

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

v.
TRI-J COAL CO.

IBLA 92-570

Decided September 29, 1995

Appeal from an order of Administrative Law Judge David Torbett denying the Office of Surface Mining Reclamation and Enforcement's motion to set aside that part of his decision ordering the Office of Surface Mining Reclamation and Enforcement to refund a civil penalty paid by respondent. NX 92-8-P.

Reversed.

1. Secretary of the Interior—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

The Department has a policy of refunding prepayment of a civil penalty made to secure administrative review of the penalty when the failure to petition for review timely or to tender payment timely requires dismissal of the petition for review. This policy is not operative when it appears from the record that the payment was tendered to facilitate issuance of a permit and not in order to secure review of the penalty.

APPEARANCES: Judith M. Stolfo, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Office of Surface Mining Reclamation and Enforcement (OSM) has filed a petition for discretionary review of an order issued by Administrative Law Judge David Torbett on June 30, 1992, in Tri-J Coal Co. v. OSM, Hearings Division Docket No. NX 92-8-P. That order denied OSM's motion to set aside in part the Administrative Law Judge's May 27, 1992, ruling in the case to the extent it ordered OSM to refund the civil penalty paid by Tri-J Coal Company, Inc. (Tri-J). We granted the petition for discretionary review by order of the Board dated September 23, 1992.

On May 28, 1991, OSM issued five imminent harm cessation orders (CO's) to Tri-J. The Notice of Proposed Assessment was served upon

Tri-J on July 9, 1991. As a result of a subsequent assessment conference, Tri-J's penalty was reduced and the conclusion of the conference report was served on Tri-J on December 2, 1991.

Tri-J paid the civil penalties totaling \$1,700 on January 15, 1992. On January 28, 1992, Tri-J filed a petition for review of the assessment of the civil penalties with the Hearings Division, Office of Hearings and Appeals (OHA).

On April 2, 1992, OSM filed a motion to dismiss the petition for review. Citing the regulation at 30 CFR 845.19 requiring that a petition for review of a civil penalty be filed within 30 days of service of the conference officer's action, OSM based its motion on the fact that Tri-J's petition was untimely. ^{1/} OSM also noted that the check for the assessed penalties was received on January 15, 1992, before Tri-J's petition for review was filed, but after the filing deadline imposed by the regulations.

By order dated May 27, 1992, Judge Torbett dismissed Tri-J's petition for review on the grounds that Tri-J had failed to meet time limitations for filing a petition for review set forth at 43 CFR 4.1151 and 43 CFR 4.1152. He also ordered OSM to refund to Tri-J the sum of \$1,700 plus interest in accordance with the Secretary's decision cited as In Re L.W. Overly Coal Co., 94 I.D. 349 (1987).

On June 29, 1992, OSM filed with the Administrative Law Judge a motion to set aside that portion of Judge Torbett's order directing OSM to refund monies to Tri-J. OSM contended that Tri-J did not pay the \$1,700 to secure its right to review of the civil penalties. Rather, according to OSM, Tri-J paid the penalties because such payment was required before OSM could grant final approval of Tri-J as an operator on Richland Coal Company's (Richland) permits.

OSM sought to distinguish the Overly case in which the Secretary directed OSM to refund payments made to obtain a hearing in a civil penalty proceeding when a petition for review is subsequently denied because the payment had not been timely filed. OSM contended that because the penalties were not paid to support an appeal of the civil penalty assessments but to facilitate operator approval, refund of Tri-J's civil penalties does not come under the Secretary's policy enunciated in Overly.

On June 30, 1992, Judge Torbett issued an order denying OSM's motion. On August 5, 1992, OSM filed a petition for discretionary

^{1/} Counsel for OSM acknowledged that the petition for review made reference to an earlier letter to OSM requesting formal review. Counsel stated that she had located no record of that letter. Tri-J did not respond to OSM's motion.

review which the Board granted by order dated September 23, 1992. In its brief filed in response to our order granting discretionary review, OSM further elaborated on the basis of its contention that the Overly case is distinguishable.

A party seeking formal review and hearing of a notice of proposed assessment of a civil penalty must file a petition for review with the Hearings Division, OHA, within 30 days from service of the proposed assessment. 43 CFR 4.1151(a). Alternatively, if there has been a timely request for a conference, the petition for review must be filed within 30 days from service of notice by OSM's conference officer that the informal conference has been completed. 43 CFR 4.1151(b).^{2/} Such petition must be accompanied by full payment of the proposed assessment to be placed in an escrow account pending final determination of the assessment. 43 CFR 4.1152(b)(1). It appears from the record that the conclusion of conference report regarding these citations (which reduced the penalty assessed to \$340 for each citation) was served on Tri-J on December 2, 1991. Accordingly, the 30-day period for filing any petition for review of the assessments (and payment of the amount of the assessment) ended January 1, 1992, and such filing was required by the close of the first business day after the New Year's holiday. See 43 CFR 4.22(e). In this case, payment was tendered on January 15, 1992, and the petition for review was filed on January 28, 1993, well after the deadline.

It is well established that failure to timely prepay a civil penalty renders OHA (including both the Hearings Division and the Board of Land Appeals) without jurisdiction to review the proposed penalty. 30 U.S.C. § 1268(c) (1994); 43 CFR 4.1152(c); Firchau Mining, Inc. v. OSM, 101 IBLA 144 (1988); Bill Smith Coal Co. v. OSM, 101 IBLA 224 (1988); Tri Coal Co. v. OSM, 85 IBLA 146 (1985).

[1] In this case, neither the petition for review nor the payment of the proposed assessment was timely filed. Therefore, Judge Torbett properly dismissed the petition for review. Judge Torbett, however, also ordered OSM to refund the sum of \$1,700 plus interest in accordance with the Secretary's decision in Overly, supra. In that case, the Secretary stated:

^{2/} The version of 43 CFR 4.1151(b) found in the Code of Federal Regulations in 1991 actually required filing the petition for review within 15 days of service of notice by the conference officer that the conference is deemed completed. This was inconsistent, however, with the regulation at 30 CFR 845.19(a) which had been revised in 1991 to provide a period of 30 days after service of notice of the assessment conference officer's action in which to file a petition for review. 56 FR 10063 (Mar. 8, 1991). The regulation at 43 CFR 4.1151(b) was subsequently amended to provide a 30-day period after notice of the conference officer's action to file a petition for review. 59 FR 1488 (Jan. 11, 1994).

As a matter of general policy, if a person seeking administrative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

In Re L.W. Overly Coal Co., *supra* at 352.

We find that the case in issue is distinguishable from Overly. In Overly, the payment of the civil penalty was made to meet the requirements for administrative review. In the present case, the facts show that the payment was made to facilitate permit approval.

It appears from the record that Richland, the permittee of a coal mine operated by Tri-J, was cited (NOV No. 90-91-088-004) on October 18, 1990, for failure to conduct mining operations in accordance with the approved permit in that Tri-J was not identified as the operator in the approved permit. Abatement of the citation required submission and approval of a permit revision identifying Tri-J as the operator. It appears that permit revisions changing the operator to Tri-J were filed, initially on October 19, 1990, and subsequently amended on October 18, 1991, to cure deficiencies. The time for abatement of the citation was eventually extended to January 14, 1992.

Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1260(c) (1994), requires the applicant for permit approval to file with the application a schedule listing all notices of violation of SMCRA and the regulations. The schedule shall also indicate the final resolution of any such notice of violation. Section 510(c) also states that the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected. The implementing regulation, 30 CFR 773.15(b)(1), requires that, if a violation exists, OSM shall require the applicant, before issuance of the permit to either, (i) submit proof that the violation has been or is in the process of being corrected, or (ii) establish that an administrative or judicial appeal had been filed and is presently being pursued, in good faith, to contest the validity of the violation. Tri-J had not filed a timely appeal of the CO's or petition for review of the assessed civil penalties. Therefore, in order for it to comply with 30 CFR 773.15(b)(1) and obtain permit approval, it was necessary for it to pay the civil penalties.

Information accompanying OSM's petition for discretionary review supports the contention that the penalties were paid in order to obtain permit approval. In an affidavit submitted by Judith Stolfo, attorney

for OSM, Ms. Stolfo states that in late December 1991 she had numerous conversations with representatives from Tri-J, Richland, and their counsel regarding Tri-J's status for operator approval. Ms. Stolfo reminded all parties that the unpaid penalties would operate to "permit block Tri-J." A decision was made that if payment for the civil penalties was not received by the close of the January 14, 1992, inspection, a failure-to-abate CO would be issued. On January 14, 1992, Inspector Mullikin informed Ms. Stolfo that Tri-J had remitted a check for \$1,700. ^{3/} Information in the case file shows that OSM approved Tri-J as operator on Richland's permits on January 14, 1992.

The timing of these events, along with the fact that the payment for civil penalties did not accompany the petition for review and that such payment was made after the deadline for filing the petition for review, show that payment was not made to secure administrative review. Thus, under the circumstances presented in this case, there is no basis in the regulations for a refund of the civil penalty payments.

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

C. Randall Grant, Jr.
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

^{3/} See also affidavit of Gary Kitzmiller giving a concurring account of these events. In his affidavit Kitzmiller stated that he spoke with the President of Richland by telephone on the morning of January 14, 1992, and reminded him that if the civil penalties were not paid by the end of the inspection, "Tri-J would be ceased from operating on the Richland permits and denied approval as operator on the Richland permits."

