

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-562
Petitioner	:	A.C. No. 15-18861-137278
v.	:	
	:	Docket No. KENT 2008-782
CONSHOR MINING, LLC,	:	A.C. No. 15-18861-143281
Respondent	:	
	:	Mine No. 1

ORDER

The captioned civil penalty proceedings concern 104(d)(2) Order Nos. 7502867 and 7502879 in Docket No. KENT 2008-562 issued in May 2007, and 104(d)(2) Order No. 7503222 in Docket No. KENT 2008-782 issued in June 2007. All three of the subject orders allege violations of the mandatory standard in section 75.220(a)(1) that requires a mine operator to follow its approved roof control plan. 30 C.F.R. § 75.220(a)(1). However, all three of the cited violative conditions concern different provisions of Conshor Mining, LLC’s (“Conshor’s”) roof control plan.

I. Background

Section 110(b)(2) of the Mine Improvement and New Emergency Response Act of 2006 (“New Miner Act”) provides for enhanced penalties for flagrant violations. 30 U.S.C. § 820(b)(2). The Secretary alleges the subject roof control violations are “repeated” flagrant violations as contemplated by section 110(b)(2) of the New Miner Act. Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or *repeated failure* to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

30 U.S.C. § 820(b)(2). (Emphasis added).

The Secretary seeks to impose civil penalties of \$94,900 for Order No. 7502867; \$110,900 for Order No. 7502879; and, \$122,200 for Order No. 7503222 pursuant to section 100.5(e) of the Secretary's rules governing her procedures for assessment of proposed penalties. 30 C.F.R. § 100.5(e). The language of section 100.5(e), adopted as initially proposed through a notice and comment rulemaking, essentially repeats the statutory provisions of section 110(b)(2) of the New Miner Act. 72 Fed. Reg. 13592 (Mar. 22, 2007). Specifically, newly adopted section 100.5(e) states:

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For purposes of this section, a flagrant violation means "a reckless or *repeated failure* to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

72 Fed. Reg. at 13646. (Emphasis added).

As a matter of policy, the Secretary relies on two prior unwarrantable violations of the same mandatory standard within 15 months as the basis for a repeated flagrant violation. This criteria for a repeated flagrant violation was initially adopted by the Mine Safety and Health Administration (MSHA) in Procedure Instruction Letter ("PIL") No. 106-111-04 (Oct. 26, 2006). However, this "repeated violation" criteria may not have been promulgated in accordance with section 553 of the Administrative Procedure Act ("APA") as the PIL criteria was not explicitly delineated in the proposed provisions of the new rule. 5 U.S.C. § 553.

Consistent with MSHA's PIL criteria, the subject violations are alleged to be repeated flagrant violations based on two final unwarrantable violations of different roof control provisions that occurred within 15 months of the subject orders in these proceedings. Order No. 6663986 was issued on March 19, 2007, and Order No. 7551844 was issued on April 10, 2007. Predicate 104(d) Order Nos. 6663986 and 7551844 cited violations of the mandatory standard for roof control plans in section 75.220. While Order No. 7551844 cited a violation of 75.220(a)(1) that requires a mine operator to follow its approved roof control plan, Order No. 6663986 cited a generic violation of 75.220 without citing a subsection of the mandatory standard. Conshor stipulated that Order No. 6663986 should be construed as citing a violation of 75.220(a)(1).¹

¹ Although Order Nos. 6663986 and 7551844 cite violations of different provisions of Conshor's roof control plan, the Secretary asserts that Conshor's general failure to adhere to its roof control plan as required by 75.220(a)(1) constitutes violations of the same mandatory standard.

II. Procedural History

MSHA issued a notice seeking public comment on its proposed rule in section 100.5(e) that would serve as the basis for proposing enhanced civil penalties under the “flagrant” violation provisions of section 110(b)(2) of the New Miner Act. 71 Fed. Reg. 53054 (Sept. 2006). The comment period closed on November 9, 2006. 71 Fed. Reg. 62572 (Oct. 2006). However, as previously noted, the proposed section 100.5(e) merely repeated section 110(b)(2) of the New Miner Act and did not articulate MSHA’s interpretation of the statutory provision with respect to a repeated failure to eliminate a known violation.

On October 26, 2006, MSHA issued Procedure Instruction Letter (“PIL”) No. 106-111-04 setting forth its procedures for evaluating flagrant violations.² The PIL noted its purpose was to:

establish uniform procedures for Coal and Metal and Nonmetal Mine Safety and Health enforcement personnel to properly evaluate flagrant violations of mandatory safety and health standards as provided in the Mine Improvement and New Emergency Response Act of 2006 (MINER Act).

The PIL outlines the requirements for a violation to be designated as flagrant based on a mine operator’s “repeated failure to make reasonable efforts to eliminate a known violation.” The requirements are:

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. *At least two prior “unwarrantable failure” violations of the same safety or health standard have been cited within the past 15 months.*

PIL No. 106-111-04 (emphasis added).³

On March 22, 2007, MSHA issued a final rulemaking regarding the criteria and procedures for its proposed assessment of civil penalties in 30 C.F.R. Part 100. 72 Fed. Reg. 13592. Consistent with the prior notice seeking public comment, the final provisions of section 100.5(e) retained the statutory language in section 110(b)(2) of the New Miner Act without any reference to prior violations within a 15 month period, as the basis for a “repeated” flagrant violation. *Id.* at 13622.

² PIL No. 106-111-04 apparently was issued prior to the close of the November 9, 2006, comment period for proposed rule 100.5(e).

³ PIL No. 106-111-04 was followed by PIL No. 108-111-02 issued on May 29, 2008, which repeated the same criteria initially established by MSHA for a “repeated” flagrant violation.

At issue is the validity of the flagrant violation criteria adopted in MSHA's PILs. Generally, MSHA's enforcement guidelines and policy memoranda are not binding on the Commission. *Sec'y of Labor v. D. H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) citing *King Knob Coal Company*, 3 FMSHRC 1417, 1420 (June 1981). Rather, the Commission possesses subject matter jurisdiction under the Act and Commission precedent to consider the validity of MSHA policy memoranda in civil penalty contests. *Drummond Company, Inc.*, 14 FMSHRC 661, 677-78 (May 1992).

In *Drummond*, the Commission declined to accord legal weight to Program Policy Letter ("PPL") No. P90-III-4 (May 1990) that applied the Secretary's civil penalty regulations in 30 C.F.R. Part 100 to an interim "excessive history" program. *Id.* at 661. The PPL was not given effect because it was not promulgated in accordance with the notice and comment provisions of section 553 of the APA. *Id.* at 682; *see also King Knob* at 3 FMSHRC at 1420-21.

III. Issues

A. APA Compliance

In view of the Commission's subject matter jurisdiction, articulated in *Drummond*, the parties should address the following:

"A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid." *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) *citing Chamber of Commerce v. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980). Section 553 of the APA requires agencies to provide a notice of proposed rulemaking and an opportunity for public comment prior to the rule's promulgation. Section 553(b)(3)(A) provides that the notice and comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." Specifically, the parties should address:

- (1) Whether the standard for a "repeated" flagrant violation, articulated in MSHA's PIL Nos. 106-111-04 and 108-111-02 is an interpretive rule, or, a substantive rule that must be adopted in accordance with section 553 of the APA.
- (2) Assuming MSHA's PIL standard is a substantive rule, the parties should address whether the criteria was adopted in accordance with the provisions of section 553 of the APA. The parties should also address the significance of the absence of MSHA's PIL standard for a "repeated" flagrant violation in proposed rule 100.5(e) in light of section 553 of the APA.

(3) The Mine Act authorizes the Secretary to promulgate rules in accordance with section 553 of the APA, unless there are other permissible means of promulgating rules, as manifest by congressional intent. 30 U.S.C. § 811(a); *U.S. v. Mead*, 533 U.S. 218, 225 (2001). The parties should address whether the legislative history of the New Miner Act authorizes the Secretary to promulgate criteria for implementing the flagrant provisions of 110(b)(2) without regard to the notice and comment provisions of section 553 of the APA.

B. Deference

Assuming adoption of the PIL criteria does not contravene the notice and comment provisions of section 553 of the APA, the parties should address:

(1) Given the vagueness of the term “repeated failure” in section 110(b)(2), the parties should analyze whether the PIL criteria is a reasonable interpretation of the flagrant violation provisions. Specifically, the parties should address the apparently arbitrary choice of two unwarrantable violations of the same safety or health standard during the previous 15 month period on the issue of deference. The parties should address whether the *Chevron* “step two” reasonable interpretation test articulated in *Chevron, U.S.A., Inc., v. Natural Res. Def. Council*, 467 U.S. 837 (1984), or the lesser *Mead* “respect according to its persuasiveness” deference standard for agency policy pronouncements should apply.

(2) The parties should address whether the “repeated failure” provision in section 110(b)(2) refers to a history of similar violations, or, a failure to correct a known violation over a significant period of time, such as an uncorrected violative condition repeatedly noted in examination books.

(3) The parties should address the significance, if any, of the absence of a specific statutory timeline to support enhanced civil penalties for a repeated flagrant violation in 110(b)(2), as compared to the specific timeline for unwarrantable withdrawal orders provided in 30 U.S.C. § 814(d) on the questions of reasonable interpretation and legislative intent.

(4) Assuming the reasonableness of *two prior unwarrantable violations of the same mandatory standard within the past 15 months* as the basis for a repeated flagrant violation, is it reasonable to consider violations of different provisions of a roof control plan to be “violations of the same safety or health standard?”

ORDER

IT IS ORDERED that the parties should file their responses within 30 days from the date of this Order. The parties should provide case law, regulatory provisions, and legislative history to support their positions. The parties may provide any relevant additional arguments outside the parameters of the above questions, as they deem necessary. **IT IS FURTHER ORDERED** that the parties shall have 14 days for replies.

Jerold Feldman
Administrative Law Judge

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