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MSHA V. WESTMORELAND COAL
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FMSHRC-WDC
April 18, 1986

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. WEVA 82-152-R
WEVA 82-369

WESTMORELAND COAL COMPANY

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et se . (1982)("Mine Act"). The issue is whether a Commission administrative law judge abused his discretion by failing to reduce, in his decision on remand. the civil penalty imposed for a violation of 30 C.F.R. § 75.202, a mandatory roof control standard. For the following reasons we conclude that the judge's penalty assessment constitutes an abuse of discretion.

The complete factual background of this case is set forth in our decision remanding this matter to the judge. 7 FMSHRC 1338 (September 1985). It is sufficient to note here that in his initial decision the judge found that the foreman for Westmoreland Coal Company ("Westmoreland") had knowledge of the violative condition but failed to correct it "through indifference or lack of reasonable care." The judge concluded that the violation was the result of the "unwarrantable failure of the operator to comply with the law and ... of gross negligence." 5 FMSHRC 132, 137 (January 1983)(ALJ). Considering this negligence finding, and the other statutory civil penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the judge assessed a civil penalty of \$8,000. 5 FMSHRC at 137. The Commission granted Westmoreland's petition for

review.

On review, the Commission found that the judge's conclusion that the violation was the result of Westmoreland's "unwarrantable failure" not only "lack[ed] substantial support in the record" but was "contrary to the overwhelming weight of the evidence." 7 FMSHRC at 1342. The Commission stated that it "[could] not conclude that the foreman's actions in allowing the work to proceed represent[ed] the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act." The Commission also stated that "the violation ... did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1342. Consequently, the Commission reversed the judge's unwarrantable failure finding. The Commission concluded, "[b]ecause the judge's penalty assessment rested in part on his determination that the foreman acted with indifference and without reasonable care, the case is remanded to the judge for reconsideration of the amount of civil penalty in light of our decision." 7 FMSHRC at 1343.

On remand, the judge acknowledged that the case was before him for the purpose of reconsideration of the amount of the civil penalty in light of the Commission's finding that the violation was not the result of Westmoreland's "indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1647 (October 1985)(ALJ). The judge revised his original finding that the violation was caused by Westmoreland's "gross negligence" and concluded instead that Westmoreland was negligent. 7 FMSHRC at 1648. In spite of his conclusion that the degree of Westmoreland's lack of care was less than originally found, the judge again assessed a civil penalty of \$8,000.

A Commission judge is accorded broad discretion in assessing civil penalties under the Mine Act. This exercise of discretion, however, is not unbounded. The penalty must reflect proper consideration of the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. *Pyro Mining Co.*, 6 FMSHRC 2089, 2091 (September 1984). When the Commission, using this standard, has concluded that the penalties assessed do not properly reflect the penalty criteria, it has assessed new penalties as warranted by the record. In some instances the resulting assessments have been higher, e.g., *Pyro Mining Co.*, *supra*, in others, the assessments have been lower, e.g., *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984). In all instances, the objectives have been the same: fidelity to the record

and effectuation of the enforcement scheme of the Act.

Here, the judge modified his prior finding of "gross negligence" in light of our conclusion that the violation did not result from Westmoreland's "indifference, willful intent, or serious lack of reasonable care." His determination of an appropriate penalty to be assessed necessarily should have been affected by his finding of a lesser degree of negligence. Instead, the judge imposed the same penalty without change. The judge's failure to modify the penalty in accordance with his modified findings is unsupportable and an abuse of discretion.

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In considering the other statutory penalty criteria, the judge found that the violation reflected a high degree of gravity, that Westmoreland was a large operator, that Westmoreland had a fairly substantial history of previous violations, and that Westmoreland's ability to continue in business would not be affected by the penalty imposed. 5 FMSHRC at 137. These findings, which were not disturbed on remand, are supported by substantial evidence. Based upon these findings, and upon the finding of a lesser degree of negligence, we conclude that a civil penalty of \$5,000 is appropriate.

Finally, the violation of 30 C.F.R. § 75.202 was alleged in an order issued under section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). Westmoreland requests that we modify the section 104(d)(1) order to a citation issued under section 104(a), 30 U.S.C. § 814(a), because of our previous reversal of the judge's finding of "unwarrantable failure." 7 FMSHRC at 1342. We conclude that the requested modification is appropriate. See Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1980).

Accordingly, we vacate the judge's assessment of a penalty of \$8,000 for the violation of 30 C.F.R. § 75.202 and assess a civil penalty of \$5,000. Further, we modify the subject order issued under section 104(d)(1) to a citation issued under section 104(a). 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this case.

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