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MSHA V. YOUGHIOGHENY & OHIO COAL
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FMSHRC-WDC
April 30, 1987

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 84-98

YOUGHIOGHENY & OHIO COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) (the "Mine Act"), the issues are whether a Commission administrative law judge erred in holding Youghiogheny & Ohio Coal Co. ("Y&0") in default; whether two violations of a mandatory safety standard were "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. $ 814(d)(1); and whether the procedure followed in assessing civil penalties for the violations was proper. For the reasons that follow, we conclude that, to the extent that the judge characterized his disposition as a default, he erred. Further, we affirm the judge's findings that the violations were significant and substantial and his civil penalty assessments.

Y&O's Nelms No. 2 Mine, an underground coal mine, is located in Harrison County, Ohio. On March 14, 1984, Robert Cerana, an inspector/ventilation specialist of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a ventilation inspection of the 013 section of the mine. In the "C" entry the inspector observed coal dust filtering through the man doors in the stopping line between the "C" and "D" entries. The inspector had detected recirculation of air on the 013 section twice during the

two months prior to March 1984. The coal dust indicated to the inspector that the section again might be experiencing recirculation of air. Utilizing a smoke tube, the inspector determined that return air in the "D" entry was recirculating into the "C" entry and was traveling from the "C" entry to the face. The inspector believed that the recirculation was caused by an auxiliary fan on the section. The inspector found .1% to .2% of methane in the

section. (The mine liberates methane at a rate of approximately 1.5 million cubic feet per minute.)

The inspector issued a citation alleging a violation of 30 C.F.R. $ 75.302-4. 1/ Although the inspector estimated that the violation could be corrected in about one hour, he allowed approximately two hours for abatement. During that time the section foreman tried unsuccessfully to abate the violation. The inspector did not extend the abatement period and issued a withdrawal order pursuant to section 104(b) of the Mine Act. 30 U.S.C. $ 814(b).

Subsequent to the issuance of the withdrawal order, the mine superintendent was summoned to the area. The superintendent ordered the installation of three canvas-type baffle curtains behind the auxiliary fan. Installation of the baffle curtains stopped the recirculation of air.

On April 5, 1984, the inspector conducted another inspection at the mine. When he arrived at the 021 section he observed three miners working and several pieces of electrical equipment in operation, including an auxiliary fan, a roof bolting machine, and a continuous mining machine. The inspector took a mean entry air velocity reading at the continuous mining machine. The reading indicated a mean entry air velocity of 30 feet a minute. 30 C.F.R. $ 75.301-4(a) requires a minimum mean entry air velocity of 60 feet a minute. (A citation was issued for this violation but it is not before us). To increase the air velocity, the tail tube was removed from the back of the auxiliary fan.

Approximately fifteen minutes later the inspector observed coal dust suspended in the atmosphere in the "B" entry. The inspector determined that air was recirculating on the section between the "A" and "B" entries. The inspector also detected methane in the section, .5% at the face of the "A" entry and between .2% and .3% in the "B" entry. The inspector issued a citation alleging a violation of section 75.302-4(a) and found that the violation was significant and substantial.

The violation was abated when the foreman installed three baffle curtains behind the auxiliary fan. This procedure was suggested to the foreman by the inspector after the foreman indicated that he did not know how to abate the violation.

1/ 30 C.F.R. $ 75.302-4(a) provides in part:

In the event that auxiliary fans and tubing are used in lieu of or in conjunction with a line brattice system to provide ventilation of the working face:

(a) The fan shall be a of permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use.

Because the inspector's supervisor believed that the recirculation problem "reoccurs consistently" (Exh. M-5), the supervisor recommended that MSHA specially assess both violations under 30 C.F.R. $ 100.5. 2/ Consequently, the Secretary proposed specially assessed civil penalties of $850 and $950 for the violations.

At the conclusion of an evidentiary hearing, former Commission Administrative Law Judge Joseph B. Kennedy issued a bench decision in which he found that the violations of section 75.302-4(a) occurred and that they were significant and substantial. The judge assessed civil penalties of $1,000 and $950. Later, the judge confirmed his bench decision in writing (7 FMSHRC 1185 (August 1985)(ALJ)) but on review, the Commission concluded that the content of the written decision failed to conform to the requirements of Commission Procedural Rule 65(a), 29 C.F.R. $ 2700.65(a). The Commission remanded the case to the judge for the entry of a decision in accordance with the Commission s Rules of Procedure. 7 FMSHRC 1335-36 (September 1985).

On remand, the judge ordered both parties to file briefs with proposed findings of fact and conclusions of law. One day before Y&O's submission was due, it petitioned the Commission for interlocutory review, requesting relief from the judge's order and asserting that a submission would be futile in view of the judge's prior rulings. The Commission denied Y&O's petition. The judge next ordered Y&0 to show cause why it should not be deemed to be in default for failing to make any submission. Y&0 did not respond and the judge issued his final decision in part purporting to default Y&0 and ordering the payment of the same penalties he had previously assessed. 3/ 8 FMSHRC 121 (January 1986)(ALJ). In addition, the judge set forth reasons and bases for his finding the violations significant and substantial and for his penalty assessments. ln response to Y&O's argument that the Secretary had not complied with his Part 100 regulations in proposing penalties for the violations and that therefore MSHA should reassess the penalties, the judge held that the Commission exercises independent judgment in civil penalty assessments, is not bound by the manner in which MSHA arrives at civil penalty proposals, and that therefore reassessment by MSHA was unnecessary. 8 FMSHRC at 134.

On review Y&0 argues that the judge erred in finding it in default. Y&0 also challenges the judge's findings that the violations were significant and substantial, as inconsistent with the Commission's

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2/ 30 C.F.R. Part 100 sets forth the criteria and the procedures by which the Secretary of Labor, through MSHA, proposes the assessment of civil penalties under sections 105 and 110 of the Mine Act. 30 U.S.C. $$ 815 and 820. Under 30 C.F.R. $ 100.5 of these procedures, MSHA may elect to waive its regular penalty assessment formula (30 C.F.R. $ 100.3) or single penalty assessment provision (30 C.F.R. $ 100.4) and instead specially assess penalties for violations.

3/ Y&O's failure to respond to the judge's order was the subject of a disciplinary referral by the judge and has been addressed previously by the Commission. Disciplinary Proceeding, 8 FMSHRC 663 (May 1986).

decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). Finally, Y&0 asserts that the .judge erred in refusing to require the Secretary to reassess his proposed penalties under Part 100.3 or 100.4.

We hold that the judge's purported "default" of Y&0 was in name only, and had no practical adverse impact on Y&0 or upon the substance of the decision. Commission Procedural Rule 62, 29 C.F.R. $ 2700.62, empowers a Commission judge to require the submission "of proposed findings of fact, conclusions of law, and orders, together with supporting briefs." 4/ Commission Procedural Rule 63(a) authorizes a Commission judge to enter an order of default "[w]hen a party fails to comply with an order of a judge after an issuance of an order to show cause...." 29 C.F.R. $ 2700.63(a). However, Commission Procedural Rule 63(b), 29 C.F.R. $ 63(b), states that in a civil penalty proceeding the judge, after finding a party in default, is required to "also enter a summary order assessing the [Secretary's] proposed penalties as final...." (Emphasis added). 5/ One of the purposes of these rules is to provide for the Commission's assessment of civil penalties in those instances where because of a party's default, there is an inadequate record upon which to base a judge's independent penalty determination. Here, the judge did not assess the Secretary's proposed penalties as final, rather he assessed the penalties d novo, based upon the complete record developed at the hearing before him and in accordance with the statutory penalty criteria. In essence, therefore, the judge's disposition was on the merits, it was not a "default."

We now address Y&O's challenge to the significant and substantial findings and the other penalty aspects of this case. In concluding that

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4/ 29 C.F.R. $ 2700.62, titled "Proposed findings, conclusions and orders," states:

> The Judge may require the submission of proposed findings of fact, conclusions of law, and orders, together with supporting briefs. The proposals shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

5/ 29 C.F.R. $ 2700.63, titled "Summary disposition of proceedings," states:

> (a) Generally. When a party fails to comply

with an order of a judge or these rules, an order
to show cause shall be directed to the party before
the entry of any order of default or dismissal.

(b) Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

the first violation of section 75.302-4(a) was significant and substantial, the judge found that there existed a reasonable likelihood that the hazard contributed to by the violation could result in a serious or extremely serious injury. 8 FMSHRC at 131-132. 6/

We have previously held that a violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

Y&0 admits that air was recirculating on the 013 section. The evidence establishes that the discrete safety hazard contributed to by the violation was the accumulation of methane and coal dust and a resulting danger of explosion or fire. The key issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there is an injury.

We conclude that substantial evidence supports the judge s finding that such a reasonable likelihood existed. As the judge properly recognized, the violation must be evaluated in terms of continued normal

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6/ We recognize that the judge, sua sponte, made a finding that
the violation was significant and substantial, where no such charge
was alleged by the Secretary. In its petition for discretionary
review, Y&0 did not challenge the judge's authority to make such a
finding, nor did we sua sponte direct review of the issue. Thus, we
leave for another day the question of whether a Commission judge may
make findings that a violation is significant and substantial absent
a Secretarial allegation to that effect. 30 U.S.C.
$$ 823(d)(2)(A)(iii), 823(d)(2)(B); 29 C.F.R. $$ 2700.70(f), 2700.71.

mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The air on the section was recirculating and coal was being mined. Although the concentration of methane was low at the point in time that the violation was cited, the mine liberates large quantities of methane and the inspector testified without contradiction that sudden releases of methane can occur at any time. In fact, as the judge noted, due to the amount of methane liberated at the mine it is on the frequent inspection cycle mandated by section 103(i) of the Act, 30 U.S.C. $ 813(i). Thus, had normal mining operations continued, methane could have accumulated in unsafe concentrations. See U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). Further, several potential ignition sources were present on the section in the form of an electrically powered ram car, a roof bolting machine, a scoop and an auxiliary ventilation fan.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

Y&O's challenge to the judge's significant and substantial designation of the second violation of section 75.302-4(a) must also be rejected in light of the substantial evidence supporting the judge's decision.

Here, the inspector testified that at the time of the violation he found .5% methane at the face. He further testified that a sudden release or outburst of methane had occurred recently at the mine, which resulted in a concentration of 1.8%. (As noted above the mine is on a section 103(i) inspection cycle.) The presence of the electrically powered continuous mining machine constituted a possible ignition source. Accordingly, the judge's findings of significant and substantial violations must be affirmed.

Finally, we turn to the penalty aspects of this case, and to Y&0's assertion that the judge erred in failing to require the Secretary to redetermine his proposed penalties under the Secretary's regular penalty assessment procedure of section 100.3 or his single penalty procedure of section 100.4.

At the outset, we acknowledge that the argument raised by Y&0 here differs somewhat from that presented in other cases

addressing the separate roles of the Secretary and the Commission under the Mine Act:s bifurcated penalty assessment scheme. In the prior cases cited by the parties the central issue has concerned whether in assessing penalties in contested cases the Commission and its judges are bound by the penalty assessment regulations adopted by the Secretary in Part 100. We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersburg Stone Co., 5

FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1986); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In the present case, however, Y&0 makes it clear that it is not arguing that the Commission is required to adhere to the Secretary's penalty regulations. Rather, it argues that when the Secretary fails to conform to his own regulations in proposing penalties, the Commission must require the Secretary to re-propose a penalty in a manner consistent with his regulations. We have carefully considered Y&O's argument. For the reasons that follow, we conclude that the Commission's independent penalty assessment authority under the Mine Act's bifurcated penalty assessment scheme serves to provide the necessary and appropriate relief in the vast majority of instances where the Secretary fails to follow his penalty assessment regulations in proposing penalties. We further hold, however, that in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations.

As has been stated, "[i]t is axiomatic that an agency must adhere to its own regulations." Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.), citing Accardi v. Shaughnessy, 347 U.S. 260, 265.67 (1954). The Secretary's Part 100 penalty regulations were formally promulgated and are published in the Federal Register. Therefore, if the regulations were to be considered in isolation they would appear to fall within the purview of the referenced axiom and fidelity by the Secretary to his regulations would be essential to assessment of an appropriate penalty. Id. Viewing the Secretary's regulations in their proper context in the Mine Act's overall penalty assessment scheme, however, we conclude that it generally is neither required nor desirable to require the Secretary to re-propose a penalty. The Commission possesses explicit, statutory authority to independently assess an appropriate penalty based on the record evidence pertaining to the statutory criteria specified in section 110(i), 30 U.S.C. $ 820(i), developed before it. The record developed in an adversarial proceeding concerning the statutory penalty criteria invariably will be more complete, current and fairly balanced than the information that is normally available to the Secretary at the pre-hearing stage when he must unilaterally determine and propose a penalty. Further, because the Commission is itself bound by proper consideration of the statutory criteria and its penalty assessments are themselves subject to judicial review under an abuse of discretion standard, no compelling legal or practical purpose would be served by requiring the

Secretary to undertake again to propose a penalty where a preferable record already has been developed before the Commission. Therefore, we hold that, once a hearing has been held, a determination by the Commission or one of its judges that the Secretary failed to comply with Part 100 in proposing a penalty does not require affording the Secretary a further opportunity to propose a penalty. Rather, in such circumstances the appropriate course is for the Commission or its judges to assess an appropriate penalty based on the record.

We further conclude, however, that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be

given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings. However, given that the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations, and given the Commission's independent penalty assessment authority, the scope of the inquiry into the Secretary's actions at this juncture necessarily would be limited.

We recognize that in the present case Y&0 did attempt to raise this issue at an early stage of the proceedings, but was rebuffed by the judge who failed to distinguish Y&O's argument from those that had been previously considered by the Commission. On this record, however, the judge's error was harmless. Y&0 has not established that the special penalty assessments proposed by the Secretary were arbitrarily made. 30 C.F.R. $ 100.5 provides that "MSHA may elect to waive the regular assessment formula ($ 100.5) or the single assessment provisions ($ 100.4) if the Agency determines that conditions surrounding the violation warrant special assessment." It further states, "[S]ome types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty [by using the regular or the single penalty assessment provisions]." The regulation provides that "[a]ccordingly, the following categories [of violations] will be individually reviewed to determine whether a special assessment is appropriate:

* * *

> (h) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

30 C.F.R. $ 100.5(h). MSHA's supervisory mining engineer who reviewed the citations at issue and recommended that they be specially assessed testified that he made the recommendations, among other reasons, because recirculation was a continuing problem at the mine, because he believed Y&0 exhibited a high degree of negligence in permitting the violations to exist, and because of the seriousness of the hazard posed by the violations. These considerations all fall within the purview of section 100.5(h) as a basis for a special

assessment, and we cannot conclude that in proposing the special assessments under section 100.5 the Secretary acted arbitrarily. Therefore, it was proper for the judge to assess penalties based on the record developed at the hearing.

Although Y&0 further challenges the judge's penalty assessments as they relate to the negligence and gravity criteria, we hold that substantial evidence supports the judge:s negligence and gravity findings regarding both violations. It is not disputed that recirculation previously occurred at the mine. Approximately one month

before the first violation was cited the mine superintendent discussed the mine's recirculation problems with MSHA district personnel. During these discussions the superintendent was told that the use of baffle curtains offered a possible solution. When the second recirculation violation here was cited, three weeks after the first, the section foreman apparently still was not aware that the use of baffle curtains could prevent the recirculation problem encountered. Regarding the gravity of the violations, the mine liberates large amounts of methane, some methane was present in the sections at the time each violation was cited, and ignition sources were also present. In view of these factors, the judge properly evaluated the gravity of the violations as being serious. We further find that the amount of the penalties assessed by the judge are supported by the record, are consistent with the statutory penalty criteria, and will not be disturbed. Shamrock Coal Co., 1 FMSHRC 469 (June 1979).

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Accordingly, the decision of the administrative law judge is affirmed insofar as it is consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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