

CCASE:

SOL (MSHA) V. TURNER BROTHERS

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

April 24, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. CENT 83-12

TURNER BROTHERS INC.

DECISION

The operator's petition for discretionary review of the administrative law judge's decision in this matter was granted on December 29, 1983. 30 U.S.C. § 823(d)(2)(Supp. V 1981). The operator's petition raised two issues: whether a Commission administrative law judge has the authority to assess a penalty greater than that proposed by the Secretary of Labor, 1/ and whether a Commission administrative law judge has the authority to assess additional penalties based on a perceived "cavalier attitude" and "contempt" that the operator and its counsel displayed in the litigation of the matter before the administrative law judge. These latter conclusions by the judge were based on the respondent's failure to appear at the scheduled hearing or otherwise notify the judge of its intention not to appear. 2/

Pursuant to the Commission's Rules of Procedure, the failure to file a brief in support of a petition for review that has been granted can result in dismissal of the proceeding. 29 C.F.R. § 2700.8(b) and .72(a). Because the operator failed to file a timely brief, the Commission issued an order advising the operator of the possible effect of its failure to comply with the Commission's rules, and specifically ordering the operator to submit its brief and a motion for leave to file the brief out of time with an explanation for the delay. The operator's response to the Commission's order was to submit a "brief." 3/ Contrary to the Commission's order, a motion to accept the late-filed brief was not filed.

1/ It is well established that, in a case contested before the Commission, the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. "The 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."

Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), pet. for review filed No. 83-1630 (7th Cir. April 8, 1983).

2/ The judge noted that the operator's counsel had also failed to appear at another hearing before a different Commission judge one week prior to the hearing set in this case.

3/ The operator's submission was a four paragraph, one and one-half page restatement of its petition for review.

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Due to the operator's failure to comply with the Commission's rules and orders, and consequent failure to prosecute this matter, the operator's petition for discretionary review is dismissed in part.

Because the second issue raised in the petition relates to a matter which is "contrary to law or Commission policy," 30 U.S.C.

§ 823(d)(2)(B)(Supp. V 1981), and for which we have an independent concern, we have retained jurisdiction in part.

The judge's decision contains an assessment of a total of \$600 in additional penalties based on the "cavalier attitude"

and "contempt" that the operator and its counsel displayed towards

the Mine Act, the Department of Labor's Mine Safety and Health

Administration inspectors, and the Commission. While we may well

empathize with the judge's reaction, the proper recourse available to

the judge in this situation would be that set forth in Commission

Rule 80, governing the standards of conduct for individuals practicing

before the Commission, and providing for the institution of

disciplinary proceedings in appropriate circumstances. 29 C.F.R.

§ 2700.80. The need to scrupulously follow the Commission's rules on

disciplinary procedures previously has been stressed by the

Commission. Secretary of Labor ex rel. Roy A. Jones v. James Oliver &

Wayne Seal, FMSHRC Docket No. NORT 78-415, March 27, 1979; Canterbury

Coal Co., 1 FMSHRC 335 (May 1979). Due to the limitations set forth

in the Act as to the criteria to be applied in assessing penalties, as

well as the need for faithful adherence to the Commission's Rules, we

vacate that portion of the judge's decision assessing six additional

penalties of \$100 per violation due to the attitude of the operator

and its counsel. Our decision today does not foreclose the

institution of proceedings by the judge below under section 2700.80 if

he is of the view that this is appropriate.

Accordingly, we dismiss for lack of prosecution the operator's

appeal challenging the judge's assessment of penalties totalling

\$5,100 based on the statutory criteria specified in section 110(i).

The judge's decision stands as the final order of the Commission in

this regard. The portion of the judge's decision assessing a total

of \$600 in penalties for the "cavalier attitude" displayed by the

operator and its counsel is vacated.

A. E. Lawson, Commissioner

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