FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
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Washington, D.C. 20004-1710

April 2, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2024-0231 A.C. No. 46-09569-594789
v.	:	
CONSOL MINING COMPANY, LLC Respondent.	:	Mine: Itmann No. 5

ORDER DENYING RESPONDENT'S SECOND MOTION TO VACATE SPECIAL ASSESSMENTS

This case is before me upon the filing of the Petition of the Secretary of Labor for Assessment of Civil Penalty against CONSOL Mining Company, LLC ("CONSOL") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. On July 17, 2024, Chief Administrative Law Judge Glynn F. Voisin assigned me this docket and attached a copy of my Prehearing Order. Counsel for the parties have complied with my Prehearing Order and filed their initial prehearing reports. By order dated November 20, 2024, I set this matter for a hearing to be held on May 28–30, 2025, in Beckley, West Virginia.

Counsel for CONSOL on November 19, 2024, filed a pre-trial Motion to Vacate Special Assessments and Require Secretary to Follow the Regular Assessment Procedures for both the citation and order issued to CONSOL under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). On December 8, 2024, the Secretary filed her Opposition to Motion to Vacate Special Assessment. Thereafter, I issued my Order Denying Respondent's Motion to Vacate Special Assessments on January 31, 2025.

Later that same day, January 31, 2025, CONSOL filed its Second Motion to Vacate Special Assessments for both the citation and order issued to CONSOL under section 104(d)(1) of the Mine Act. On February 6, 2025, the Secretary filed her Opposition to Second Motion to Vacate Special Assessment.

I. THE PARTIES' ARGUMENTS

In its Second Motion to Vacate Special Assessments, CONSOL asks me again to vacate the Secretary's proposed "special" assessments and, instead, require the Secretary to recalculate the penalties using the Secretary's "regular" assessment formula under section 100.3, 30 C.F.R. § 100.3. (Resp't Mot. at 1.) CONSOL raises several new arguments, including constitutional

arguments, that it failed to present in its first motion. CONSOL argues that the Mine Act does not authorize the Secretary to classify proposed civil penalties as "regular" versus "special" and, therefore, the distinction is invalid. (Resp't Mot. at 4–5.) CONSOL also asserts that by deeming a proposed penalty assessment "special," the Secretary is permitted to ignore her own promulgated regulations regarding proposed penalty assessments, which goes "beyond any power conferred to the Secretary by the Mine Act." (Resp't Mot. at 5.) Furthermore, CONSOL contends that under Commission case law, the Secretary's determination to propose a "regular" penalty assessment, as opposed to a "special" penalty assessment, alters how the Commission will decide its own penalty assessment. (Resp't Mot. at 5–6.)

CONSOL asserts that the Supreme Court's recent decision in *Loper Bright* dictates that I cannot defer to section 100.5, 30 C.F.R § 100.5, the regulation establishing special assessments, because the Mine Act does not explicitly mention special assessment penalties. (Resp't Mot. at 7.) CONSOL further asserts that the authorization of special assessments under section 100.5 is impermissible under the Supreme Court's decision in *West Virginia v. EPA*, not only because it imposes significant economic consequences on an operator, but because it is also based upon a "general grant" of authority rather than a specific grant of authority. (Resp't Mot. at 8.) CONSOL concludes that under both *Loper Bright* and *West Virginia v. EPA*, the Secretary exceeded her authority in creating a classification scheme of "regular" versus "special" proposed penalty assessments, and as such, any regulations, filings, or assessments based on this improper delineation must be stricken. (Resp't Mot. at 8.) Instead, CONSOL argues that the Secretary should follow her "regular" proposed penalty assessment analysis. (Resp't Mot. at 9.)

In response, the Secretary argues that CONSOL's motion should be denied, because CONSOL waived its new constitutional arguments when it failed to raise these arguments in a previous motion that sought identical relief.[1] (Sec'y Opp'n at 2.) In the alternative, the Secretary argues that I should deny CONSOL's motion because proposed special penalty assessments are irrelevant, given that the Commission is not bound by the Secretary's penalty proposal in its *de novo* penalty assessment. (Sec'y Opp'n at 3.) Additionally, the Secretary asserts that the Mine Act explicitly allows the Secretary great discretion in proposing penalties to the Commission for assessment. (Sec'y Opp'n at 3.) Thus, the Secretary argues that *Loper Bright* has no bearing on this case because there is no ambiguity to interpret here. (Sec'y Opp'n at 3–4.) Lastly, the Secretary argues that *West Virginia v. EPA* is irrelevant, because her use of proposed special penalty assessments creates no "radical or fundamental change" to the Mine Act. (Sec'y Opp'n at 4.)

[1] The Secretary asserts that CONSOL's motion is akin to a motion to dismiss and therefore is restricted by Fed. R. Civ. P. 12(g)(2), which prevents parties from raising a defense or objection that was previously available to the party but omitted from its earlier motion. Despite the Secretary's assertion, I determine that CONSOL's Second Motion to Vacate Special Assessments is not a motion to dismiss and, thus, will entertain it.

II. ANALYSIS AND CONCLUSIONS OF LAW

A. The Mine Act Grants the Secretary Discretion in Proposing Penalties to the Commission for Assessment

Under section 110 of the Mine Act, "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary." 30 U.S.C. § 820(a)(1). Further, "[i]n proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to h[er] and shall not be required to make findings of fact concerning the above factors." 30 U.S.C. § 820(i). The "above factors" are—

> 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).

Despite the broad language of section 110 of the Mine Act which grants the Secretary discretion in proposing civil penalties, CONSOL argues that the Secretary's distinction between "regular" versus "special" proposed civil penalties should be deemed invalid. Yet, section 110 does not impose any specific restrictions on the Secretary's discretion to propose penalties; rather, it explicitly relieves the Secretary of any requirement to make findings of fact concerning the six factors the Commission must consider in assessing a penalty. 30 U.S.C. § 820(i). Moreover, while the Secretary under section 110 "may rely upon a summary review of the information available to h[er]" in proposing civil penalties, this is not a requirement but merely a permissible practice. 30 U.S.C. § 820(i). Thus, the Mine Act authorizes the Secretary to create a framework to classify proposed penalty assessments as "regular" or "special" and to determine whatever method she sees best for calculating the proposed penalty assessments. *See also Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 727 (D.C. Cir. 2019) (holding that "the Secretary is under no obligation to 'prove' h[er] decision to suggest a special assessment rather than a regular assessment"). In light of these considerations, CONSOL's argument fails.

Similarly, CONSOL's argument—that deeming a proposed penalty assessment "special" thereby permits the Secretary to ignore her own promulgated regulations regarding proposed penalty assessments—carries no weight. Under Section 508 of the Mine Act, the Secretary is "authorized to issue such regulations as" she "deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957. Under this authority, the Secretary has promulgated several regulations to guide her assessment of penalty proposals at 30 C.F.R. part 100. Section 100.3 provides guidance and tables to translate evaluations of the six penalty criteria in sections 105(b) and 110(i) of the Mine Act into points which are added together and then converted into a dollar amount under the penalty conversion table for a "regular assessment" penalty proposal. 30 C.F.R. § 100.3. Nonetheless, under section 100.5 "MSHA may elect to waive the regular

assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). When MSHA determines that a special assessment is appropriate, the proposed penalty simply must be based on the six criteria set forth in section 100.3(a). 30 C.F.R. § 100.5(b). Moreover, section 100.5 does not require the Secretary to utilize the penalty conversion tables in section 100.3 for every penalty assessment. 30 C.F.R. § 100.5. Rather, the Secretary may utilize her discretion to propose a special assessment. 30 C.F.R. § 100.5(a). Thus, instead of going "beyond any power conferred to the Secretary by the Mine Act" as CONSOL alleges, the Secretary exercised her authority to promulgate rules on proposed penalties. (Resp't Mot. at 5.)

CONSOL's argument—that the Secretary's choice between a "regular" versus a "special" penalty assessment somehow alters how the Commission will decide its own penalty assessment—holds little sway. Here, the Secretary has alleged that CONSOL engaged in two "unwarrantable failure" (or highly negligent) violations of standards under section 104(d)(1) of the Mine Act. (Sec'y Pet., Ex. A.) Given the scheme of the Mine Act and its "(d)-chain," with higher penalties for violations purportedly involving a higher degree of negligence, one would expect that the Secretary may choose to propose higher assessments for violations she deems higher on the negligence scale. But the Secretary must still *prove* the alleged higher level of negligence to, in turn, support her proposed penalty assessment. *Compare Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ) (Commission Judge upheld flagrant violation sustaining total penalties of $761,000), *with Blue Diamond Coal Co.*, 36 FMSHRC 541 (Feb. 2014) (ALJ) (Commission Judge vacated flagrant allegations with proposed penalty of $723,500 and reduced operator's total liability nearly ninefold to $85,940 and dismissed section 110(c) case with penalty of $3,000). The Commission and its ALJs assess penalties based on the evidence educed at hearing, not on the Secretary's litigating position.

Additionally, in *Solar Sources Mining, LLC*, the Commission confirmed that "when the penalty assessed by the Judge substantially diverges from a proposed, *regularly assessed* penalty, the Commission *requires* Judges to provide an explanation for the divergence to avoid an appearance of arbitrariness in penalty assessments." *Solar Sources Mining, LLC*, 42 FMSHRC 181, 193–94 (Mar. 2020). The Commission also clarified that "Judges are not required to explain their divergence from a special assessment," rather Judges "must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point." *Solar Sources Mining, LLC*, 42 FMSHRC at 197, 200. However, this minor difference in how Commission ALJs should address the Secretary's penalty proposal is irrelevant, as "the Commission independently assesses a civil penalty *de novo* based on findings of fact and consideration of six penalty factors," regardless of the type of penalty proposed by the Secretary. *Solar Sources Mining, LLC*, 42 FMSHRC at 183.

B. CONSOL's Constitutional Arguments are Inapposite

In *Loper Bright*, the Supreme Court overruled *Chevron* and held that "courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024). CONSOL points to no ambiguity in the Mine Act requiring interpretation here; therefore, *Loper Bright* has no bearing on this case. As previously discussed, *see* discussion

supra Part II.A, section 110 of the Mine Act explicitly grants the Secretary considerable discretion in proposing penalties to the Commission for assessment. Consequently, the Secretary has not exceeded the scope of her power in promulgating section 100.5, 30 C.F.R. § 100.5.

Moreover, the Secretary in her response to CONSOL's motion recognizes her penalty regulations are irrelevant to independent Commission proceedings and does not argue I should grant them *Chevron* deference. As previously discussed in my order denying CONSOL's first motion to vacate special assessments, section 110 of the Mine Act clearly grants Commission ALJs independent authority to assess all contested penalties *de novo*. (Jan. 31, 2025, Order Denying Resp't Mot. to Vacate Special Assessments at 4.) Therefore, section 100.5 is irrelevant to my ultimate assessment of an appropriate penalty in this case based on my findings of fact related to each penalty criterion.

Likewise, the Supreme Court's decision in *West Virginia v. EPA* has no bearing on this case. In *West Virginia v. EPA*, the Supreme Court addressed whether the EPA, under the Clean Air Act, could promulgate a rule that interpreted the statutory language of "best system of emission reduction" to include a requirement that coal power plants reduce their own production of electricity, or subsidize it via natural gas, wind, or solar sources. *West Virginia v. EPA*, 597 U.S. 697, 706 (2022). The Supreme Court held that the EPA's interpretation was a radical and fundamental change from Congress's statutory scheme because "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (citations omitted). However, the Secretary's use of proposed special penalty assessments pursuant to section 100.5, 30 C.F.R. § 100.5, is not an "extraordinary grant[] of regulatory authority." *See West Virginia v. EPA*, 597 U.S. at 723. The Commission has affirmed that "[n]o significance attaches to MSHA's penalty which is specially proposed for litigation purposes. The Judge must assess the penalty *de novo* based only upon the Judge's findings of fact related to each penalty criterion." *Solar Sources Mining, LLC*, 42 FMSHRC at 198. Nor is the Secretary's use of proposed special penalty assessments a "radical or fundamental change" to the Mine Act. *See West Virginia v. EPA*, 597 U.S. at 723. Section 110(i) of the Mine Act simply states that "[i]n proposing civil penalties . . . , the Secretary may rely upon a summary review of the information available to h[er]." 30 U.S.C. § 820(i). The directive in section 100.5 to base a special assessment "on the six criteria set forth in § 100.3(a)" is in line with the Mine Act and could hardly be described as a "radical or fundamental change." 30 C.F.R. § 100.5(b); *West Virginia v. EPA*, 597 U.S. at 723. Accordingly, I determine that CONSOL's constitutional arguments fail.

In considering the arguments put forth by the parties, I conclude that the Mine Act authorizes the Secretary's penalty regulations at 30 C.F.R. part 100. I also conclude that CONSOL has failed to establish any constitutional basis for vacating the proposed special penalty assessments prior to hearing under the Mine Act's penalty scheme.

III. ORDER

Based on the foregoing reasoning, CONSOL's Second Motion to Vacate Special Assessments is hereby **DENIED**.

Alan G. Paez
Administrative Law Judge

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