FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2017-0224-M A.C. No. 21-00831-434118 Docket No. LAKE 2017-0248-M A.C. No. 21-00831-435608 Mine: Northshore Mining Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. MATTHEW ZIMMER, employed by, NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0141-M A.C. No. 21-00831-457528 A Mine: Northshore Mining Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. ROGER PETERSON, employed by, NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0146-M A.C. No. 21-00831-457527 A Mine: Northshore Mining Company

DECISION UPON REMAND

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act"). The four dockets involve a citation and order issued to Northshore Mining Company ("Northshore") and two 110(c) enforcement actions against individuals. 30 U.S.C. § 820(c). However, the only issue before me is the penalty amount to be assessed for Order No. 8897220, which is the subject of docket number LAKE 2017-0248.

For reasons set forth below, I assess a penalty of $100,000.00.

PROCEDURAL HISTORY & BACKGROUND

These matters were originally before former Commission Judge Margaret Miller. In her February 13, 2019 decision on the merits, Judge Miller found, among other things, that, with regard to Order No. 8897220[1], Northshore violated section 56.11002 of the Secretary's regulations, and that the violation was a result of Northshore's reckless disregard and unwarrantable failure to comply. *Northshore Mining Co. et al.*, 41 FMSHRC 50 (Feb. 2019) (ALJ). Although the Secretary designated the order as "flagrant" and proposed a specially assessed penalty of $130,200.00, Judge Miller found that violation was not flagrant within the meaning of the Act and assessed a penalty of $60,000.00. *Id*. at 69, 77.

Following the filing of petitions for discretionary review by both parties, the Commission affirmed Judge Miller's findings regarding reckless disregard and unwarrantable failure, as well as her determination that the violation was not flagrant. *Northshore Mining Co. et al.*, 43 FMSHRC 1 (Jan. 2021).

On appeal, the Eighth Circuit Court of Appeals ("Eighth Circuit") denied Northshore's petition for review of the Commission's conclusions on reckless disregard and unwarrantable failure, but granted the Secretary's cross-petition for review of the Commission's conclusions on the flagrant designation, and reversed the Commission's decision affirming Judge Miller's deletion of the flagrant designation. *Northshore Mining, et al. v. Sec'y of Labor*, 46 F.4th 718, 739 (8th Cir. 2022). The court remanded the matter to the Commission "for consideration of whether the penalty amount for [the flagrant violation described in Order No. 8897220] should be reassessed." *Id*.

On May 30, 2024, the Commission remanded the matter to the Office of the Chief Administrative Law Judge for consideration of the issue described by the Eighth Circuit. On August 5, 2024, the Commission's Chief Administrative Law Judge assigned the dockets to this court.

I encouraged the parties to settle this matter by agreeing to an appropriate penalty. They were unable to do so. On August 21, 2024, I ordered the parties to file briefs in support of their respective positions on the penalty to be assessed for Order No. 8897220. On September 12, 2024, the parties filed their briefs.

[1] The Secretary issued Order No. 8897220 under section 104(d)(1) of the Act for a violation of section 56.11002, which requires that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 56.11002. The body of the order states, in pertinent part, that the subject elevated walkway was not of substantial construction and was not maintained in good condition, which resulted in a failure of the walkway.

PARTIES' ARGUMENTS

The Secretary argues that, given the Eighth Circuit's holding that Order No. 8897220 is a flagrant violation, the originally proposed specially assessed penalty of $130,200.00 should be assessed. Sec'y Br. 1. As support, she cites the Commission's recognition that it is Congress's intent that a "flagrant penalty . . . be severe enough to target ''bad actors' who fail to take their safety responsibilities seriously…'" Sec'y Br. 2 (citing *Northshore Mining, et al*., 43 FMSHRC 1, 11 (Jan 2021) (citing 152 Cong. Rec. S4619 (daily Ed. May 16, 2000) (statement of Sen. Michael Enzi)). Here, despite Northshore management's knowledge that the outer walkways were structurally inadequate and unsafe, Northshore made no efforts to make repairs or post warnings, and instead allowed miners to access the area. Sec'y Br. 2. Moreover, the Secretary's proposed penalty is significantly less than both the statutory maximum for flagrant violations and the projected cost of repairs. Sec'y Br. 2-3. Further reduction of the penalty would thwart "Congress's intention that flagrant violations carry stiff enough penalties to encourage compliance" and incentivize "other operators to weigh the cost of litigation against the cost of correcting known hazards." Sec'y Br. 3-4.

In addition, the Secretary agues that Judge Miller's factual findings regarding the statutory penalty factors support the proposed penalty. Sec'y Br. 3. The Secretary points to Judge Miller's findings regarding the gravity and negligence of the violation, and specifically her determination that the violation was S&S, could result in serious injuries, and was a result of Northshore's reckless disregard and unwarrantable failure to comply with the regulation. Sec'y Br. 3. Further, the Secretary notes that Northshore stipulated that the penalty will not affect its ability to continue in business. Sec'y Br. 4.

Moreover, the Secretary asserts that Judge Miller identified hazards created by the violation and determined that those hazards were reasonably expected to cause death or serious body injury.[2] Sec'y Br. 4. The Secretary emphasizes that the Eighth Circuit found that substantial evidence supported Judge Miller's findings on those hazards, and that the hazards in fact caused a serious injury to a miner. Sec'y Br. 4.

Finally, the Secretary notes that Judge Miller's originally assessed penalty was 88% of the maximum penalty allowed for non-flagrant violations. Sec'y Br. 4. If this court assesses a flagrant penalty using the same percentage of the maximum penalty allowed for flagrant violations, the amount would be much higher than the Secretary's proposed penalty of $130,200.00. Sec'y Br. 4.

Northshore argues that Judge Miller's original penalty assessment of $60,000.00 for Order No. 8897220 should be upheld. It asserts that the Act and the Secretary's own penalty regulations do not require a particular amount be assessed for a flagrant violation and, rather, afford the judge "latitude to assess a penalty amount that . . . is appropriate." NS Br. 9. Here, the

[2] The Secretary also notes that Judge Miller considered and rejected Northshore's assertion that its fall protection policy lessened the injury expected. Sec'y Br. 4.

Secretary offered no evidentiary basis for the proposed specially assessed penalty. [3] NS Br. 9-10. Although Judge Miller deleted the flagrant designation, she properly considered each of the statutory penalty criteria and declined to assess even the maximum penalty for non-flagrant violations. NS Br. 11-12. Finally, Northshore argues that, had Judge Miller fully considered certain evidence, her gravity and negligence determinations may have been affected, which could have in turn affected the size of the assessed penalty. NS Br. 12-14.

DISCUSSION

Section 110(i) of the Mine Act states that "[i]n 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." 30 U.S.C. § 820(i). Commission judges assess penalties de novo pursuant to section 110(i) and are not bound by the Secretary's proposed assessments or Part 100 regulations governing those proposed assessments. *Solar Sources Mining, LLC*, 43 FMSHRC 367 (Aug. 2021). Moreover, although Commission judges are required to explain significant deviations from the Secretary's proposed regular assessments, the same is not true with special assessments. *Solar Sources Mining, LLC*, 42 FMSHRC 181, 197-199 (Mar. 2020). In addition, the Commission has cautioned its judges to "avoid the unconscious effect" of "anchoring" their decision to the Secretary's proposed special assessments, and to, instead, assess penalties that are "commensurate only with the actual factual findings after hearing." *Id.* at 197-199 n.25.

Here, the Secretary proposed a specially assessed penalty of $130,200.00 for Order No. 8897220. In her decision on the merits Judge Miller specifically noted that the Secretary's originally proposed penalty of $130,200 was "based upon a finding that the violation was flagrant[.]" In assessing a penalty of $60,000.00 Judge Miller determined that the Secretary had not met her burden with regard to the flagrant finding and stated the following regarding the statutory penalty criteria:

> However, there is a violation of the mandatory standard, the violation is S&S and unwarrantable. In addressing those issues, I addressed the negligence of the operator and agree that the mine engaged in a reckless disregard of the mandatory standard. I have also addressed the gravity of the violation and found it to be a serious violation that would result in death or serious bodily injury. I have also considered the history of assessed violations. . . . The violation was abated in good faith. The mine has not raised the ability to pay. Northshore is considered a large mine operator. Based upon my findings, I assess a penalty of $60,000 for this violation.

[3] Northshore cites multiple Commission ALJ decisions for the general proposition that judges may reject specially assessed penalties where the Secretary fails to provide adequate bases for the proposed special assessment. NS Br. 10-11.

41 FMSHRC at 77 (internal citation omitted). Neither the Commission nor the Eighth Circuit disturbed Judge Miller's findings on the statutory penalty factors. Accordingly, the only issue before me is the impact of the Eighth Circuit's determination that the violation was flagrant on Judge Miller's originally assessed penalty of $60,000.00.

In its decision remanding this matter back to the Commission, the Eighth Circuit acknowledged that the purpose of the Mine Act "was to create a graduated penalty scheme through which MSHA would levy heftier fines for more egregious conduct by mine operators." 46 F.4th at 732. The court went on to explain that the Mine Improvement and New Emergency Response Act ("the MINER Act"), among other things, amended the penalty section of the Mine Act and added the "flagrant" designation, which was meant for "the most serious type of violation." *Id*.

Given that flagrant violations are the most serious type of violation in the graduated penalty scheme created by the Mine Act, it stands to reason that the penalty assessed for a flagrant violation will generally be larger than the penalty assessed for an identical violation that does not have a flagrant designation.

A violation is "flagrant" when it involves a "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). At the time in question, flagrant violations could be assessed penalties as high as approximately $250,000.00. *Id.,* 30 C.F.R. § 100.5(e) (2016).

In reversing the Commission and finding that Order No. 8897220 involved a flagrant violation, the Eighth Circuit considered the three "key" terms in the Act's definition of "flagrant" – "(1) 'reckless,' (2) 'known violation,' and (3) 'reasonably could have been expected to cause ... death or serious bodily injury.'" 46 F.4th at 735. A brief review of the court's analysis of those terms as relevant to Order No. 8897220 is helpful to understand the seriousness of the violation.

First, in finding that substantial evidence supported the determination that Northshore acted "recklessly," the Eighth Circuit rejected the Commission's assertion that an operator is "reckless" when it consciously or deliberately disregards a safety issue. *Id*. Rather, it explained that "designating a violation as flagrant does not require burying or hiding evidence of wrongdoing[,]" as the Commission would have required, and that "Northshore's unjustified declination to begin repairing or even planning to repair the dangerous walkways suffice[d]" for purposes of establishing that Northshore acted recklessly. *Id*. Further, it specifically noted that neither the existence of a fall protection policy, nor the hiring of an engineering firm to inspect the walkways, both of which the Commission relied upon as substantial evidence to support deletion of the flagrant designation, were actually efforts to fix the violation, i.e., the poor condition of the subject walkway. *Id*.

Second, in finding that substantial evidence supported the determination that Northshore knew it was violating the regulation, the court pointed to Judge Miller's findings that there were work orders dating back to 2013 detailing concerns about walkways, that the engineering firm hired by Northshore had recommended that the walkway be restricted, that some of the

walkways had not been reinforced with steel plates like others had, and that mine mangers, employees and engineers testified that the relevant walkway was not being maintained in a safe condition. *Id*.

Third, and finally, in finding that substantial evidence supported the determination that the violation was reasonably expected to cause death or serious bodily injury, the court pointed to Judge Miller's findings regarding the multiple hazards created by the violation and her determination that a serious injury was likely even if Northshore's fall protection policy was taken into consideration. *Id*. at 735-736.

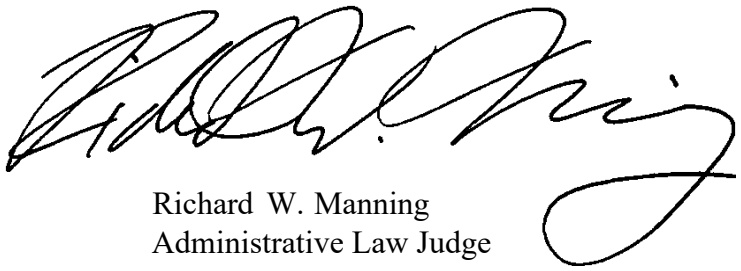
Although it is clear that a considerable penalty is warranted for the flagrant violation at issue in Order No. 8897220, I am troubled by the lack of transparency on the Secretary's part regarding how she arrived at the proposed specially assessed penalty of $130,200.00. In other matters before this court the Secretary, as part of the petition for assessment of a specially assessed penalty and in addition to the special assessment narrative findings, has often provided a special assessment "worksheet," which a judge could use to understand how the Secretary calculated the proposed special assessment, including how the Secretary weighed the pertinent factors. As far as the court can determine, no such document was filed the Commission, or accepted into evidence at hearing, nor was any methodology for calculating the penalty discussed at hearing or in the Secretary's post hearing brief. In *Solar Sources Mining, LLC*, the Commission alluded to the latitude Commission judges have when assessing a final penalty where the Secretary proposed a specially assessed penalty. 42 FMSHRC 181, 197-199 (Mar. 2020).[4] As a consequence, I have not relied upon the Secretary's proposed "special assessment" in determining an appropriate penalty to assess in this case. Instead, in arriving at a final penalty, I have relied on Judge Miller's findings on the statutory penalty criteria, 41 FMSHRC at 60-66, 76-77, and the Eighth Circuit's findings regarding the flagrant violation.

Having reviewed Judge Miller's findings on the statutory penalty criteria and given the Eighth Circuit's determination that the violation was flagrant, I find that a substantial penalty, greater than that which was originally assessed by Judge Miller, is appropriate. Accordingly, I assess a penalty of $100,000.00 for Order No. 8897220. The amount reflects this court's acknowledgement of Judge Miller's findings on the statutory penalty criteria and the Eighth Circuit's determination that the violation was flagrant, a designation Congress reserved for the most serious type of violation in the Mine Act's graduated penalty scheme.

[4] Judge Miller has declined to adopt proposed specially assessed penalties where the Secretary's support for such was lacking. *Freeport McMoRan Morenci, Inc.*, 35 FMSHRC 172, 181 (Jan. 2013) (ALJ).

ORDER

Northshore Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $100,000.00 within 40 days of the date of this decision.[5]



Richard W. Manning
Administrative Law Judge

[5] In addition to remanding to the Commission the issue discussed herein, the Eighth Circuit also denied Northshore's petition for review of the Commission's conclusion on reckless disregard and unwarrantable failure as relevant to Citation No. 8897219 at issue in LAKE 2017-0224, and reinstated Judge Miller's penalty assessments for individual liability in docket numbers LAKE 2018-0141 and LAKE 2018-0146. As a result, Judge Miller's penalty assessments on those issues are final, i.e., $60,000.00 for Citation No. 8897219, $4,000.00 for Matthew Zimmer, and $4,000.00 for Roger Peterson. If Northshore, Mr. Zimmer and Mr. Peterson have not yet paid those penalties, they are **ORDERED TO PAY** the Secretary of Labor those amounts within 40 days of the date of this decision. All payments ordered in this decision (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via https://www.pay.gov/public/form/start/67564508 Please include Docket Number & A.C. Numbers with payment.

Distribution

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