

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

October 19, 2018

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

LEHIGH ANTHRACITE COAL, LLC,  
Respondent.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

SHANE T. WETZEL, EMPLOYED BY  
LEHIGH ANTHRACITE COAL, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2014-0108  
A.C. No. 36-01761-340312

Docket No. PENN 2014-0109  
A.C. No. 36-01761-340312

Mine: Tamaqua Mine

CIVIL PENALTY PROCEEDING

Docket No. PENN 2016-0135  
A.C. No. 36-01761-402886A

Mine: Tamaqua Mine

**DECISION ON REMAND**

Appearances: Jennifer L. Bluer, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for Petitioner;

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly PLLC,  
Pittsburgh, Pennsylvania, for Respondents.

Before: Judge L. Zane Gill

These cases are before me on remand from the Commission. 40 FMSHRC 273 (Apr. 2018). On November 22, 2016, I issued a decision and order for the two citations issued by the Secretary of Labor (“Secretary”) to Respondent Lehigh Anthracite Coal, LLC (“Lehigh”) pursuant to sections 104(a) and 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §§ 814(a), 814(d)(1), and a civil penalty issued to Respondent

Shane T. Wetzel pursuant to section 110(c), 30 U.S.C. § 820(c). 38 FMSHRC 2782 (Nov. 2016) (ALJ). On appeal, the Commission reversed my negligence determinations for Citation No. 8000958<sup>1</sup> and vacated and remanded the determination of penalties. 40 FMSHRC at 284-85.

## I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

On July 3, 2013, MSHA issued Citation Nos. 8000958 and 8000959. On February 10, 2016, MSHA issued a civil penalty against Wetzel pursuant to section 110(c) of the Mine Act.

A hearing was held on April 12–13, 2016, in Allentown, Pennsylvania. In my November 22, 2016 decision, I found a violation in each instance and made various findings and determinations. Of central consequence, I concluded that although Lehigh and Wetzel had displayed highly negligent behavior, their negligence did not rise to the highest level of reckless disregard. On December 22, 2016, the Secretary filed his petition for discretionary review, which was granted by the Commission. On April 10, 2018, the Commission concluded that I erred in holding that Citation No. 8000958 was the result of high negligence, concluded the negligence was instead reckless disregard, and vacated and remanded the case with instructions to reassess the civil penalties against the respondents in accordance with its decision. 40 FMSHRC at 284-85. The commission accepted as undisturbed my factual findings and credibility determinations. *Id.* at 278.

Consequently, the sole issue before me on remand is the appropriate penalty for Lehigh and Wetzel in light of the reckless disregard determination by the Commission for Citation No. 8000958.<sup>2</sup>

## II. PRINCIPLES OF LAW

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). When assessing a civil penalty, section 110(i) of the Mine Act requires that the Commission consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

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<sup>1</sup> The single citation in Docket No. PENN 2014-0109 was not before the Commission on appeal. According to MSHA's mine retrieval and data website, the \$285.00 penalty for Citation No. 8000959 was paid and the citation was closed on January 2, 2017.

<sup>2</sup> The facts of this case have been discussed at length in both the original decision, *see* 38 FMSHRC at 2784-87, as well as the Commission's decision. *See* 40 FMSHRC at 274-76. Accordingly, I will not restate the factual findings in its entirety but will, at times, reference and highlight certain details nonetheless.

These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). Specifically, the commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and, (6) the demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

In addition, deterrence is a relevant factor that judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). A judge need not make exhaustive findings, but the judge must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Finally, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties [. . .]. [W]e find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”).

### **III. PENALTY**

The sole task before me is to reassess the civil penalties for Lehigh and Wetzel consistent with the Commission's instructions and the increased negligence designation of reckless disregard.

As intimated in my original decision, I considered Wetzel’s conduct—and Lehigh’s by extension—as having teetered on the narrow edge between involving high negligence and reckless disregard. Guided by MSHA’s definition of reckless disregard as conduct that exhibits the “absence of the slightest degree of care,” 30 C.F.R. § 100.3(d), I ultimately found that Wetzel made efforts to demonstrate some degree of care to comply with the safety standard and concluded that, by definition, he did not act with reckless disregard. 38 FMSHRC at 2800. The penalties I originally assessed were issued with this close call in mind.

On appeal, the Commission stated that a literal application of MSHA’s definition adapts poorly to the holistic consideration of negligence by Commission judges after a hearing. 40 FMSHRC at 280. The Commission explained that judges should instead be guided by broader and more general common-law standards more congruent with the Act’s intent and purpose of prioritizing the health and safety of miners. *Id.* Specifically, the Commission determined that Wetzel’s willingness to enter the pit himself and his genuine-but-objectively-unreasonable belief that the pit was safe were not factors that reduced the level of negligence. *Id.* at 281-82. Additionally, the Commission concluded Wetzel’s various actions—meeting with the crew, discussing means of freeing the bucket, identifying a procedure to limit exposure by quickly attaching a chain to the crow’s foot away from the highwall, examining the southern slope for indications of future movement and support strength, illuminating the area with the dragline, and providing the dragline operator with a horn to alert Erik Osenbach if conditions became hazardous—were “effectively meaningless” in terms of realistically reducing the hazards in the pit to Osenbach. *Id.* at 282.

Ultimately, the Commission concluded that the record on review “supports only the conclusion that the respondents recklessly disregarded the safety of a miner, and thus demonstrated the highest possible level of negligence for purposes of penalty assessment under section 110(i).” *Id.* at 284.

The Commission’s determination that respondents acted with reckless disregard does not require that I assess radically higher penalties, nor does it require me to automatically adopt the penalties listed in Table XIV of 30 C.F.R. § 100.3(g). *See Sellersburg Stone Co.*, 736 F.2d at 1151-52. With this in mind, I will reassess the penalties for Lehigh and Wetzel below in turn.

**a. Civil Penalty for Lehigh**

Although not highlighted in my original decision, both the Commission’s majority and dissent discussed Lehigh’s exceptional response upon learning about the events that transpired between the night of June 19, 2013, and the morning of June 20, 2013. *See* 40 FMSHRC at 276, 284 n.14, 299.

On June 20, 2013, mine foreman Louis Mitchalk found the 2400 Lima Bucket buried in the pit while conducting his preshift inspection. (Tr.234:9-15; 248:8-12; Ex. S–19, at 2). He thereafter called safety director John Hadesty. (Tr.234:22-25; Ex. S–19, at 2).

Mitchalk and Hadesty immediately started an internal investigation, (Tr.235:5-8; 376:17-19), which included documenting the physical features of the incident area, taking nearly 50

digital photographs, recording relevant measurements, transcribing notes, and drawing sketches of the scene. (Tr.373:3-7; 375:22-376:16; Ex. S-20, at 8) Additionally, Mitchalk and Hadesty conducted a complete review of training records and examination records. (Ex. S-20, at 8) Hadesty also conducted multiple interviews with the employees involved and with persons who had knowledge of the incident. (Tr.236:12-16; 373:18-20; 384:12-17; Ex. S-20, at 8)

Upon completing the internal investigation, Lehigh disciplined the four miners involved—Shane Wetzel, Larry McNeal, Erik Osenbach, and Rich Rudinsky—with written warnings, foregoing its ordinary first step of providing verbal warnings because the miners’ conduct was so dangerous.<sup>3</sup> (Tr.73:15-21; 245:6-20; 350:6-14; Ex. S-19, at 3) The miners also received verbal counseling. (Tr.246:3-6)

On June 24, 2013, MSHA became involved after receiving an anonymous safety complaint. (Tr.22:20-23:3; 387:10-13) By all accounts, Lehigh was cooperative and helpful in MSHA’s investigation: Hadesty offered his notes and photos from Lehigh’s internal investigation to Inspector David Labenski (Tr.28:11-17; 49:3-9; 52:14-24; 111:16-19; 113:17-20; 390:6-15; 395:10-12); Hadesty gave Inspector Labenski a copy of Wetzel’s email (Tr.122:14-16; *see* Ex. S-13); and Hadesty gave Inspector Labenski a copy of McNeal’s handwritten note. (Tr.109:7-8; *see* Ex. S-10)

Indeed, Inspector Labenski’s notes state that Lehigh had been “very cooperative and share[d] info freely when requested. Action was taken to correct the problem before anyone from MSHA knew about it and policies have been written to prevent further troubles. Company tries very hard to make jobs safe.” (Ex. S-3, notes for 7-8-13, at 7) Inspector Tom Leshko similarly testified that Lehigh was fully cooperative with the 110(c) investigation. (Tr.283:3-10) Special Investigator John Stepanic also testified it was nice to see that the company took it upon itself to issue the written warnings. (Tr.303:24-25)

In addition, the operator formalized the procedure it had used to recover the buried bucket, sought and eventually received approval from MSHA for the procedure as an addendum to its ground control plan, and provided training on the new procedure to its miners. (Tr.124:1-4; 126:18-127:4; Ex. S-5, at 3; Ex. S-14; Ex. R-9) Notably, the addendum to the ground control plan was not required by MSHA (Tr.125:3-14; 126:14-17; 401:21-402:1); rather, it was independently developed and executed by Lehigh to ensure safer working conditions moving forward.<sup>4</sup> (Tr.124:18-24; 125:9-11; 211:21-22; 402:6-10) The citations were abated after the

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<sup>3</sup> In a footnote in my original decision, I stated that I would not take Lehigh’s disciplinary actions of Wetzel, McNeal, Osenbach, and Rudinsky into consideration since they played no part in Inspector Labenski’s decision making in the proceeding. 38 FMSHRC at 2787 n.4. On remand, however, I will consider this fact in assessing the civil penalty.

<sup>4</sup> This proactive safety measure is particularly commendable given the apparent rarity of bucket retrievals. Field Office Supervisor Tom Yencho testified that he only saw one other instance of a bucket retrieval in 15–20 years of experience and, to his knowledge, no other operator besides Lehigh has a provision in its ground control plan addressing how to recover a

updated ground control plan was approved by MSHA and Lehigh had a safety talk with all of the employees. (Tr.126:18-22; 402:15-21)

Lehigh's proactive actions may be considered under section 110(i) as "demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." See *Hidden Splendor Res. Inc.*, 36 FMSHRC 3099, 3109 (Dec. 2014) (Comm'r Cohen, concurring). The Commission articulated in its decision that it does not consider the statutory phrase "after notification of a violation" as "being limited to notification by MSHA or its inspectors. An operator which is ultimately charged with a violation may receive 'notification of a violation' where, as here, another foreman discovers the unsafe action and notifies the company's safety director." 40 FMSHRC at 284 n.14.

Moreover, a severe fine is not necessary to achieve future compliance in this case as Lehigh has already positively demonstrated safety consciousness by taking exemplary unilateral corrective action. Deterrence, as is abundantly evident here, is a relevant factor that Judges may consider separately from the statutorily-prescribed criteria in assessing penalties. See *Black Beauty Coal Co.*, 34 FMSHRC at 1864-69.

Lehigh took quick and decisive action in its investigation and acted aggressively to deter similar errors in the future prior to involvement by MSHA. When MSHA got involved, Lehigh cooperated fully and made efforts to improve safety beyond what MSHA required. Even in light of a negligence determination of "reckless disregard," I give special weight to the exceptional response by Lehigh as demonstrating good faith to achieve rapid compliance and its commitment to ensuring a safer work environment moving forward.

After reweighing the civil penalty factors,<sup>5</sup> I conclude a civil penalty of \$10,000 is appropriate and will sufficiently further the purposes of the Mine Act.

**b. Civil Penalty for Wetzel**

As Special Investigator Stepanic explained at hearing, the 110(c) penalty is used as a deterrent—personal liability gets people in the mining community to talk. (Tr.305:19-306:3) The Commission has also opined on the role of deterrence in assessing a civil penalty: "The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates." *Black Beauty Coal Co.*, 34 FMSHRC at 1865.

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bucket. (Tr.218:10-21) Similarly, Mitchalk had only seen five bucket retrievals in 33 years (Tr.249:14-25), and Hadesty had never seen it in his 27 years of experience. (Tr.379:19-25)

<sup>5</sup> Of the 110(i) criteria, the history of violations, appropriateness of the penalty to the size of the business, ability to pay, and gravity criteria remain undisturbed from my original decision.

Taking into account the entirety of Wetzel's actions, I determine that Wetzel's conduct constituted reckless disregard. Given this heightened level of negligence, and after rebalancing the 110(i) factors,<sup>6</sup> I find my original assessed penalty of \$1,000 is inadequate. It is imperative that the penalty assessed be large enough to sufficiently deter Wetzel from future negligent conduct and to impress upon him the severity of his actions. With this in mind, I note that Wetzel was punished by Lehigh immediately after the incident and before MSHA's involvement. Lehigh forewent its standard first step of providing a verbal warning and instead gave Wetzel a written letter of reprimand. This was not insignificant. Such punishment serves as an additional deterrent against future negligent and dangerous conduct for Wetzel.

Accordingly, for the reasons stated above and in light of the deterrent-focused purposes of 110(c) liability, I conclude a civil penalty of \$2,000 is appropriate and will sufficiently further the goals of the Act.

#### IV. ORDER

It is **ORDERED** that Citation No. 8000958 be **AFFIRMED** as written.

**WHEREFORE**, it is **ORDERED** that Lehigh Anthracite Coal, LLC **PAY** a penalty of \$10,000.00 and that Shane Wetzel **PAY** a penalty of \$2,000.00 within forty (40) days of the date of this Decision on Remand.<sup>7</sup>



L. Zane Gill  
Administrative Law Judge

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<sup>6</sup> Of the 110(i) criteria for 110(c) liable respondents, four criteria—Wetzel's history of violations, the appropriateness of the penalty to Wetzel's income and net worth, Wetzel's ability to pay, and the gravity—remain undisturbed from my original decision.

<sup>7</sup> Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Edward Waldman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th Street, South, Suite 401  
Arlington, VA 22202-5414

Jennifer L. Bluer, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
The Curtis Center  
170 South Independence Mall West, Suite 630E  
Philadelphia, PA 19106-3369

R. Henry Moore, Esq.  
Jackson Kelly PLLC  
Three Gateway Center  
401 Liberty Avenue, Suite 1500  
Pittsburgh, PA 15222-1009

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th Street, South, Suite 401  
Arlington, VA 22202-5414

Melanie Garris  
Office of Civil Penalty Compliance, MSHA  
U.S. Department of Labor  
201 12th Street, South, Suite 401  
Arlington, VA 22202-5414