

Editor's note: 93 I.D. 1

PEABODY COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT

IBLA 84-766

Decided January 28, 1986

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming a civil penalty assessment. CH 3-3 P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Negligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of \$ 750 per day on the basis of inability to comply.

APPEARANCES: Michael O. McKown, Esq., St. Louis, Missouri, for petitioner; Linda C. Breland, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Peabody Coal Company (petitioner) has petitioned for discretionary review of a decision rendered on June 26, 1984, by Administrative Law Judge Frederick A. Miller which affirmed a civil penalty assessment of \$ 22,500. Judge Miller held that 30 CFR 843.18(c), which authorizes consideration of the operator's inability to comply in mitigation of a civil penalty, did not give him jurisdiction to reduce the civil penalty in this case. ^{1/} By order dated August 7, 1984, the Board granted the petition, and subsequently the parties filed briefs in support of their respective positions.

Petitioner is the operator of the Simco No. 4 underground mine located in Coshocton County, Ohio. Active mining ceased in October 1978, at which time the mine was sealed. On June 17, 1980, OSM issued Cessation Order No. 80-3-7-12, Violation 1, to petitioner for failure to abate an earlier notice of violation which had been issued because discharge from the disturbed area failed to meet effluent limitations. Petitioner filed an application for review and an application for temporary relief on July 9, 1980. The application for temporary relief was denied on August 4, 1980. On February 27, 1981, the Administrative Law Judge dismissed the application for review proceeding at the request of Peabody.

^{1/} Although Judge Miller cited the regulation at 30 CFR 843.18(c), counsel for the Office of Surface Mining Reclamation and Enforcement (OSM) points out on appeal that the relevant regulation is actually the substantively identical provision at 30 CFR 722.17(c) pertaining to the interim regulatory program.

On September 21, 1982, the Assessment Office of OSM proposed a civil penalty assessment for the cessation order in the amount of \$ 22,500. Petitioner requested a conference on the assessment which was held on November 17, 1982, and which resulted in no change in the assessment. On December 3, 1982, Peabody filed a petition for review of the proposed assessment of a civil penalty and a hearing was held before Judge Miller on April 20, 1983, in Columbus, Ohio.

The substantive facts as outlined by the Administrative Law Judge in his decision are not in dispute and are set forth as follows:

On March 14, 1980, OSM Reclamation Specialist Jeffrey A. Smith conducted an inspection of Peabody Coal Company, Simco No. 4 mine. During the course of his inspection he noted there was a lack of drainage control facilities for the disturbed areas of the mine site. He found the discharge was in excess of the iron effluent limitation and Notice of Violation No. 80-3-7-17 was issued. The Notice of Violation stated the nature of the violation to be a discharge from the disturbed area which failed to meet the effluent limitations for iron (total) prior to discharge from the mine area. This was a violation of 30 CFR 717.17(a) of the Federal Interim Rules and Regulations. The petitioner was required to take all necessary measures so that discharge meets applicable effluent limitations of Section 717.17(a) by April 14, 1980.

Subsequent lab tests entered into evidence revealed the total iron content to be 33.9 milligrams per liter. On April 10, 1980, an extension was granted until May 14, 1980, due to the need for engineering design requirements for abatement of the violation. Then a second extension was given until June 12, 1980. Cessation Order No. 80-3-7-12 was issued upon subsequent inspection when a total iron reading of 16.5 milligrams per liter was found.

Under cross examination, Inspector Smith testified that he had given the petitioner two extensions and that extensions generally are not granted unless the operator is making all attempts to abate a violation but due to circumstances beyond his

control additional time is warranted. He thus testified that Peabody Coal Company in his opinion, was diligent in its [sic] attempts to obey the cessation order. 2/

Earl Murphy, an environmental supervisor for Peabody Coal, testified that Simco No. 4 was an underground operation which started in 1970 and closed October 20, 1978, and the seal of the [mine's] portal was approved by both MSHA and also Ohio Division of Mines (Tr. 38). Mr. Murphy testified that eventual abatement was made possible only by the subsequent decrease in the amount of flow from Simco No. 4.

Donald Z. Wilzbacher, manager of environmental affairs for Peabody Coal, testified that in his experience, or Peabody's experience, there was no established procedure for effectively sealing the mine. He further testified that only the eventual reduction in the volume of flow from Simco No. 4 enabled Peabody to institute a treatment system consisting of a three cell system of sedimentation ponds with sodium hydroxide, twenty percent sodium hydroxide liquid, and soda ash briquettes.

(Decision at 2-3).

Similarly, petitioner does not dispute the following analysis set forth in the decision of the

Administrative Law Judge:

The testimony of Inspector Smith and lab results clearly show that the petitioner was in violation of 30 CFR 717.17(a). In fact the petitioner does not contest the fact of the cessation order or that it was legally issued. It is petitioner's position that notwithstanding the fact of the violation and Peabody's inability to abate within 90 days, its [sic] diligence and good faith attempt to abate the violation should be taken into account as a substantial mitigating factor and the civil penalty should be reduced substantially from twenty-two thousand five hundred dollars (\$ 22,500.00) to five thousand dollars (\$ 5,000.00).

The evidence clearly reflects that Peabody did make honest, good faith attempts to abate the violation. In fact, Peabody

2/ It appears that Judge Miller was referring to good faith effort to abate the violation outlined in the notice of violation. It is the failure to resolve this timely which led to the cessation order.

even attempted a new innovative method to seal the mine using a material called Poz-o-tec which proved to be unsuccessful.

(Decision at 3).

The sole issue in dispute is Judge Miller's holding that 30 CFR 722.17(c) 3/ does not confer jurisdiction upon an Administrative Law Judge to reduce the civil penalty imposed for a failure-to-abate cessation order.

Peabody contends that the amount of a civil penalty based on a cessation order may properly be reduced where the operator has been unable to timely abate a notice of violation through no lack of diligence on its own part. OSM contends that there is no authority to reduce a minimum statutory civil penalty assessment for a failure-to-abate cessation order.

In support of its contention Peabody relies upon the language of 30 CFR 722.17 which provides:

§ 722.17 Inability to comply.

(a) Neither a notice of violation nor a cessation order issued under this part may be vacated because of inability to comply.

(b) A permittee may not be deemed to have shown good cause for not suspending or revoking a permit by showing inability to comply.

3/ Although Judge Miller addressed in his decision the regulation at 30 CFR 843.18(c), the relevant regulation here is 30 CFR 722.17(c), which is identical in substance.

(c) Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of a civil penalty under Part 723 of this chapter and the duration of the suspension of the permit under § 722.16 of this part.

[1] The relevant statutory provision of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), is found at section 518, 30 U.S.C. § 1268 (1982). Section 518(a) of SMCRA provides that "any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to issuance of a cessation order under section 521, the civil penalty shall be assessed." 30 U.S.C. § 1268(a) (1982) (emphasis added). Section 518(a) provides a \$ 5,000 maximum penalty for each violation, but further provides each day of a continuing violation may be deemed a separate violation for purposes of assessment. Section 518(a) further authorizes consideration of several enumerated factors in setting the amount of the penalty assessed including "whether the permittee was negligent" and "the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation." 30 U.S.C. § 1268(a) (1982).

A separate penalty provision governing violations which are not abated within the time provided in the notice or order is set forth in section 518(h) of SMCRA. 30 U.S.C. § 1268(h) (1982). Section 518(h) provides in pertinent part: "Any operator who fails to correct a violation for which a citation has been issued under section 521(a) within the period permitted for its correction * * * shall be assessed a civil penalty of not less than

\$ 750 for each day during which such failure or violation continues." 30 U.S.C. § 1268(h) (1982)
(Emphasis added).

The regulations developed to implement section 518 of the Act provide that OSM will review each notice of violation and cessation order in accordance with the regulatory assessment procedures to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate penalty for purposes of the total penalty assessed. 30 CFR 723.11. OSM developed a point system to determine the amount of penalties providing for the assignment of points for such factors as history of previous violations, seriousness, negligence, and good faith in attempting to achieve compliance. 30 CFR 723.13. ^{4/} OSM determines the amount of any such civil penalty by converting the total number of points assigned under 30 CFR 723.13 to a dollar amount using the conversion table in 30 CFR 723.14. The regulations specifically provide that OSM shall assess a penalty for each cessation order and for each notice of violation if the point total is 31 points or more. For notice of violation point totals of 30 points or less, assessment is discretionary. 30 CFR 723.12.

In determining whether to assess a civil penalty separately for each day, 30 CFR 723.15 provides:

(a) The Office may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the Office

^{4/} These are the same factors set forth in section 518(a) of SMCRA.

shall consider the factors listed in 30 CFR 723.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under 30 CFR 723.13(b), the Office shall assess a civil penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to section 521(a) of the Act, a civil penalty of not less than \$ 750 shall be assessed for each day during which such failure to abate continues, * * *.

[Emphasis added.]

Thus, under OSM's scheme for daily assessments, civil penalties are discretionary for each day from the date of issuance of the notice order to the date set for abatement. In determining whether to make such an assessment, OSM is required to consider the factors in 30 CFR 723.13. However, if the violation cited in the notice or order continues beyond the date set, or subsequently extended, for abatement, the regulations require, in accordance with section 518(h) of the Act, that not less than \$ 750 shall be assessed for each day the failure to abate continues.

The regulation cited by Peabody, 30 CFR 722.17(c), allowing the consideration of inability to comply in mitigation of the amount of the civil penalty assessed, is applicable only to discretionary civil penalties, whether established by OSM or by the administrative law judge in accordance with 43 CFR 4.1157. 5/ In this case Peabody was served with a

5/ The regulation at 43 CFR 4.1157(b)(1), provides as follows:

"(b) If the administrative law judge finds that --

"(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to the point system and conversion table contained in 30 CFR 723.12 and 723.13, except that the administrative law judge may waive the use of

failure-to-abate cessation order and the penalty assessed pursuant thereto is under review herein. Such a penalty is clearly assessed in accordance with the mandatory requirements of section 518(h) and 30 CFR 723.15(b), neither of which makes any reference to mitigating factors.

Accordingly, we find no authority in the statute and regulations for consideration of mitigating factors such as inability to comply or good faith effort of the permittee to comply in assessing the statutory minimum penalty for a failure-to-abate cessation order.

In Save Our Cumberland Mountains, Inc. v. Watt, 550 F. Supp. 979, (D.D.C. 1982), the court rejected the Department's argument that the assessment of penalties for failure-to-abate cessation orders is discretionary. Id. at 982. The court held that the existence of administrative review procedures does not support a finding that the Secretary has prosecutorial discretion not to assess a penalty of not less than \$ 750 per day under section 518(h) of SMCRA. Id. The court held that: "Although the order or assessment might not withstand the rigors of administrative review, the Secretary cannot rely on the possibility of an adverse outcome as an excuse for failing to take the first step in the penalty process required by statute." Id. 6/ Further, the Department has in the past declined to reduce

such point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act."

6/ Peabody argues that the quoted language supports a finding of discretionary authority in the administrative law judge to reduce the amount of the assessment. OSM contends the court did not address subsequent mitigation of failure-to-abate penalties. We find that proper construction of the statute and the implementing regulations precludes the administrative law judge from reducing the statutory minimum failure-to-abate penalty.

the minimum civil penalty of \$ 750 per day for a failure-to-abate cessation order on the ground that this is the minimum required by 30 CFR 723.15. Apex Co., 4 IBSMA 19, 89 I.D. 87 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed.

C. Randall Grant, Jr.

Administrative Judge

We concur:

Franklin D. Arness

Administrative Judge

Bruce R. Harris

Administrative Judge

