

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

July 22, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. YORK 99-39-M
	:	
DOUGLAS R. RUSHFORD TRUCKING	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding involving a miner fatality arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). Upon a second remand for reassessment of a civil penalty, Administrative Law Judge Gary Melick assessed a penalty of \$4,000 for Citation No. 7716903 against Douglas R. Rushford Trucking (“Rushford”). 23 FMSHRC 1418 (Dec. 2001) (ALJ); Gov’t Ex. 5. This is the same amount the judge assessed in his previous decision. See 22 FMSHRC 1127, 1132-33 (Sept. 2000) (ALJ). We granted the Secretary of Labor’s petition for discretionary review challenging the judge’s penalty assessment. For the reasons set forth below, we vacate the judge’s penalty and assess a penalty of \$15,000 against Rushford.

I

Factual and Procedural Background

This is the third time that this proceeding has been before the Commission. A summary of the background facts and the judge’s decisions can be found in the Commission’s prior decisions. *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000) (“*Rushford I*”) and 23 FMSHRC 790 (Aug. 2001) (“*Rushford II*”). We briefly summarize below the relevant facts and procedural history pertinent to this proceeding, as well as the judge’s most recent decision.

A Rushford employee was fatally injured while attempting to inflate a truck tire without using a stand-off device. *Rushford I*, 22 FMSHRC at 599. The Department of Labor’s Mine

Safety and Health Administration (“MSHA”) charged, and the judge found, that Rushford violated 30 C.F.R. § 56.14104(b)(2),¹ which requires stand-off inflation devices to be used during tire inflation. 22 FMSHRC at 599. The judge also determined that the violation was significant and substantial (“S&S”) and a result of Rushford’s unwarrantable failure.² *Id.* He assessed a \$3,000 civil penalty, rather than the Secretary’s proposed penalty of \$25,000. *Id.*

On review, in *Rushford I*, we concluded that the judge neglected to make findings on all of the penalty criteria set forth in section 110(i).³ *Id.* at 602. We instructed the judge to provide a more complete explanation of his penalty assessment on remand, and that if he decided that a substantial reduction in the penalty proposed by the Secretary was warranted, he must explain any such decision, especially in light of his finding of “gross negligence.” *Id.* We also directed the judge to examine Rushford’s lack of history of violations and, because the record was unclear on this point, indicated that the judge could reopen the record to assist in his examination. *Id.*

On remand, the judge discussed each of the section 110(i) criteria. 22 FMSHRC at 1128-31. Of particular interest to the instant appeal, he determined that an increase in the penalty was warranted because Rushford’s lack of history of violations stemmed from its mistaken failure to file quarterly forms and, according to the Commission’s instructions, could not be a mitigating factor in the penalty assessment. *Id.* at 1128-30. The judge reached this conclusion

¹ 30 C.F.R. § 56.14104(b)(2) provides in pertinent part: “To prevent injury from wheel rims during tire inflation, one of the following shall be used . . . [a] stand-off inflation device which permits persons to stand outside of the potential trajectory of wheel components.”

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” The unwarrantable failure terminology, taken from the same section of the Act, establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

³ Section 110(i) provides in pertinent part:

In assessing civil monetary penalties, the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and 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).

notwithstanding his observation that the Commission’s review of the Secretary’s history of violations claim lacked “legal authority.” *Id.* at 1128. With respect to the negligence criterion, the judge stated that, although the violation was the result of “high” and “gross” negligence, he considered that Rushford’s negligence resulted from “self-imposed ignorance” of the standard rather than any “intentional non-compliance,” making the violation arguably “not the result of unwarrantable failure,” and factored this consideration into his penalty determination. *Id.* at 1130. The judge assessed a civil penalty of \$4,000, noting that the Secretary’s proposed assessment of \$25,000 lacked analytical support. *Id.* at 1132-33.

On review for a second time, in *Rushford II*, we vacated the judge’s penalty assessment because he erred in his analysis of the negligence criterion. 23 FMSHRC at 792-94. We concluded that the judge’s negligence determination on remand conflicted with his original findings that the violation was a result of unwarrantable failure and “high negligence.” *Id.* at 792 (comparing 22 FMSHRC at 1130 with 22 FMSHRC at 77-78). Those initial findings of high, gross negligence and unwarrantable failure had become the law of the case and therefore any attempt to retract the findings was erroneous. 23 FMSHRC at 793. Additionally, we held that the judge’s reasoning that “self-imposed ignorance” reduced an operator’s negligence contravened Commission precedent. *Id.* We remanded the matter for assessment of a new penalty, explaining that all six findings made by the judge on the statutory penalty criteria were to remain undisturbed. *Id.* at 794. In particular, we reiterated that the judge’s negligence finding in his original decision was the law of the case, and that this finding served as an aggravating factor for penalty purposes. *Id.* (citing 22 FMSHRC at 77-78).

In his most recent decision on remand, the judge again assessed a penalty of \$4,000, stating “that the underlying premise for the remand in [*Rushford II*] was incorrect.” 23 FMSHRC at 1420. The judge justified his former negligence determination, explaining that the “‘gross negligence’ herein was not at the highest end of the ‘gross negligence’ continuum,” and that he did not formally modify the unwarrantable failure or gross negligence findings. *Id.* at 1419. The judge stated that the \$1,000 increase in the civil penalty from his initial decision to his first remand decision included the gross negligence finding. *Id.* As in his previous remand decision, the judge again faulted the Secretary’s proposed special penalty assessment because she failed to produce any information underlying her penalty analysis. *Id.* at 1420.

II.

Disposition

We find that, once again, the judge failed to adhere to our remand instructions. In particular, he failed to acknowledge our holding in *Rushford II* that self-imposed ignorance could not be a mitigating factor in determining the level of Rushford’s negligence. *See* 23 FMSHRC at 793. His decision is devoid of any acknowledgment of this error, much less any reconsideration of the penalty amount in light of the error.

The judge also erred when he maintained that he entered no formal modification of his original findings of gross negligence and unwarrantable failure in his first remand decision. *See* 23 FMSHRC at 1419. Although the judge stated that the \$1,000 increase in the civil penalty from his original decision was based on Rushford's gross negligence (*id.*), this statement is inconsistent with his first remand decision. In that decision, he specified that "[t]he increase in penalty herein" reflected the Commission's instructions regarding Rushford's history of violations, i.e., that the lack of any such history could not be a mitigating factor because it was due at least in part to the company's failure to file quarterly reports. *See* 22 FMSHRC at 1128-30. Moreover, the discussion of the company's negligence in the first remand decision reveals that the judge took into account when assessing the penalty his mistaken view that self-imposed ignorance of the law made the violation arguably not an unwarrantable failure. *Id.*

We find it inexcusable that the judge refused to acknowledge the legal errors in his earlier decisions and to follow our simple instructions. Recently, the Commission stressed "the overwhelming importance we attach to judges faithfully carrying out the remand instructions we provide in our decisions." *Dolan v. F & E Erection Co.*, 23 FMSHRC 235, 242 (Mar. 2001). In this case, we directed the judge to take full account of his original finding of high, gross negligence when assessing a penalty, and not to mitigate this finding based on the legally incorrect assumption that Rushford's ignorance of the law reduced its culpability. Had he focused on these clear directions instead of trying to prove that the "underlying premise" of our decision in *Rushford II* was "incorrect" (23 FMSHRC at 1420), the parties would in all likelihood have avoided the expense and time involved in this additional round of proceedings. It is not in the best interests of the parties, nor the Commission as an institution, for a judge to second-guess the body charged by Congress with reviewing his or her decision. *See* 30 U.S.C. § 823(d)(2)(C) (providing the Commission with the authority to direct, modify, affirm or set aside the decisions of its judges). A judge's refusal to adhere to our directions undermines the statutory framework for resolving disputes and therefore cannot be condoned.

When faced with a similar situation, the Commission in *Westmoreland Coal Co.* assessed a penalty it found appropriate rather than remanding the matter to the judge again. 8 FMSHRC 491, 493 (Apr. 1986).⁴ In this instance, in light of the fact that findings have been entered on each of the statutory penalty criteria, we too find it preferable to assess a penalty ourselves rather than remanding the matter to the judge. *See Steen employed by Ambrosia Coal & Constr. Co.*, 20 FMSHRC 381, 386 (Apr. 1998) (holding that, in the interest of a speedier resolution to litigation, the Commission may assess a penalty rather than remand to the judge for

⁴ In *Westmoreland*, the Commission initially reversed the judge's unwarrantable failure determination and remanded for reconsideration of the civil penalty. 8 FMSHRC at 492. On remand, although the judge revised his original negligence finding so as to comply with the Commission's instructions, he assessed a civil penalty in the same amount as in his original opinion. *Id.* In deciding to assess the penalty itself, the Commission stated that the judge's "determination of an appropriate penalty to be assessed necessarily should have been affected by [the Commission's determination] of a lesser degree of negligence." *Id.*

assessment). We note that the following findings entered on each of the statutory penalty criteria, as set forth in *Rushford II*, constitute the law of the case:

As to the history of violations criterion, we affirm as supported by substantial evidence the judge's findings on remand that the lack of history of violations was due to both MSHA's error in classifying the mine as "closed" as well as to Rushford's failure to file the required quarterly reports with MSHA. Accordingly, the lack of history of violations is neither an aggravating nor a mitigating factor for penalty purposes. With respect to the criteria of size and good faith abatement, the judge found, and we affirm, that Rushford is a very small operator, and demonstrated good faith in complying with the standard after the fatality. These two findings support some mitigation of the penalty. We also leave undisturbed the judge's finding that a penalty as high as \$25,000, the amount proposed by the Secretary, would have no adverse effect on Rushford's ability to continue in business. This finding on the ability to continue in business criterion does not weigh in favor of reducing the proposed penalty. . . . [T]he law of the case with respect to negligence is controlled by the judge's finding from his original decision that the violation was a result of "high and gross negligence."⁵ This finding on the negligence criterion serves as an aggravating factor for penalty purposes. We also affirm the judge's finding that the violation, "which caused the death" of the Rushford employee in this case, was of high gravity. This gravity finding also serves as an aggravating factor for penalty purposes. Finally, [in connection with the company's negligence], we find Rushford's alleged ignorance about a protective device as well known as stand-off inflation equipment, which is ubiquitous in any industry working with split rim truck tires, truly remarkable and unfortunate. For the benefit of the entire mining community, it is important to emphasize that, in this case, for the lack of a common and inexpensive safety device, a miner died.

23 FMSHRC at 794-95 (citations and footnote omitted).

⁵ In the judge's original decision, he concluded that "a finding of unwarrantability and gross negligence" were "clearly support[ed]" by "the evidence that Rushford had never bothered to obtain a copy of the health and safety regulations governing the operation of [the] mine," that the appropriate tire-inflating device was not available at the mine, and that the mine owner "did not even know what a stand-off inflation device was." 22 FMSHRC 74, 77-78 (Jan. 2000).

In assessing this penalty, we note that the size of the operator and its good faith abatement merit some reduction to the proposed penalty. In light of the fact that this case involves a fatality that resulted from Rushford's S&S violation of the cited standard, and the operator's unwarrantable failure and gross negligence, a substantially higher penalty than the \$4,000 assessed by the judge is justified. In consideration of the findings set out above, we assess a civil penalty of \$15,000.

III.

Conclusion

For the foregoing reasons, we vacate the judge's assessment of a penalty of \$4,000 for the violation of 30 C.F.R. § 56.14104(b)(2) and assess a civil penalty of \$15,000.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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