

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 4, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 95-29-M
	:	CENT 95-30-M
REB ENTERPRISES, INC.,	:	CENT 95-239-M
HAROLD MILLER, and	:	CENT 95-240-M
RICHARD BERRY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners¹

ORDER

BY THE COMMISSION:

¹ Commissioner Beatty elected not to participate in the Commission's March 30, 1998, decision because he assumed office after the case had been considered 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 Beatty continues to elect not to participate in this matter.

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (Mine Act). On September 5, 1996, Administrative Law Judge Avram Weisberger issued a decision in which he, in part, determined that four violations by REB Enterprises, Inc. (REB) were not the result of its unwarrantable failure to comply with various standards,² that REB did not violate section 30 C.F.R. ' 56.14130(a)(3) as alleged in Order No. 4327626, and that Order No. 4327628 must be dismissed because it alleged a violation of the wrong standard. 18 FMSHRC 1603, 1622-24 (Sept. 1996) (ALJ). On October 7, 1996, REB paid \$2,400 in civil penalties that were assessed by the judge for the violations. *Id.* at 1627. On October 15, 1996, the Commission granted a petition for discretionary review filed by the Secretary of Labor challenging the judge's determinations.

On March 30, 1998, the Commission issued a decision in which it, in part, vacated the judge's determination that the four violations were not the result of REB's unwarrantable failure, reversed the judge's determination that REB did not violate section 56.14130(a)(3) as alleged in Order No. 4327626, and vacated the judge's dismissal of Order No. 4327628. 20 FMSHRC 203, 218-19 (Mar. 1998). The Commission remanded the matter to the judge for further consideration and assessment of civil penalties. *Id.*

In an April 24, 1998, remand decision, the judge affirmed his findings that the four violations were not unwarrantable. 20 FMSHRC 455, 456-59 (Apr. 1998) (ALJ). In addition, he found that the violations alleged in Order Nos. 4327626 and 4327628 were not unwarrantable and assessed \$1,400 in civil penalties for the two violations. *Id.* at 458-59.

On April 30, 1998, the Commission received REB's Motion to Dismiss Consideration of Further Penalties.³ Relying on section 100.7(b) of the Secretary's civil penalty assessment procedures, 30 C.F.R. ' 100.7(b),⁴ REB argues that since it had already paid the civil penalties

² The four violations are as follows: Citation No. 4327776 alleging a violation of 30 C.F.R. ' 57.14131(a) for failure of a haul truck driver to wear a seat belt; Order Nos. 4327622 and 4327625 alleging violations of 30 C.F.R. ' 56.14130(g) for failure of bulldozer drivers to wear seat belts; and Order No. 4327631 alleging a violation of 30 C.F.R. ' 56.14107(a) for failure to guard the tail pulley of a radial stacker conveyor belt. 18 FMSHRC 1603, 1607, 1610-12, 1614-16, 1619-21, 1624-25 (Sept. 1996) (ALJ).

³ The certificate of service attached to the motion indicates that it was mailed on April 27, 1998.

⁴ Section 100.7(b) states, in part:

Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify MSHA in writing of the intention to contest the proposed penalty.

assessed by the judge in his initial decision, and since MSHA had accepted the payment prior to the Commission's decision, the Secretary is estopped from seeking to augment penalties based on the same violations. Mot. at 1.

On May 12, 1998, the Commission received the Secretary's opposition to the motion. Therein, the Secretary asserts that the acceptance provision of section 100.7(b) applies only if, within 30 days of receipt of the proposed penalty, the charged party pays the proposed penalty instead of contesting the proposed penalty. Opp'n at 1-2. She argues that, since REB contested the proposed penalties instead of paying them within 30 days of receipt, REB cannot now invoke the acceptance provision of section 100.7(b). *Id.* at 2. In addition, the Secretary argues that, even if the acceptance provision could be invoked to prevent her from seeking increased penalties, it could not prevent the Commission from assessing increased penalties because the Commission has authority to assess penalties *de novo*. *Id.* at 2-3 (citing 30 U.S.C. ' 820(i); *Wallace Bros., Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-93 (Mar. 1983)). Further, in light of the judge's remand decision affirming his unwarrantable failure findings with respect to the four violations and, thus, affirming the penalty amounts, the Secretary notes that if she does not petition for discretionary review, REB's motion will be moot. *Id.* at 4 n.2. Subsequently, the Secretary did not seek review of the judge's remand decision.

On June 15, 1998, REB submitted a letter to the Commission in which it states that it wants to hold . . . in abeyance [the paying of the \$1,400 civil penalties for the violations alleged in Order Nos. 4327626 and 4327628] until the Commission makes a decision on . . . [the motion]. REB asserts that, if the motion is granted, then it would not owe the penalties.

The judge's jurisdiction over this case terminated when his remand decision was issued on April 24. 29 C.F.R. ' 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. ' 823(d)(2)(A); 29 C.F.R. ' 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. ' 823(d)(1). REB's motion was received by the Commission on April 30, within 30 days of the judge's decision. The Commission did not act on the motion and the judge's decision became a final decision of the Commission 40 days after its issuance.

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply as far as practicable in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem REB's motion to be a petition for discretionary review, which we deny. *See Remp Sand & Gravel*, 16 FMSHRC 501, 502 (Mar. 1994) (reopening proceeding after decision became final due to Commission's inaction on letter deemed to be timely filed petition).

In its motion, REB asserts that the Secretary is estopped from augmenting the penalties that it had previously paid and that the Secretary had accepted. Mot. at 1 & 2, 3. However, in his remand decision, the judge did not augment the four penalties that REB had previously paid. By affirming his initial decision that the four violations were not unwarrantable, the judge, in effect, merely affirmed the penalties that he had previously assessed. 20 FMSHRC at 456-59. Accordingly, REB's argument has no basis.

In addition, it appears that REB is arguing that, because it paid penalties for *all* violations and the Secretary accepted those payments, it cannot be assessed further penalties. Mot. at 1; Letter dated June 15, 1998. However, Order Nos. 4327626 and 4327628 were initially dismissed by the judge. 18 FMSHRC at 1622-24. Accordingly, REB never paid penalties for those orders and the Secretary never accepted payment for them. The assessment of penalties for those orders in the sum of \$1,400 by the judge in his remand decision was not an augmentation, but an initial assessment. In any event, we agree with the Secretary that REB cannot invoke the acceptance provision of section 100.7(b) because it contested all six of the proposed penalties instead of paying them within 30 days upon receipt of the Secretary's notice of proposed penalties. See 30 C.F.R. § 100.7(b)(2).

Based on the foregoing, we reopen this proceeding, deem the motion to be a petition for discretionary review, and deny the petition. Accordingly, REB's motion is denied. REB is directed to pay \$1,400 in civil penalties for the violations contained in Order Nos. 4327626 and 4327628.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

James E. Crouch, Esq.
Cypert, Crouch, Clark & Harwell
111 Holcomb Street
P.O. Box 1400
Springdale, AR 72765-1400

James B. Crawford, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041