**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 23, 2001

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket Nos. CENT 2000-65, CENT 2000-80 |
| GEORGES COLLIERS, INCORPORATED | : | |

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge Gary Melick assessed penalties in the amount of $3713 against Georges Colliers, Inc. ("GCI"). 22 FMSHRC 1091, 1093-94 (Sept. 2000) (ALJ). GCI filed a petition for discretionary review ("PDR") challenging the judge's penalty assessments, which was granted. For the reasons set forth below, we vacate the judge's penalty assessments and remand for reassessment.

I.

Factual and Procedural Background

On September 10, 1999, the Secretary proposed penalties in the amount of $4896 for 18 citations and one section 104(b) order in Docket No. CENT 2000-65, and on September 16, she proposed penalties in the amount of $1255 for 10 citations in Docket No. CENT 2000-80. GCI contested each of the proposed assessments, which together totaled $6151. The Secretary then filed with the Commission petitions for assessment of penalties. Subsequently, the proceedings were consolidated. The parties agreed that the only issue in dispute was the effect of the penalties on GCI's ability to continue in business. A hearing was held on this issue on April 13, 2000.

At the hearing, GCI presented evidence of its financial condition, including audits, signed tax returns, letters from contract purchasers of coal indicating that GCI was unable to meet

production, letters from the holder of a secured note that GCI was in default, a list of outstanding delinquent unsecured debtors, and detailed testimony of an expert witness in support of its position that the penalties would affect its ability to continue in business. In addition, the judge instructed the parties to submit joint stipulated facts on the remaining penalty criteria.

While the parties were negotiating a joint stipulation of facts, they discovered that the Secretary had incorrectly determined GCI's history of violations. On August 14, 2000, the Secretary submitted to the judge amended proposed stipulations stating that GCI's violations history included 277 violations. S. Am. Proposed Stips. of Fact at 1. GCI disputed this calculation and the parties subsequently stipulated to a lower number of violations (218). Jt. Stips. of Fact at 1. As a result, the Secretary reduced the total proposed assessments. Letter dated Sept. 15, 2000 from Sec'y of Labor. On September 11, 2000, the parties submitted the joint stipulations, which included a reduction of the proposed penalty assessments from $4896 to $2819 in Docket No. CENT 2000-65, and from $1255 to $894 in Docket No. CENT 2000-80, for a total of $3713.[1]

The judge issued his decision on September 20, 2000. In his decision, he declined to consider "numerous financial records and extensive unrebutted factual and expert testimony" submitted by GCI at the hearing, stating that the evidence was "no longer relevant" due to the reduced proposed assessments. 22 FMSHRC at 1092. The judge also relied on the passage of time between April 2000, when the evidence was submitted at the hearing, and September 2000, when the parties submitted the joint stipulations to the judge, and the fact that GCI no longer operated the mine which was the subject of the violations. *Id.* at 1092-93. The judge assessed penalties totaling $3713. *Id.* at 1093-94. To minimize the financial impact of the penalty assessments, the judge directed GCI to make an initial payment of $113 on November 1, 2000, followed by equal payments of $150 on the first of each month for the succeeding 24 months. *Id.* at 1093.

[1] While the judge stated in his decision that the Secretary's total reduced proposed assessment in both dockets was $3767, he assessed penalties totaling only $3713 without explaining his reduced assessment. 22 FMSHRC at 1091 & n.1, 1093-94. It appears that the discrepancy arises from inconsistent figures provided by the Secretary. The joint stipulations provided that the proposed assessment in Docket No. CENT 2000-80 was $948. Jt. Stip. of Facts at 1. However, in a letter from the Secretary's counsel to the judge, the Secretary listed the revised, along with the original, proposed assessments for each violation, indicating that the total revised proposed assessment in Docket No. CENT 2000-80 was $894. Letter dated Sept. 15, 2000 from Sec'y of Labor. This amount is consistent with the judge's assessment. 22 FMSHRC at 1093-94.

II.

Disposition

GCI argues that the judge abused his discretion when he declined to consider evidence of GCI's financial condition. PDR at 8-13.[2] GCI maintains that substantial evidence establishes that it was "insolvent" and, therefore, that the penalties would affect its ability to continue in business. PDR at 9, 12; G. Reply Br. at 5. GCI asserts that the judge committed a prejudicial procedural error by not allowing it an opportunity to demonstrate that the Secretary's reduced penalties would still affect its ability to continue in business, or to supplement or update evidence of its financial condition. PDR at 14-15; G. Reply Br. at 6-7. GCI clarifies that although its expert witness testified that it could pay the penalty, he indicated that it would have to forego payment to another debtor which would affect its operations at the mine. G. Reply Br. at 5. GCI requests the Commission to vacate the judge's penalty assessments and remand for consideration of its financial evidence. PDR at 16-17; G. Reply Br. at 9.

The Secretary responds that the judge did not abuse his discretion by assessing penalties in the amount of $3713. S. Br. at 10. The Secretary contends that GCI was not prejudiced by the judge's decision, because GCI's evidence did not establish that the proposed assessment of $6151 would affect its ability to continue in business and, thus, could not have satisfied its burden of proof for an even lower proposed assessment amount ($3713). *Id.* at 6-7. The Secretary asserts that the judge did not err by failing to provide GCI an opportunity to respond, because it was aware of the reduced proposed assessments in the joint stipulations, and could have filed a motion for leave to submit additional evidence before the judge issued his decision. *Id.* at 8-9. The Secretary points out that, in any event, GCI conceded at the hearing that a penalty in the amount of $3600 paid by amortized payments would not affect its ability to continue in business. *Id.* at 9-10. The Secretary requests that the Commission affirm the judge's decision. *Id.* at 10.

The Commission's judges are accorded considerable discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[3] *Id.* (citing *Sellersburg*

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[2] GCI designated its PDR as its opening brief.

[3] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the

*Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not 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. 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). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.[4]

Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *See Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998) (considering evidence of an operator's financial condition to determine whether the penalty would have an effect on the operator's ability to continue in business); *Spurlock Mining Co.*, 16 FMSHRC 697 (Apr. 1994) (same); *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997) (same).

One basis for the judge's refusal to consider GCI's financial evidence was his conclusion that the evidence was no longer relevant due to the passage of time. The evidence submitted by GCI covered its financial condition from 1996 up to the first quarter of 2000. The judge issued his decision on September 20, 2000, five months after the hearing. Notably, the Secretary does not attempt to defend the judge's refusal to consider the financial evidence submitted by GCI at the hearing or contend that the evidence is irrelevant. In fact, the Secretary appears to concede the relevance of GCI's financial evidence by arguing that even if the judge considered the evidence, it could not successfully prove that the penalties would affect GCI's ability to continue in business. We conclude that the passage of time did not make GCI's evidence of its financial condition irrelevant. It is not uncommon to have a gap in time between the hearing and the issuance of the judge's decision. However, this does not render irrelevant financial evidence

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> gravity of the violation, and [6] 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).

[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

introduced to support (or refute) an argument that the proposed penalty would affect the operator's ability to continue in business.[5]

We also reject the judge's reliance on the Secretary's post-hearing reduction of the proposed penalty assessments as support for his refusal to consider the evidence of GCI's financial condition. We find that the evidence of GCI's financial condition as of the time of the hearing consists of factual data which is unaffected by the Secretary's reduced proposed assessment. For example, GCI's expert witness, Paul Matlock, in summarizing the import of the financial documents it submitted, including audits and tax returns, testified that GCI was not "solvent." Tr. 39. Matlock stated that "[GCI] would be [insolvent] if the forbearance [on its debt payments] was not given," and that GCI has "no guarantee" that the forbearance will continue. Tr. 12-13, 39. He further testified that GCI was "behind on . . . production taxes, . . . royalties, . . . [and] utilities," and asserted that "anything we pay outside that are not considered critical production items, we would have to trade out for production items, which basically would cause us to have to shut down production." Tr. 25, 27-29. Under this view, it appears that a penalty assessed at $6000 would have the same impact on GCI as a penalty of $3000.

On the other hand, Matlock also testified, in response to the judge's questioning, that GCI could pay $100 per month over three years, but that GCI "would have to take $100 out of our production," which would affect "operations." Tr. 41. The Secretary characterizes Matlock's equivocal testimony as a concession that GCI could pay penalties totaling $3600. While we take no position on the Secretary's characterization, the financial evidence of record is clearly relevant to the reduced proposed assessments. Although it was appropriate for the judge to consider the reduced penalty when evaluating the ability to continue in business criterion, we conclude that the financial data submitted at the hearing is still relevant to consider in relation to the reduced proposed assessments.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Here, the judge failed to evaluate evidence of GCI's

[5] The fact that the operator no longer operates the mine in question does not render the "ability to continue in business" criterion irrelevant. Even if the operator no longer operates the mine that is the subject of this proceeding, it will remain subject to a penalty if it is still in business, has not dissolved, and has assets. *See Spurlock Mining*, 16 FMSHRC at 699-700 (holding that the operator was still in business because it had not dissolved and planned to resume operations). Thus, the judge erred when he declined to consider GCI's evidence on this basis.

financial condition in making findings as to whether the proposed penalty would adversely affect its ability to continue in business.[6]

Accordingly, we conclude that the judge abused his discretion when he declined to consider GCI's evidence. We vacate the judge's penalty assessment and remand this proceeding to the judge for consideration of all relevant evidence of GCI's financial condition, including any evidence with which the judge may, in his discretion, allow the parties to supplement the record. *See Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1302 (Dec. 1998) ("it is within the province of the judge to ensure that the record contains sufficient information on all the statutory criteria").

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessments and remand this proceeding to the judge to reassess penalties consistent with this decision.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

[6] We reject the Secretary's suggestion that the Commission consider the merits of whether GCI's financial evidence satisfies its claim that the penalty affects its ability to continue in business. That issue is for the judge, as the trier of fact, to consider in the first instance.

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