FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WEST ALABAMA SAND & GRAVEL, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2009-870-M A.C. No. 01-02738-194100 Mine: West Alabama Sand & Gravel

DECISION ON REMAND

Before: Judge Feldman

I. Procedural History

This single citation civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involves Citation No. 6511548 issued to West Alabama Sand and Gravel, Inc., ("West Alabama") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 6511548 alleges that a truck driver climbed on top of his truck without fall protection on West Alabama's mine property, in violation of 30 C.F.R. § 56.15005, which provides that "[s]afety belts and lines shall be worn when persons work *where there is danger of falling*. . . ." (emphasis added). Specifically, Citation No. 6511548 alleges:

> A customer truck driver [Johnny Koger, who was employed by Denbar Transportation,] was observed climbing on top of the loaded trailer. [Koger] was not wearing a safety belt and lanyard or any other type of restraining device to prevent a fall to the ground below. [Koger] was on his knees pulling on tarp within inches of the side of the trailer. [Koger] was exposed to a fall of ten feet to ground level. Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

As there was no dispute of material facts, the initial disposition affirmed, through summary decision, the violation and its significant and substantial (S&S) designation, but ruled that it did not result from an unwarrantable failure[1] to comply with the standard in question. Consequently, the initial decision reduced the penalty from the proposed assessment of $15,971.00 to $760.00. 34 FMSHRC 1651 (July 2012) (ALJ). The Secretary appealed the deletion of the unwarrantable failure designation, which was based on a reduction in the degree of negligence attributable to West Alabama's conduct, from "high" to "moderate," and the resultant reduction in proposed civil penalty.

The Commission now has vacated the initial decision with respect to the deletion of the unwarrantable failure, the reduction in negligence, and the reduction of the proposed penalty, directing my further consideration of these issues consistent with its remand decision. 37 FMSHRC 1884, 1891 (Sept. 2015).

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).

2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of "high" negligence level.

West Alabama's Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Given West Alabama's stipulation to the Secretary's unwarrantable failure designation, the issue remains the appropriate penalty to be imposed for Citation No. 6511548. The statutory penalty range for a violation attributable to an unwarrantable failure under section 104(d)(1) of the Mine Act is between $2,000.00 and $70,000.00. 30 U.S.C. § 820(a)(1), (a)(3)(A).

In considering the appropriate civil penalty, the parties were ordered to address the applicability of the section 110(i) statutory criteria, outlined below. 38 FMSHRC 383 (Feb. 2016) (ALJ). In addition to addressing the section 110(i) penalty criteria, the Secretary noted:

> . . . that Respondent continues to consistently violate safety standards and essentially stopped paying assessed penalties in approximately January 2010, according to the Mine Data Retrieval System ["MDRS"]. Respondent's history,

[1] The Commission has determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987).

present refusal to pay assessed penalties, along with the admitted gravity and high negligence of this violation, support the Secretary's assessed penalty.

Sec'y Resp., at 12 (Mar. 9, 2016). Consequently, on May 9, 2016, the parties were further ordered to address whether delinquency in paying civil penalties is a relevant consideration in determining the appropriate penalty to be assessed. 38 FMSHRC __, slip op. (May 9, 2016) (ALJ). A discussion of the applicability of the section 110(i) criteria and delinquency follows.

II. Application of Section 110(i) Criteria

The Secretary proposes a $15,971.00 civil penalty. The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "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) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
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> > [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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that the *de novo* consideration of the appropriate civil penalty to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

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). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising my discretion, each penalty criterion shall be evaluated with regard to whether it is a mitigating, neutral, or aggravating factor.

1. History of Violations

The Commission has addressed the appropriate considerations for evaluating the effect of the history of violations criterion in section 110(i) of the Mine Act:

> The Commission has recognized that "the language of section 110(i) does not limit the scope of history of previous violations to similar cases." *Secretary of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (Apr. 1996). The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for this component." *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992) (emphasis added); *see also Glover*, 19 FMSHRC at 1539 (remanding to the judge with instructions to consider the operator's general history of violations, not only its prior section 105(c) violations).

Cantera Green, 22 FMSHRC at 623.

The Secretary asserts, and the MDRS reflects, that 17 citations were issued to West Alabama in the two-year period preceding the July 1, 2009, issuance of Citation No. 6511548. Of these 17 citations, 14 were designated as non-S&S in nature, and none of the subject 17 violations were attributable to an unwarrantable failure. While the general violation history should be considered, it is noteworthy that, of these 17 citations, none cited section 56.15005—the mandatory standard at issue in this matter. As only three of the 17 relevant cited violations evidence gravity of a reasonably serious nature, **West Alabama's history of violations is a mitigating factor.**

2. Appropriateness of Penalty to Size of Business

The evidence of record reflects that West Alabama has approximately eight employees. The Secretary does not dispute that West Alabama has a small workforce. However, the Secretary disputes that a small workforce precludes imposition of a relatively high penalty, arguing that such limitation "goes directly against the deterrent purposes of the Act." *Sec'y Resp.*, at 12. I conclude that **the size of West Alabama's business operations, with respect to the Secretary's $15,971.00 proposed penalty, is a neutral factor.**

3. Negligence

The Secretary's unwarrantable failure designation fundamentally is based on a "gotcha" question from the MSHA inspector. Clay Junkin, Vice President of West Alabama, was asked by the inspector if he knew that truck drivers had to tie down when climbing on their trucks to secure loads. This confronted Junkin with the unenviable choice of admitting liability or admitting ignorance. Citation No. 6511548 informs that Junkin responded that he knew that haul truck drivers were required to tie down when covering their loads with tarp.

Attempting to rehabilitate himself in this proceeding, Junkin now maintains that he was not aware that he was responsible for the contractor's violative conduct. The Commission's remand noted that I erred in the initial decision when I opined that Junkin's purported lack of awareness of his responsibility for contractor conduct was based on a "reasonable and apparent good faith belief" that was a mitigating factor that reduced West Alabama's degree of negligence. 37 FMSHRC at 1886.

Of course, it is a "knew or should have known" standard that imposes the responsibly on mine operators to fulfill their obligations under the Mine Act. Thus, it is true that a mine operator's professed ignorance of its responsibility for the unsafe conduct of its contractors is irrelevant. As the Secretary has acknowledged, absent aggravating circumstances, a mine operator's accountability for the violative conduct of its contractor commonly is based on strict liability. *Sec'y Resp.*, at 17. That is why such "gotcha" questions are inappropriate.

Although the initial decision unsuccessfully attempted to pay lip service to West Alabama's claim that it did know that it was responsible for its contractor's conduct, the intended emphasis in the initial decision with respect to notice, which admittedly was not made clear, was that West Alabama had not been previously cited for a violation of section 56.15005. I view this as somewhat mitigating in nature.

More significantly, it is noteworthy that the cited violation is predicated on the spontaneous action of a contract haul truck driver. The Secretary does not contend that Junkin was aware of the violation in that Junkin was not present, did not observe, and did not otherwise supervise or encourage, Johnny Koger, the subject truck driver, as he covered his load with a tarp. In this regard, it is significant that the negligence of an hourly employee ordinarily is not imputed to a mine operator unless there is evidence of inadequate supervision and control. *Reading Anthracite Co.*, 32 FMSHRC 399, 411 (April 2010); *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (Aug. 1982). While the Secretary has the discretion to cite a mine operator, its contractor, or both, it is unfortunate that MSHA did not cite Denbar Transportation, Koger's employer, which is better suited to encourage the tie down compliance of its drivers. *See Sec'y Resp.*, at 17-18.

West Alabama has stipulated to "high" negligence. While the negligence remains high, in sum, for the purposes of assessing a civil penalty, I conclude that West Alabama's derivative liability for the acts of its contractor, in the absence of a history of similar violations, **is a mitigating factor with respect to its degree of negligence**.

4. Ability to Continue in Business

It has neither been contended nor shown that the Secretary's proposed penalty will affect West Alabama's ability to continue in business. As such, I conclude that **this criterion is a neutral factor**.

5. Gravity

The gravity penalty criterion requires an evaluation of the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In evaluating the seriousness of a violation, the Commission has focused on "the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Citation No. 6511548 was designated as S&S and affecting one person. As noted in the initial decision:

> West Alabama does not deny that it is reasonably likely that the continued practice of working on an uneven surface elevated ten feet above the ground will result in an accident involving a fall that is reasonably likely to result in serious injury. Consequently, the cited violation is properly designated as S&S.

34 FMSHRC at 1654. Accordingly, the violation is serious in gravity. **I view this criterion as neutral with regard to the appropriate penalty to be assessed.**[2]

6. Good Faith Abatement

West Alabama's abatement is troubling. Instead of installing signage requiring all contract haul drivers to tie down when installing tarp, West Alabama posted a sign prohibiting truck drivers from installing tarp on mine property by advising drivers "not to climb on vehicles." *West Alabama Resp.*, at 6. (Mar. 24, 2016). In other words, if a haul truck operator was inclined to expose himself to the danger of falling, he must do so off mine property. Although approved by MSHA, this is questionable good faith abatement, at best. Consequently, **I view West Alabama's abatement efforts as an aggravating factor.**

On balance, applying the traditional section 110(i) analysis would provide for a meaningful reduction of the $15,971.00 penalty proposed by the Secretary.

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[2] The mandatory standard in section 56.15005 requires "[s]afety belts and lines shall be worn when persons work *where there is danger of falling*. . . ." (emphasis added). Section 56.15005 must, of necessity, be broad because the myriad circumstances requiring safety lines cannot be foreseen. However, the securing of loads on haul trucks is an everyday occurrence. I am concerned that the Secretary appears to take the position that the failure to tie down when installing tarp on a haulage truck is a *per se* violation of section 56.15005. In view of the Secretary's *per se* approach, it is difficult to assess the degree of hazard posed by the facts surrounding the violation at issue in Citation No. 6511548, wherein the truck operator was observed installing the tarp "on his knees." To avoid arbitrary enforcement, the Secretary should consider initiating a rulemaking to promulgate a mandatory standard to require *truck operators to tie down when securing their load.* By way of example, the mandatory standard at 30 C.F.R. § 56.12016 requires that *all* electrically powered equipment must be de-energized before mechanical work is performed on such equipment. It is noteworthy that section 56.12016 does not require de-energizing electrical equipment *only* when there is a danger of electric shock or other injury.

III. Delinquency

As previously noted, the Secretary has alluded to West Alabama's civil penalty payment delinquency as a relevant consideration in determining the appropriate penalty to be assessed for Citation No. 6511548. *See Sec'y Resp.*, at 12. Specifically, the MDRS reflects that of the $27,890.00 in civil penalties assessed for the 59 citations and orders issued to West Alabama during the period June 2010 to November 2015, West Alabama has paid $200.00 in satisfaction of two citations. The MDRS further reflects that West Alabama is delinquent in its payment of the $27,690.00 total civil penalty for the remaining 57 citations and orders. Thus, with the exception of two citations, West Alabama has been delinquent in its payment of assessed civil penalties for approximately six years.

With respect to delinquency as it relates to the imposition of civil penalties, in the past, the Commission has narrowly construed the civil penalty criteria in section 110(i). In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), the Commission stated: "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Id.* at 850.

However, in *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012), the Commission departed from its narrow interpretation of section 110(i) by emphasizing the role of deterrence as a proper consideration in assessing civil penalties. In this regard, the Commission noted:

> Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, and it explicitly called for consideration of the protection of the "public interest" - which includes such compliance - before a [penalty is assessed]. Consequently, it is eminently appropriate for a Judge to acknowledge the need for deterrence in [considering the appropriate civil penalty], with the understanding that the [ultimate civil penalty], consistent with fundamental principles underlying the penalty provisions of the Mine Act, discourage operators from violating health and safety regulations and laws in the future.

Id. at 1866. In sum, the Commission stated:

> Simply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties - to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties.

Id. at 1869.

On May 9, 2016, the parties were ordered to address whether delinquency is a relevant consideration in determining the appropriate penalty to be assessed. 38 FMSHRC __, slip op. (May 9, 2016) (ALJ). West Alabama responded on May 31, 2016, asserting that "while the Court may consider the matter of Respondent's delinquent payment history," *Black Beauty* does

not compel the Court to do so. *West Alabama Resp. to Order to Show Cause*, at 1 (May 31, 2016). West Alabama further argues that its delinquent payment history does not adversely affect deterrence because "there is no history of relevant violations with respect to drivers climbing on their trucks and failing to tie down, and accordingly no history of delinquent payment for such violations." *Id.* at 2.

The Secretary responded on June 14, 2016, asserting that West Alabama's numerous unpaid civil penalties "have done nothing to deter safety infractions at Respondent's mine or to compel Respondent to honor its obligations under the Mine Act." *Sec'y Resp. to Order to Show Cause*, at 2 (June 14, 2016). Consequently the Secretary avers that West Alabama's "six-year delinquent payment history should be given great weight in assessing the penalty in this matter." *Id.*

The ultimate goal of the Mine Act is to promote a general culture of safety by deterring violations of the Mine Act and the Secretary's mandatory safety regulations. In this regard, the Commission in *Black Beauty* stated:

> 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.
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> The Senate Report, for example, acknowledged that civil penalties are "an enforcement tool," and recognized that the "settlement of penalties often serves a valid enforcement purpose." Legis. Hist. at 632-33. It emphasized that:
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> > [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards....
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> > ...To be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.
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> > ... [T]he Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, [but] is indeed for the purpose of encouraging operator compliance with the Act's requirements....

Black Beauty, 34 FMSHRC at 1865-66 (quoting S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978)). Although *Black Beauty* concerns the propriety of considering deterrence in the context of approving settlements of civil penalties, it is clear that deterrence is also an appropriate consideration in determining civil penalties in contested cases. *See id.*

West Alabama acknowledges the deterrent effect that the payment of civil penalties has in promoting compliance with the Mine Act and the Secretary's regulations. *See West Alabama Resp. to Order to Show Cause*, at 2. Yet West Alabama did not provide any explanation for its six-year history of delinquency. There was no claim of oversight or regret. Rather, in an unabashed reliance on a distinction without a difference, West Alabama asserts that, despite its extensive history of delinquency, deterrence has not been compromised simply because it has not previously been cited for, and thus has not previously failed to pay a civil penalty for, a violation of the safety belt requirement in section 56.15005. *Id.*

Succinctly put, the Mine Act's legislative history makes clear that the purpose of a civil penalty is to induce compliance. *Id.* at 1867. Suffice it to say that West Alabama's six-year non-payment history cannot be ignored, as it frustrates this purpose and may expose miners to hazardous working conditions. I decline to elevate form—by the purposeless assessment of civil penalties—over substance—by encouraging that civil penalties be paid.

In the final analysis, West Alabama's delinquency must be considered as a *significant* aggravating circumstance that warrants a meaningful increase in the civil penalty assessed for Citation No. 6511548. I am cognizant that increasing the civil penalty in view of West Alabama's pattern of delinquency raises an obvious question: How will raising the civil penalty foster compliance in view of West Alabama's apparent disinclination to pay? Encouraging compliance is a two-step process. As noted, compliance is achieved through the payment of civil penalties. Thus, step one involves motivating delinquent mine operators to pay civil penalties by increasing future assessed penalties that, if not paid, become a debt owed to the federal government, collectable through an action brought by the Department of Justice. In step two, by encouraging the payment of civil penalties, the Mine Act's goal of deterrence and future compliance hopefully will be achieved.

As previously noted, *de novo* consideration of the appropriate civil penalty to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Consequently, consistent with the Commission's holding in *Black Beauty* that the deterrent goal of assessing civil penalties under the Mine Act is a proper consideration, West Alabama's long-standing pattern of delinquency warrants increasing the proposed penalty sought by the Secretary. Accordingly, **a civil penalty of $22,450.00 shall be assessed against West Alabama.**

ORDER

In view of the above, **IT IS ORDERED** that West Alabama Sand & Gravel, Inc. pay, within 40 days of the date of this Decision, **a total civil penalty of $22,450.00** in satisfaction of the single violation at issue. Upon timely receipt of this amount, Docket No. SE 2009-870 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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