FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 31, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2013-0291 A.C. No. 44-00068-316647
v.	
SUNBELT RENTALS, INC., Respondent	Mine: Roanoke Cement Company

DECISION AND ORDER AFTER REMAND

Appearances: Andrew Tardiff, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and
Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Respondent: Travis W. Vance, Esq., and Collin G. Warren, Fisher & Phillips LLP, Charlotte, North Carolina, for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before the undersigned after a second remand from the Commission upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Act). Citation No. 8723677 remains at issue and charges scaffold-erection subcontractor Sunbelt Rentals, Inc. (Sunbelt or Respondent) with a highly negligent and significant-and-substantial section 104(a) violation of 30 C.F.R. § 56.18002(a) after a non-fatal accident occurred on January 8, 2013. At the time of the accident, § 56.18002(a) provided that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a) (2013). MSHA proposed a specially-assessed civil penalty of $51,900.

The sole issue currently on remand before the undersigned is the assessment of the penalty for Citation No. 8723677.

II. Procedural Background

As the facts and history of this case are detailed in *Sunbelt Rentals, Inc.*, 40 FMSHRC 573 (April 2016) (ALJ) (*Sunbelt III*), only the relevant facts will be discussed here. The undersigned initially issued an order granting the Respondent's Cross-Motion for Summary Decision. *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208 (Sept. 2013) (ALJ) (*Sunbelt I*). On July 12, 2016, the Commission vacated the undersigned's summary decision in favor of all Respondents and remanded all three dockets. *Sunbelt Rentals, Inc., et al*., 38 FMSHRC 1619 (July 2016) (*Sunbelt II*).[1]

After holding a hearing in Roanoke, Virginia, on May 23-24, 2017—and after careful review of the record, and the parties' post-hearing briefs, and accepting the Commission's remand as the law of the case—the undersigned found, as relevant here, that Sunbelt violated 30 C.F.R. § 56.18002(a) by failing to adequately examine the seventh level of the preheat tower at least once during the January 8, 2013 shift, and by failing to promptly initiate corrective action to remove a falling-material hazard. The undersigned further found that the violation resulted from Sunbelt's high negligence. *Sunbelt III*, 40 FMSHRC at 603-05.

The undersigned assessed a penalty of $23,750 based upon the consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act.

The Respondent appealed *Sunbelt III* to the Commission. As relevant here, the Respondent challenged the findings in *Sunbelt III* of a violation and that any violation was significant and substantial and resulted from high negligence.

The Commissioners issued four opinions: one by Commissioners Young and Althen, presented as the majority opinion; one by Commissioner Jorden, concurring, in part, and dissenting, in part; one by Chairman Rajkovich, dissenting in part, concurring in part, and joining in result the opinion of Commissioners Young and Althen only on the issue of negligence; and one by Commissioner Traynor, concurring with Commissioner Jordan's opinion. *Sunbelt Rentals, Inc.*, 2020 WL 508744 (Jan. 2020) (*Sunbelt IV*). The initial question before the undersigned is whether, given the fractured opinions of the Commissioners, the undersigned has any further jurisdiction in this matter.

Under Commission Procedural Rule 69, a judge's jurisdiction "terminates when his decision has been issued." 29C.F.R. § 2700.69(b). Jurisdiction may be returned to a judge after a remand from the Commission. The contours of such a remand provide the sole and specific issues that a judge may consider on remand. *Boswell v. Nat'l Cement Co.*, 15 FMSHRC 935, 937 (June 1993). As such, it is paramount for a judge on remand to determine what, if any, majority opinion dictates how to proceed.

The Supreme Court has stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent" of a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the

[1] Prior to a hearing after the first remand, two of the three dockets settled, leaving Sunbelt the sole Respondent.

narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ). The Court of Appeals for the District of Columbia has refined the *Marks* rule by defining one opinion as "narrower" than another "only when one opinion is a logical subset of other, broader opinions" and ruling that "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by" a majority. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1992). The Supreme Court has also held that decisions of administrative agencies "must be set forth with such clarity as to be understandable" because a reviewing court "must know what a decision means before the duty becomes [that of the reviewing court] to say whether it is right or wrong." *Chenery Corp. v. Fed. Water & Gas Corp.*, 332 U.S. 194, 195-97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. CO*, 294 U.S. 499, 511 (1935).

A brief analysis of the opinions in *Sunbelt IV*, as relevant here, is in order. In their opinion, Commissioners Young and Althen affirmed the finding of a violation and that finding that it was significant and substantial. However, Commissioners Young and Althen analyzed the evidence and found that "[t]he record simply does not support the notion that [an examiner-agent of Sunbelt] showed an aggravated lack of care." *Sunbelt IV*, 2020 WL 508744, at *11 (opinion of Commissioners Young and Althen). Commissioners Young and Althen concluded that the violation "was a result of the operator's ordinary negligence." *Id.* at *14. Consequently, Commissioners Young and Althen voted to remand this matter "for a reassessment of the penalty" based on ordinary negligence. *Id*.

Commissioner Jordan, concurring, in part, and dissenting, in part, ruled that there was substantial evidence to support a finding of high negligence and voted to uphold the undersigned's findings in *Sunbelt III*.

Dissenting in part and concurring in part, Chairman Rajkovich found that there was "no substantial evidence of a violation" and stated that he would reverse on those grounds. *Id.* at *17 (opinion of Chairman Rajkovich). However, Chairman Rajkovich also stated that, in the alternative, he joined Commissioners Young and Althen in finding "the lower level of negligence." *Id.* at *21. Specifically, Chairman Rajkovich stated that "given [his] view that there was no violation, it would be wholly inconsistent for [him] to find that the record supports the notion of an aggravated lack of care, warranting a label of 'high negligence.'" *Id.*

Finally, Commissioner Traynor wrote a separate opinion concurring with Commissioner Jordan. In his opinion, Commissioner Traynor opined that, because of the inconsistency between Chairman Rajkovich's two positions, there was no valid majority on the issue of negligence.

Taking all of these separate opinions together, there is no common rationale for a finding of ordinary negligence. The opinion of Commissioners Young and Althen clearly states a rationale for finding ordinary negligence; however, Chairman Rajkovich does not join in that reasoning, only in the result. *Compare id.* at *11-14 (opinion of Commissioners Young and Althen) (stating the reasoning for finding ordinary negligence in Part III E), *with id.* at *21 (opinion of Chairman Rajkovich) (joining Part III A and B but not E of the opinion of

Commissioners Young and Althen).[2] Both Commissioners Jordan and Traynor would have upheld the undersigned's finding of high negligence. Without a common rationale, there is no rationale to form as the basis for precedential effect in other cases. *United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016).

As there is no common rationale, the next question must be whether, without a common rationale, there is a valid majority remanding the matter—and returning jurisdiction—to the undersigned. However, even without a common rationale, a lower court is still bound by the specific result of a higher court's decision. *See, e.g., id.* ("[W]here we can identify no rationale common to a majority of the Justices, we are bound only by the result."); *King v. Palmer*, 950 F.2d at 784. In *Sunbelt IV*, the result, at least, is clear: Chairman Rajkovich joined the opinion of Commissioners Young and Althen in the result—a remand solely on the issue of the penalty with ordinary negligence. *Sunbelt IV*, 2020 WL 508744, at *16 (opinion of Chairman Rajkovich) ("I concur in result only in the opinion of Commissioners Young and Althen."). Accordingly, the undersigned remains bound by the majority result on ordinary negligence.

Consequently, although lacking a common rationale, a majority of the Commission validly remanded this case to the undersigned solely to decide the amount of the penalty given ordinary negligence.

III. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Act. Section 110(i) of the Act delegates to the Commission the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the

[2] Chairman Rajkovich's opinion, while a pragmatic decision to craft a majority result on the issue of negligence, adopts two seemingly contradictory positions. As an initial position, Chairman Rajkovich finds that there was no violation; but as an alternate position, Chairman Rajkovich finds that, "if [t]here [w]as a [v]iolation, it was [d]ue to [n]o [m]ore than [o]rdinary [n]egligence." *Sunbelt IV*, 2020 WL 508744, at *21 (opinion of Chairman Rajkovich). As Chairman Rajkovich correctly notes, "[w]hen there is not a finding of violation, the issue of negligence is never reached." *Id*. Chairman Rajkovich also correctly notes that, "given [his] view that there was no violation, it would be wholly inconsistent for [him] to find that the record supports the notion of an aggravated lack of care, warranting a label of 'high negligence.'" *Id.* However, it is equally inconsistent to find *any* level of negligence, including ordinary negligence, given Chairman Rajkovich's position that there was no violation.

> gravity of the violation, and [6] 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).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion to determine the amount of a penalty, the Commission has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As the Commission only changed the level of negligence found in *Sunbelt III*, the findings and analysis from that decision largely stand with the notable exception of substituting the undersigned's finding and analysis in *Sunbelt III* of high negligence with the Commission's findings and "analysis" of ordinary negligence.

When determining a proper assessment for this violation, the undersigned considered: 1) the Respondent's three prior violations of this standard in the 15 months prior to the accident; 2) the Respondent's size as a small contractor who worked only 26,667 hours in mines in 2012; 3) the Respondent's ordinary level of negligence; 4) the presumption—given the Respondent's failure to introduce any specific evidence to support or substantiate its inability to pay or any adverse impact on its ability to remain in business—that the penalty will not have an effect on the Respondent's ability to continue in business; 5) the high level of gravity of the significant and substantial violation; and 6) the timely abatement made in good faith.

Based upon the undersigned's consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, the undersigned assesses a penalty of $17,300.00. This amount is the result of an independent determination by the undersigned of the statutory criteria and a penalty amount that would respond to the seriousness of the violation and would deter future violations. The undersigned did not use the Secretary's proposed specially assessed penalty as a baseline or starting point for this determination. *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019).

IV. ORDER

Citation No. 8723677 is **MODIFIED** by the Commission's decision in *Sunbelt IV* to reduce the level of negligence from high to ordinary. Respondent, Sunbelt Rentals, Inc., is **ORDERED** to pay a total civil penalty of $17,300.00 within 30 days of the date of this Decision and Order.[3]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

[3] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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