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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner,<br><br>v.<br><br>THE AMERICAN COAL COMPANY,<br>Respondent. | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. LAKE 2011-701<br>A.C. No. 11-02752-253416-01<br><br>Docket No. LAKE 2011-962<br>A.C. No. 11-02752-262111-01<br><br>Docket No. LAKE 2012-58<br>A.C. No. 11-02752-268036-01<br><br>Mine: New Era Mine |

## DECISION ON REMAND

Appearances: Courtney Przybylski, Esq., & Ryan L. Pardue, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Jason W. Hardin, Esq., & Mark Kittrell, Esq., Fabian and Clendenin, Salt Lake City, UT for Respondent

Before: Judge John Kent Lewis

### PROCEDURAL HISTORY

On September 20, 2013, the undersigned ALJ issued a decision concerning the above dockets, affirming five citations[1] issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to the American Coal Company ("Am Coal"), including the significant and substantial ("S&S") designations for each violation. Further, this Court assessed a total penalty of $43,200 for the five violations at issue, rather than the total of $69,600 proposed by MSHA by special assessment. 35 FMSHRC 3077 (Sept. 2013) (ALJ).

Am Coal filed a petition for discretionary review on or about October 29, 2013, essentially challenging the propriety of the Secretary's special assessments and this Court's ultimate determination of penalties. The Commission granted Am Coal's request for review on

[1] Although the caption in the Commission's Remand Decision lists Docket No. LAKE 2011-881, the citations in said docket were settled prior to the within hearing. The originally assessed penalty for these violations was $61,678 and the approved settlement was $29,068. The citations still at issue on remand involve four violations of § 75.202(a) at Docket Nos. LAKE 2011-962 and LAKE 2012-58 and a violation of safeguard, Citation No. 8432052, § 75.1403 at Docket No. LAKE 2011-962.

or about October 30, 2013, and held oral argument on April 20, 2016. In a Remand Decision dated August 22, 2016, Commissioners Young, Cohen, and Althen, vacated in part this Court's September 20, 2013, decision, remanding "for further clarification" of this Court's penalty assessments.[2]

**SUMMARY OF THE TESTIMONY AND THE FACTUAL RECORD**

The ALJ hereby incorporates the summary of testimony as contained in his September 20, 2013, hearing decision and factual background as contained in the Commission's August 26, 2016, remand decision as though fully recited herein. 2016 WL 5868551 (Aug. 26, 2016).

## I. Review of Commission Remand Decision (Majority Opinion)

In the "Disposition" section of its remand decision, the Commission explained that a Judge's assessment must be independent and that the Secretary's (penalty) proposal "*is not a baseline or a starting point that the Judge should use (as) a guidepost for his/her assessment.*" (RO at 4)[3]. While the Commission held that this Court "did engage in a significant discussion of the evidence," it nonetheless held that the decision "*could be read to indicate,*" that this Court had "used the Secretary's special assessment as a starting point." (RO at 4). Therefore in order to assure the independence of the assessment, the Commission remanded the cases for reconsideration and further explanation. (RO at 4).

In its remand decision (Section A), the Commission reviewed the statutory and regulatory law supporting the Secretary's broad discretion in proposing penalties under the Mine Act. (RO at 4-6). The Commission noted that special assessments are governed by 30 C.F.R. § 100.5 and that this regulation does *not* state conditions warranting a special assessment. (RO at 5). "The decision to issue a special assessment rather than a regular penalty *is wholly within MSHA's discretion.*"

The Commission further noted that MSHA's Narrative Findings for a Special Assessment ("Narrative") do not state specific reasons for the decision to issue a special assessment and "provide little or no substantive information." (RO at 4). The Narrative provided only a "cursory and summary statement," of the penalty criteria for each violation. (RO at 4).

In summary the Secretary is not required to explain the basis for his proposed regular or special assessment beyond its establishment of penalty criteria as set forth in Section 110(i) of the Act and Sections 100.3(a) and 100.5(b) of the regulations. (RO at 6). If an operator ultimately disagrees with the Secretary's regular or special assessment, his remedy is to request a hearing before the Commission. (RO at 6).

In its remand decision (Section B) the Commission reviewed the statutory and case law upholding its independent authority to assess penalties under the Act. (RO at 6).

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[2] Commissioner Nakamura concurred with the remand decision *only* as to the penalty for the safeguard violation. Chairman Jordan dissented as to all five citations / penalties.

[3] Hereinafter "RO" refers to the Commission's August 26, 2016 Decision and Order.

The Commission again emphasized that a Judge is bound "neither by the Secretary's proposed penalty nor by the Part 100 regulations governing (the Secretary's) proposed penalty process." (RO at 7). A Judge's discretion is not, however, unlimited: his penalty assessments must reflect proper considerations of § 110(i) criteria and his decision must contain findings of fact under each of the statutory penalty factors. (RO at 7).

In Section C of its remand decision the Commission examined the Secretary's burden for proposed penalties. The Commission noted that the Secretary's authority to issue a special assessment was plenary and that the Secretary was *not* required to explain his reasons for his decisions to specially assess a violation to the commission. (RO at 7). However, the Commission further held that the Secretary did "bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." (RO at 7).

The Commission further held that the Secretary's decision to specially assess the penalty and the rationale supporting that decision "may be relevant if the Judge *appears to rely upon it, expressly or implicitly*." (RO at 8). While a Commission Judge has the right to impose an appropriate penalty based upon his own application of the penalty criteria, he still must explain any substantial divergence between the penalty proposed by MSHA and his own penalty assessment. (RO at 8). Thus, a Commission Judge should fully discuss the evidence bearing upon the appropriate penalty when substantially diverging from the Secretary's proposals. (RO at 9).

The Commission again emphasized that for either regular or special assessments, the Secretary's proposal must not be the "baseline from which the Judge's consideration of the appropriate penalty must start." (RO at 9). Regardless of the Secretary's proposals the Judge's assessment should be made independently, said assessment being based upon the penalty criteria and the record. (RO at 10).

In Section D of its remand opinion, the Commission stated that certain wording in this Court's decision *suggested* that it may have used the Secretary's specially assessed proposed penalties as a benchmark for calculating his ultimate assessments. (RO at 9).

*Inter alia*, the Commission found that this Court's decision "only summarily addressed the history of violations criterion in a general context as to the roof and rib violations." (RO at 11). Additionally, the Commission found that this Court had failed to make any finding on the violations history relative to the safeguards violations. (RO at 11).

The Commission specifically directed that on remand this court should do the following: explain whether it had relied on the Secretary's specially assessed proposed penalties; provide an adequate explanation for the bases of its assessments in light of the record and its § 110(i) findings; in the event that this Court relied on the Secretary's proposed assessment as a starting point for his assessments, it must specifically address the discrepancies noted in the record pertaining to the operator's history of violations and explain how this criterion was considered in assessing the penalties; make a specific finding as to the history of violations pertaining to the safeguard violation, Docket No. LAKE 2011-962. (RO at 11).

## II. Review of Commissioner Nakamura's Concurring and Dissenting Opinion

In his concurring opinion Commissioner Nakamura agreed with the Commission that a Judge has broad discretion to assess a penalty de novo and is in no way bound by the Secretary's proposed assessment or by the Part 100 regulations governing the penalty proposal process. (RO at 13) (citations omitted).

Commissioner Nakamura observed that historically Commission Judges' discretion in setting the penalty amount was circumscribed by only two legal requirements: (1) making the appropriate findings consistent with § 110(i) of the Mine Act; (2) explaining any substantial deviation from the Secretary's penalty proposal. (RO 14).

Commissioner Nakamura reasoned that the majority had now added an additional requirement, supported neither by statute or Commission precedent, demanding that the Judge be "attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision." (RO 14).

## III. Review of Chairman Jordan's Dissenting Opinion

Chairman Jordan joined in the opinion of Commissioner Nakamura in affirming the four roof control violations. Chairman Jordan further opined that the safeguard violation penalty should also be affirmed and not remanded.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

*In reaching his own independent penalty assessments, this Court did not use and has not used the Secretary's proposed specially assessed penalties as a baseline or starting point.*

As noted *supra*, the Commission's remand in part was grounded in its concern that this Court had used the Secretary's specially assessed penalty proposals as a baseline or starting point in reaching its own penalty assessments. The Commission voiced its apprehension thusly:

> In order to assure fairness, therefore, it is important for us to know whether the Judge made an independent assessment or felt constrained to making his assessment as an adjustment to the Secretary's proposal. In this unique case, if the Judge did rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record.

(RO 11).

As further noted *supra* the Commission further directed on remand that *if this Court had relied on the Secretary's proposed assessments as a starting point for his assessment*, it should specifically address the discrepancies noted in the record pertaining to the operator's history of violations and explain how he considered this criterion in assessing the penalties. (RO 11).

This Court regrets that some inartful phrasing in its decision may have created the misapprehension that it had relied upon the Secretary's penalty proposals as a baseline or starting point in determining ultimate penalty amounts.

However, this Court finds itself constrained to point out that it had directly addressed the Commission's expressed remand concerns in its original September 20, 2013 underlying decision.

Specifically, this Court notes its review of "Contentions of Respondent," in which it states the following:

> Special assessments proposed by the Secretary prevent the Commission and its ALJs from assessing civil penalties without the appearance of arbitrariness. (Respondent's Post-Hearing Brief, at pp. 1-6).
>
> The Secretary's change to the special assessment program in 2007 rendered the regulation vague, ambiguous, and undeserving of deference. (Respondent's Post-Hearing Brief, at pp. 6-10).
>
> The Secretary failed to meet his burden of proving, "particularly serious and egregious violations" or "other aggravating circumstances" justifying enhanced penalties. (Respondent's Post-Hearing Brief, pp. 10-19).
>
> In its brief Respondent cites the recent decision of ALJ Zielinski in *American Coal Co.*, LAKE 2011-183 et al, slip op., at 51 (June 13, 2013) (ALJ Zielinski); (see also Respondent's Post-Hearing Brief at p. 12). However, although ALJ Zielinski recognized American Coal's concerns about the practical implications of the Secretary's determinations to specially assess violations were well founded, he ultimately concluded that whether the Secretary proposed a regularly or specially assessed penalty *was not relevant to the Commission's determination of a penalty amount.* (American Coal Co., at p. 51).

This Court is of the same opinion.

Regardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used – this Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

> 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.

The ALJ has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. *Inter alia*, the undersigned notes: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding in *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

> With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties. (see also Secretary's Post-Hearing Brief at pp. 10-11 and cited case law).

(35 FMSHRC at 3109 – 3111.)

This Court believed (in retrospect mistakenly) that it had sufficiently communicated its intention by such decisional language to conduct a de novo determination of the penalties at issue with no reliance on the Secretary's penalty proposals as starting points or baselines and with no feelings of constraint imposed by the proposed special assessments.

This Court does not operate in an epistemological vacuum and was of course aware of the regular and special assessments associated with each citation.[4] This Court further recognizes the Respondent's underlying concerns that, in its Solomonic search for a just and fair penalty amount, this Court had been tempted to merely cut the Secretary's suggested special assessment in half. However, such is simply not the case.

The ALJ also feels compelled to address the Commission's observation that "for most violations," this Court had lowered the penalty by approximately 20% from the Secretary's special proposal. (RO at 10). While this Court's penalty amounts were roughly 20% lower than the Secretary's proposed penalties, this Court did *not* intentionally utilize any uniform across-the-board reduction formula in arriving at its individual penalty conclusions. Each penalty amount discussed within has been arrived at individually—after due consideration of § 110(i) criteria and a traditional negligence analysis pursuant to *Brody Mining, LLC,* 37 FMSHRC 1687, 1701 (AUG. 2015).

To the extent that there were any substantial deviations in this Court's penalty amounts that would require a *Sellersburg* explanation, this Court notes that, on the one hand, it frequently disagreed with the Secretary's negligence assessments.[5] On the other hand this Court gave great weight to the facts that the operator was large in size and able to continue in business despite the penalties imposed. Contrary to Am Coal's speculations, this Court imposed penalties that it felt were large enough to serve as an effective enforcement tool and discourage further violations. (see also *Black Beauty*, 34 FMSHRC at 1862 for similar considerations in considering settlement approval).

Therefore, pursuant to the Commission's remand directive, this Court emphasizes and clarifies that it did not and has not relied upon the Secretary's special assessments *as a baseline or starting point.* Accordingly, there is no need to specifically address the discrepancies noted in the record pertaining to the operator's history of violations and how such criterion was considered in assessing the penalties. (See also Commission remand directives at RO 11).

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[4] See *inter alia* Am Coal's chart of regular assessments v. proposed special assessments at page 5 of its petition for discretionary review.

[5] See *Sellersburg Stone Co.*, 5 FMSHRC 287, 298 (Mar. 1983), *aff'd* 736 F .2d 1147 (7th Cir. 1984).

This Court, however, does find that as a general matter, regardless of possible inconsistencies in the record, this mine operator inarguably had a significant history of violations. This Court specifically rejects Am Coal's apparent arguments that as its violations history was "not extraordinary or extreme," lesser penalties would be warranted. *(see Am Coal's petition for review* at p. 30).

The Mine Act is founded upon what this Court terms, "the Gibraltar" principle, that miners are valued as the most precious resource—not the shifting sands of mine operators' reported assets. In weighing the penalties to be paid this court fully took into account that miners' lives had been put at risk multiple times in the past by this operator.

In reference to the Commission's directive to "provide an adequate explanation for the bases of his (this Court's) assessments, in light of the record evidence and his section 110(i) findings," this Court shall discuss such *seriatim.*

**PENALTY ASSESSMENT FOR CITATION NO. 8428508**
**(DOCKET NO. LAKE 2011-701)**

The penalty imposed at this citation was $20,000. In its remand order the Commission noted that this Court did not make an explicit finding in the record of the size of the subject mine. (RO at 9). This Court has, in fact, considered the appropriateness of the penalty to the size of the operator pursuant to § 103.3(b). Taking into account, *inter alia*, that the subject mine tonnage exceeded 6,000,000 tons and the controlling tonnage exceeded 29,000,000 tons, this Court, in reviewing the tables in § 100.3, finds this to be a large mine. (*See also* Exhibit A). The size of Am Coal's operation would call for more than a minimal fine as to all the citations at issue.

This specific citation, as three of the succeeding violations discussed herein, involved § 104(a) S&S violations of 30 C.F.R. 75.202(a).[6]

Here, Inspector Phillip Stanley found 6 rod bolts that were not supporting the immediate mine roof. (This Court's review of the factual record as contained at 35 FMSHRC at 3105-3107 is hereby incorporated without full recitation thereof herein).

Given, *inter alia,* its findings that the injury which reasonably could be expected to result from a violation of the within standard in the cited area would be lost workdays or restricted duty and given, *inter alia*, that the inactive character of the cited area would lessen, in this Court's opinion, the negligence level of the violative conduct, this Court was persuaded that the penalty should be reduced.[7]

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[6] 30 C.F.R. § 75.202(a) provides: The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

[7] All of the Commissioners in their majority, concurring, and dissenting opinions agreed that this Court's explicit findings as to (reduced) negligence or gravity associated with the violations at issue in part explained the ultimate penalty amounts arrived at. (See *inter alia* RO at 9, 16, 18).

**PENALTY ASSESSMENT FOR CITATION NO. 8432118**
**(DOCKET NO. LAKE 2012-58)**

This citation also involved a S&S violation of 30 C.F.R. § 75.202(a). This Court imposed and again imposes a penalty of $7,200.[8]

At hearing, Inspector Law testified that he had observed inadequately supported ribs in the 1st East Tailgate. (Tr. I, 193). The standard § 75.202(a) had been cited 97 times in two years at mine 1102752 (97 to the operator, zero to a contractor).

This Court found that Law's testimony regarding the gravity of the violation was credible. (*See also* Tr. I, 205; 38 FMSHRC at 3114). However this Court further concluded that a rib collapse causing a crushing injury was less likely than that suggested by Law. Given *inter alia* the inactive character of the cited area and other mitigating factors, this Court further reduced the *negligence* level from moderate to low. (35 FMSHRC at 3114).

This Court finds that the $7,200 penalty which it imposed was appropriate given the large size of the business of the operator and that such penalty would not affect the operator's ability to continue in business. (See also § 100.3(a)(1)(i) and § 100.3(a)(1)(vi)). The operator's significant history of past violations further justifies more than a *de minimis* penalty. Further considering the *low* negligence of the operator and its demonstrated good faith in abating the violations, the ALJ again concludes that the $7,200 penalty imposed is appropriate.[9]

**PENALTY ASSESSMENT FOR CITATION NO. 8432126**
**(DOCKET NO. LAKE 2012-58)**

This citation again centered on a S&S violation of 30 C.F.R. §75.202(a). This Court had imposed a penalty of $6,100.

At hearing, Inspector Law had testified that he had discovered four damaged roof bolts in the mine's main north travel way, creating 3 different areas of unsupported roof. (Tr. II, 281; S-14).

This Court previously held that the $6,100 penalty was appropriate considering *inter alia* this § 110(i) criteria. The operator had a significant history of previous violations.[10] (See S-13).

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[8] This Court again incorporates its review of Citation No. 8432118 as set forth in its decision at 35 FMSHRC at 3112-3115 as though fully recited herein without recitation thereof.

[9] The difference in negligence levels arrived at by the Secretary and this Court essentially constitutes the reason for this Court's divergence from Secretary's proposed penalty.

[10] Notwithstanding Am Coal's arguments to the contrary, this Court finds that Am Coal's history of previous violations—regardless of alleged inconsistencies in the Secretary's assessments—was significant in nature.

The mine operator had a large sized mining operation and would be able to stay in business despite the penalty imposed. The mine operator had demonstrated good faith in attempting to achieve rapid compliance after notifications of the violation.

This Court's divergence in penalty amount was again essentially based upon a finding of low negligence rather than moderate negligence.[11]

**PENALTY ASSESSMENT FOR CITATION NO. 8432129**
**(DOCKET NO. LAKE 2012-58)**

This citation was also one of the four violations of 30 C.F.R. § 75.202(a) found by MSHA inspectors.

At hearing, Inspector Law testified he had issued the within citation for inadequate roof bolts. (Tr. II, 361).[12]

This Court imposed a penalty of $6,100 after careful consideration of the above § 110(i) criteria previously discussed as applicable to the foregoing citations. Given considerable mitigating circumstances—including that the cited condition might not have been observable when one was in the crosscut—this Court finds that the mine operator's negligence was low rather than moderate in nature. Any deviation in penalty amounts was principally owing to the reduced negligence finding.

**PENALTY ASSESSMENT FOR CITATION NO. 8432052**
**(DOCKET NO. LAKE 2011-962)**

Citation No. 8432052 involved a violation of the mandatory safety standard contained in 30 C.F.R. § 75.1403.[13]

In its remand order the three Commissioner majority, also with Commissioner Nakamura concurring, directed that this Court make a specific finding as to the history of violation criterion pertaining to the safeguard violation, Citation No. 8432052. (RO at 11, 15).

In his hearing testimony Inspector Edward Law testified that the original safeguard, Citation No. 3033358, had been issued on January 13, 1988, arising out of an incident in which a ram car struck a miner standing on the back side of a curtain. (Tr. II, 393-394; S-10).

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[11] This Court again incorporates its analysis as contained at 35 FMSHRC at 3115-3119 as though fully recited herein.

[12] This Court incorporates its analysis of said citation/violation as contained at 35 FMSHRC 3120-3122 as though fully recited herein.

[13] Both Section 314(b) of the Mine Act and 30 C.F.R. § 75.1403 provide: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

Law estimated that he had cited the instant safeguard less than 5 times in the past. (Tr. II, 416). The 55 citations noted in Citation No. 8432052, issued on January 4, 2011, concerned a multitude of safeguards associated § 75.1403 and not just Citation No. 3033358.[14] (Tr. II, 417; S-9). In recommending the within citation for special assessment, Law considered the number of previous § 75.1403 violations, that the specific violation at issue involved one of the ten "rules to live by," and that it was S&S. (Tr. II, 433).

In the Commission's remand order it was noted that the operator had a history of 19 violations of the same standard. (RO at 9, FN 8). Pursuant to the remand order this Court specifically finds that the mine operator had a history of 19 past violations within *the preceding 15 month period prior to* the present violation. (R-9)[15]

After reevaluating the entire record, including this Court's specific finding regarding the mine operator's history of past violations, this Court again determines that the sum of $3,800 is an appropriate penalty for Am Coal's violative conduct.

In reaching this penalty amount, this Court has *not* used the Secretary's proposed special assessment of $4,800 as a baseline or starting point. However, this Court is further mindful that it must explain any "substantial divergence" between the Secretary's proposed penalty ($4,800) and its own assessment ($3,800). *Sellersburg Stone Co.*, 5 FMSHRC 287, 298 (Mar. 1983), *aff'd* 736 F .2d 1147 (7th Cir. 1984).

This Court initially observes that the relatively small $1,000 differential arguably raises some question as to whether a "substantial divergence" even exists—as Chairman Jordan, in her dissenting opinion, pointedly commented: "I do not find the penalty reduction substantial enough to vacate the Judge's assessment on this basis." (RO at 18, FN 1)

Assuming, however, that the result constituted a substantial divergence, the ALJ fully considered the six statutory factors contained in 30 U.S.C § 820(i)[16] in reaching the within

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[14] See also R-36 for various other safeguards cited in connection with § 75.1403 and Respondent's cross examination regarding such at Tr. II, 417-418.

[15] § 100.3(c) provides that:

> An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

[16] 30 U.S.C. § 820(i):

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the size of the business of the operator

penalty assessment, including the operator's above discussed history of previous violations. The ALJ has not given equal weight to all of the above criteria and finds that, under the total case circumstances, more weight should be accorded to the factors of operator's negligence and gravity of the violations. As noted in his original decision, the ALJ found that the illumination of the cited area and miners' general awareness of the transformer's location lessened the degree of negligence and gravity otherwise applicable. (See also 35 FMSHRC 3105). The $3,800 penalty amount was appropriate given the size of the operator's business and given that the amount of the penalty would not affect the operator's ability to stay in business. Further, the operator had demonstrated good faith in abating the violations, lessening the amount of penalty that would have been otherwise warranted. (See also joint stipulation no. 10, Joint Exhibit 1, 35 FMSHRC 3079).

After conducting a de novo assessment based upon his own independent review of the record the ALJ finds that a substantial divergence from the Secretary's proposed penalty is justified and that, given the total case circumstances without reliance upon the Secretary's proposed penalty as a starting point, a penalty of $3,800 is appropriate.

## ORDER

This Court makes the following penalty assessments without having used the Secretary's proposed specially assessed penalties as a baseline or starting point.

At Citation No. 8432052 (Docket No. LAKE 2011-962) Am Coal is assessed a penalty of $3,800.

At Citation No. 8432118 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $7,200.

At Citation No. 8432126 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $6,100.

At Citation No. 8432129 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $6,100.

At Citation No. 8428508 (Docket No. LAKE 2011-701) Am Coal is assessed a penalty of $20,000.

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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. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors. the appropriateness of such penalty to

Am Coal is **ORDERED** to pay civil penalties in the total amount of $43,200 within 30 days of the date of this decision.[17]

John Kent Lewis
Administrative Law Judge

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[17] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390