, the Court vacated and remanded the Commission's decision, noting that it was not expressing an "opinion as to how the Commission may decide the discrimination or interference issues or

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<sup>1</sup> The Judge ordered Emerald to take the following remedial actions: (1) provide backpay to Franks in the amount of \$1,168.68 plus interest and backpay to Hoy in the amount of \$1,963.93 plus interest; (2) post the decision at the mine site and provide notice to miners of their rights under section 105(c); (3) remove all reference to the reprimand from the personnel files of Franks and Hoy. 35 FMSHRC at 1707.

<sup>2</sup> As a result of the Commission's decision that Emerald violated the Mine Act, the Secretary of Labor subsequently filed petitions for assessment of civil penalty pursuant to sections 105 and 110 of the Mine Act. The proposed penalties were \$20,000 each, for a total penalty of \$40,000. The parties filed joint stipulations addressing the penalty criteria, and the Judge assessed the total penalty of \$40,000. Unpublished Order (October 29, 2014) (Docket No. PENN 2013-305 et al.).

Emerald petitioned the Commission for review of the Judge's civil penalty decision. However, no two Commissioners voted to grant the petition. Emerald then appealed the Judge's decision to the Third Circuit. The Third Circuit consolidated the civil penalty cases with the other captioned matters.

whether it should remand the case to the [Judge] to conduct the interference analysis in the first instance . . . .” *Id.*

On remand to the Commission, a majority of the Commissioners voted to remand the proceedings to the Judge “to conduct the interference analysis in the first instance” consistent with the decision of the Third Circuit. 38 FMSHRC 226, 228 (Feb. 2016).

On April 11, 2016, the Judge issued her decision on remand. She concluded that Emerald unlawfully interfered with the complainants’ rights under the Mine Act and assessed a total civil penalty of \$40,000. She also reiterated the provisions of her previous order described in footnote 1, *supra*. 38 FMSHRC \_\_\_, slip op. at 11-13, No. PENN 2013-305 et al (Apr. 11, 2016).

On April 29, 2016, the parties filed a joint petition for discretionary review. The parties also announced that they had reached a settlement, and requested approval of their settlement agreement. The Commission has granted the petition for discretionary review in a separate Direction for Review, and now disposes of the cases.

The parties’ joint request for approval of settlement was filed in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which provides, in relevant part, that “[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.” Commission Procedural Rule 31 provides that a “proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion.” 29 C.F.R. § 2700.31(a). The movant is required to provide “facts in support of the penalty agreed to by the parties.” 29 C.F.R. §§ 2700.31(b)(1), (c)(1).

The parties represent that Emerald’s mine has ceased production of coal and is now closed. The parties further represent that Emerald and its parent company, Alpha Natural Resources, Inc., have filed for bankruptcy. Additionally, the parties represent that Emerald previously performed all the remedial actions ordered by the Judge: Emerald has provided backpay to the miners, posted the decision and notice at the mine, and removed the reprimands from the complainants’ personnel records. The parties now propose that Emerald pay a reduced civil penalty in the amount of \$20,000 in satisfaction of the violations of the Mine Act. The parties represent that Emerald has assured the Secretary that the penalty agreed upon in settlement will be paid in the ordinary course of business, pursuant to an Order of the Bankruptcy Court.

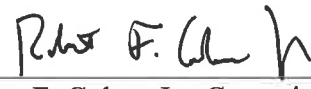
The Secretary represents that he has determined that a total penalty of \$20,000, rather than the \$40,000 ordered by the Judge, is appropriate in light of the facts that the Emerald Mine is now closed, that Emerald and its parent company are now in bankruptcy, and that all other remedies directed by the Judge, including backpay, have been fully performed.


The parties’ joint request for approval of settlement is granted. We determine that the parties have justified that a reduction of the penalty is appropriate given the change in the size of the operator’s business. *See* 30 U.S.C. § 820(i) (“In assessing civil monetary penalties, the Commission shall consider . . . the appropriateness of such penalty to the size of the business

charged. . ."). Emerald Coal is ordered to pay the civil penalty of \$20,000 within 30 days of the issuance of this order.

  
Mary Lu Jordan, Chairman

  
Michael G. Young, Commissioner

  
Robert F. Cohen Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

  
William I. Althen, Commissioner

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