

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 9, 1997

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. KENT 94-1208 |
| | : | |
| BROKEN HILL MINING COMPANY | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). At issue is whether Administrative Law Judge T. Todd Hodgdon properly applied the penalty assessment criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i), in assessing a civil penalty of \$1,000 against Broken Hill Mining Company (ABroken Hill@) for a violation of 30 C.F.R. ' 75.1702.² 17 FMSHRC 338, 345 (March 1995) (ALJ). The Commission granted Broken Hill=s petition for discretionary review challenging the judge=s penalty assessment. For the reasons that follow, we affirm.

¹ Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

² Section 75.1702, which contains language identical to that of section 317(c) of the Mine Act, 30 U.S.C. ' 877(c), provides:

No person shall smoke, carry smoking materials, matches or lighters underground The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches or lighters.

I.

Factual and Procedural Background

On May 19, 1994, inspectors Buster Stewart, Gary Gibson and Jimmy Brown, from the Department of Labor's Mine Safety and Health Administration (MSHA), conducted a spot inspection for smoking materials at Broken Hill Mine No. 1 in Pike County, Kentucky. 17 FMSHRC at 339; Pet. Ex. 10 at 3. After searching all miners in the underground working area of the mine for smoking materials, the inspectors directed those miners who had lunch buckets to retrieve them. 17 FMSHRC at 339. Inspector Stewart accompanied miner Donald Kidd to the scoop he operated to retrieve Kidd's lunch bucket. *Id.* When Kidd opened his lunch bucket in the presence of Stewart and Gibson, they found various items including a cigarette lighter. *Id.*

As a result, MSHA issued a citation to Broken Hill pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), for an alleged violation of section 75.1702. *Id.*; Pet. Ex. 1. This citation, as amended, alleged that Broken Hill's search program was inadequate because Kidd was allowed to carry a cigarette lighter underground. 17 FMSHRC at 339-40. MSHA proposed a penalty of \$2,500 for this alleged violation. *Id.* at 339. MSHA also issued a citation to Kidd pursuant to section 110(g) of the Mine Act, 30 U.S.C. ' 820(g),³ alleging a violation of the smoking prohibition contained in section 317(c) of the Act. *Id.*; Pet. Ex. 7. Broken Hill and Kidd both challenged the proposed penalty assessments.

³ Section 110(g) provides:

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation.

Following an evidentiary hearing, the judge concluded that Kidd did not willfully violate section 317(c) of the Mine Act. 17 FMSHRC at 340, 343. Accordingly, he vacated the citation and dismissed the civil penalty petition as to Kidd. *Id.* at 343.⁴ The judge further concluded that Broken Hill had committed a significant and substantial (AS&S) violation of section 75.1702. *Id.* at 343-44. The judge also concluded that this violation was not the result of high negligence or unwarrantable failure on the part of Broken Hill, and therefore affirmed the citation as modified to a violation under section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), rather than under section 104(d)(1). *Id.* at 344-45.

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, the judge found that Broken Hill has a lower than average history of prior violations, with no evidence of previous smoking violations; that the No. 1 mine is a small mine and that Broken Hill is a small operator; and that Broken Hill demonstrated good faith in abating the violation. *Id.* at 345. The judge expressly found that Broken Hill made no claim at the hearing that the penalty proposed by the Secretary was inappropriate to its size or that the penalty would adversely affect its ability to remain in business. *Id.* The judge also noted that while he had reduced the level of

⁴ While the issue of an appropriate sanction for a miner who violates section 317(c) of the Mine Act (as defined in section 75.1702) is not before the Commission in this case, Commissioner Riley wishes to comment on the judge's finding that because the miner's conduct in bringing smoking materials into this mine was not willful, as required by section 110(g), that conduct, although possibly reckless, did not separately violate the Mine Act. He observes that under the strict liability framework of the Mine Act, even though a miner may subject his coworkers to unnecessary risk, the operator alone is obliged to pay for his employee's irresponsible mistake. Commissioner Riley urges the Secretary to seek amendment to section 110(g) so as to apply the same strict liability standard to miners who needlessly expose their coworkers to danger from prohibited smoking materials. In Commissioner Riley's view, the extreme danger posed by such conduct is illustrated by the South Mountain explosion, where three of nine miners, in a badly operated mine, were found to be in possession of smoking materials underground, with fatal consequences to eight of them.

negligence, he still considered the violation to be a serious one. *Id.* Based upon these factors, the judge determined that a penalty of \$1,000 was appropriate, rather than the \$2,500 penalty proposed by the Secretary of Labor. *Id.*

The Commission granted Broken Hill's petition for discretionary review, which challenged the judge's assessment of a \$1,000 civil penalty for the section 75.1702 violation.

II.

Disposition

Broken Hill argues that the penalty of \$1,000 assessed by the judge is excessive and based upon an erroneous application of the statutory penalty criteria. B.H. Br. at 1-3. In particular, Broken Hill disputes the judge's finding that it made no claim at the hearing that the proposed penalty was inappropriate to its size or would adversely affect its ability to remain in business. *Id.* at 2-3. Broken Hill contends that it referred to its financial difficulties, and the adverse impact that the proposed penalty would have on its ability to remain in business, in both its answer to the proposed penalty assessment and its pre-hearing report. *Id.* at 2-3. Broken Hill also contends that Hobart Anderson, its president and chief executive officer, was denied an opportunity to testify at the hearing about the company's financial condition and the adverse impact of the proposed penalty as a result of an objection raised by counsel for the Secretary to Anderson's testimony. *Id.* at 3. In addition, Broken Hill argues that the \$1,000 penalty assessed by the judge is inconsistent with his findings that the violation was not willful or the result of high negligence. *Id.* at 2. Based upon the foregoing factors, Broken Hill asserts that a penalty of \$100 would be equitable. *Id.* at 3.⁵

The Secretary contends that the judge's penalty assessment reflects proper consideration and application of the statutory penalty criteria. S. Br. at 4-5. The Secretary argues that the judge properly found that Broken Hill failed to establish that the proposed civil penalty would affect its ability to continue in business because it failed to make any claim or introduce any evidence at the hearing regarding the adverse impact of the proposed penalty. *Id.* at 6-8. The Secretary contends that Broken Hill's reliance upon certain assertions made in its pre-hearing filings is misplaced, because those filings do not constitute the type of "specific evidence" that the Commission has required as proof of the adverse impact of a penalty on an operator's ability to remain in business. *Id.* at 6-7. The Secretary also disputes Broken Hill's assertion that it was precluded from offering Anderson's testimony concerning its financial condition, asserting that counsel only objected to his participation as both legal representative for his company and as a

⁵ In its brief, Broken Hill also attempts to challenge the judge's determination that the section 75.1702 violation was S&S. *Id.* at 1-2. In response, the Secretary argues that we are prohibited from considering Broken Hill's S&S claim by section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), because that issue was not raised in its petition for discretionary review. S. Br. at 5-6 n.3.

witness at the hearing, and that Broken Hill could have introduced relevant evidence on this issue through the testimony of other witnesses and the production of company documents. *Id.* at 7-8.

The Mine Act requires that, in all contested penalty cases, the Commission make an independent penalty determination and assessment based solely on the statutory criteria of section 110(i) of the Act.⁶ See *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). We have explained that A[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.@ *Sellersburg*, 5 FMSHRC at 294 (citation omitted). In reviewing a judge's penalty assessment, we must determine whether the penalty is supported by substantial evidence.⁷ While Aa judge's assessment of a penalty is an

⁶ Section 110(i) sets forth six criteria to be considered by the Commission in the assessment of penalties under the Act:

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 the violation.

⁷ The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C.

' 823(d)(2)(A)(ii)(I). The term Asubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison*

exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . @ *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on the criteria that Anot only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.@ *Sellersburg*, 5 FMSHRC at 292-93.

We conclude that the judge's penalty assessment is supported by substantial evidence. The judge considered, and made express findings concerning, each of the six statutory penalty criteria. Based upon this analysis, he assessed a penalty of \$1,000 against Broken Hill for the section 75.1702 violation, rather than the \$2,500 penalty proposed by the Secretary. In our view, the judge's penalty assessment was based upon a proper analysis of the statutory criteria and the circumstances surrounding the violation.

Co. v. NLRB, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

We reject Broken Hill's challenge to the judge's finding that it made no claim at the hearing that the Secretary's proposed penalty was inappropriate to its size or would adversely affect its ability to remain in business. As the judge found, Broken Hill failed to adduce any evidence at the hearing concerning its financial condition or the impact that the proposed penalty would have on its economic viability. While Broken Hill did raise general claims in its prehearing filings concerning the adverse impact of the proposed penalty and its inability to pay,⁸ the judge properly concluded that it did not carry its burden with respect to these claims because it failed to introduce any financial information or other specific evidence to support or substantiate them. This finding is consistent with Commission precedent. We have previously held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (September 1973)); accord *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). See also *Steele Branch Mining*, 18 FMSHRC 6, 15 (January 1996). In *Steele Branch Mining*, we rejected an operator's unsupported assertion that it should be relieved of its civil penalty liability because it was no longer in business where it provided neither the judge nor the Commission with any evidence on this claim. *Id.* In *Spurlock*, we rejected the reliance of two operators on evidence far more specific than that presented by Broken Hill including tax returns, financial statements and balance sheets as insufficient to establish that proposed penalties would affect their ability to remain in business. 16 FMSHRC at 700.

Nor do we find merit to Broken Hill's assertion that it was deprived of the opportunity to present evidence on its financial position and the adverse impact of the proposed penalty because of an objection raised by the Secretary's counsel to Anderson testifying at the hearing. The record indicates that this objection was based on the alleged conflict that would result if Anderson, who served as Broken Hill's legal representative at the hearing, was also permitted to testify as a witness on its behalf. Tr. 11. The judge never ruled on this objection, however, and it appears that Broken Hill elected voluntarily not to call Anderson as a witness. In any event, Broken Hill could have introduced evidence concerning its financial condition through other witnesses, such as its consultant Charlie Lavender, who was called to testify by the company. See Tr. 206. In addition, Broken Hill could have adduced documents and records relevant to its financial condition at the hearing, but failed to do so. Broken Hill thus cannot fairly ascribe its failure to introduce evidence at the hearing on the issue of the financial impact of the proposed penalty to the objection to Anderson's testimony asserted by counsel for the Secretary.

Contrary to Broken Hill's assertion, the record also reflects that the judge did expressly

⁸ Broken Hill's answer to the penalty petition, dated September 30, 1994, asserted as an affirmative defense that the company was "having severe financial difficulties and any fines or penalties would affect its ability to stay in business." B.H. Answer at 2. In a pre-hearing report dated December 1, 1994, Broken Hill asserted that "the penalty in question is too excessive and unreasonable[,] and reserved argument on the excessive amount of assessment." B.H. Pre-Hearing Report at 2.

consider his reduction in the level of negligence assigned to this violation, from high to moderate, in lowering the amount of the civil penalty assessment. 17 FMSHRC at 345.

Based on the foregoing, we believe that the assessment of a \$1,000 penalty against Broken Hill was within the judge's considerable discretion, based upon proper consideration of the statutory criteria, and is supported by substantial evidence. Accordingly, we affirm the judge's penalty assessment.⁹

⁹ We agree with the Secretary that the issue of whether the judge erred in finding this violation of section 75.1702 to be S&S is not properly before us, because it was not raised in Broken Hill's petition for discretionary review. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f). See *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (August 1994), *aff'd mem.*, 81 F.3d 173 (10th Cir. 1996); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 & n.6 (D.C. Cir. 1983).

III.

Conclusion

For the foregoing reasons, we affirm the judge's penalty assessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner