FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

April 3, 2025

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2024-0231
Petitioner,	:	A.C. No. 46-09569-594789
	:	
v.	:	
	:	
CONSOL MINING COMPANY, LLC	:	Mine: Itmann No. 5
Respondent.	:	

ORDER GRANTING THE SECRETARY'S MOTION FOR PROTECTIVE ORDER REGARDING RULE 30(b)(6) DEPOSITION
AND
ORDER DENYING RESPONDENT'S MOTION TO COMPEL RULE 30(b)(6) DEPOSITION

This case is before me upon the filing of the Petition of the Secretary of Labor for Assessment of Civil Penalty against CONSOL Mining Company, LLC ("CONSOL") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. On July 17, 2024, Chief Administrative Law Judge Glynn F. Voisin assigned me this docket and attached a copy of my Prehearing Order. Counsel for the parties have complied with my Prehearing Order and filed their initial prehearing reports. By order dated November 20, 2024, I set this matter for a hearing to be held on May 28–30, 2025, in Beckley, West Virginia.

I. BACKGROUND

CONSOL served a Rule 30(b)(6) deposition notice on November 19, 2024, to the Secretary, seeking to depose a representative of MSHA in relation to various aspects of how the Secretary's proposed special assessment penalties in this case were determined. (Sec'y Mot. at 1; Resp't Mot. at 1.) Specifically, the deposition notice lists twenty-three (23) topics regarding the subject matter of testimony, such as the Secretary's decision to specially assess the violations at issue in this matter, the manner in which MSHA determines that a citation should be specially assessed, the procedure for determining the amount of a proposed special assessment penalty, and the factors considered in determining a proposed special assessment penalty. (Sec'y Mot. at 3–5.) The parties then engaged in written and telephonic exchanges concerning the topics in CONSOL's Rule 30(b)(6) deposition notice but were unable to reach an agreement about conducting a deposition. (Sec'y Mot. at 2.) The parties ultimately agreed that it is appropriate for the Secretary to move for a protective order. (Sec'y Mot. at 2.)

The Secretary filed her Motion for Protective Order Regarding Rule 30(b)(6) Deposition on February 25, 2025, arguing that the proposed topics, with one exception,[1] are inappropriate for a Rule 30(b)(6) deposition. (Sec'y Mot. at 2.) CONSOL filed its Motion to Compel Rule 30(b)(6) Deposition and Response to Secretary's Motion for Protective Order Regarding the Deposition on March 13, 2025.[2] On March 21, 2025, the Secretary filed her Opposition to CONSOL Mining Company, LLC's Motion to Compel Rule 30(b)(6) Deposition. In her opposition, the Secretary states in a single sentence that she opposes CONSOL's motion to compel the Rule 30(b)(6) deposition for the reasons outlined in her motion for protective order. (Sec'y Opp'n at 1.)

In her motion, the Secretary asks me to issue a protective order prohibiting CONSOL's Rule 30(b)(6) deposition because the proposed deposition topics are irrelevant, protected from discovery by the deliberative process privilege, and unduly burdensome. (Sec'y Mot. at 10.) In contrast, CONSOL in its motion asks that I compel its Rule 30(b)(6) deposition because the requested information is necessary to give CONSOL a full and fair opportunity to challenge the basis for the Secretary's proposed special assessment penalties at the hearing on this matter. (Resp't Mot. at 2.)

Because these two motions involve the Secretary's proposed special assessment penalties and the proper scope of discovery, I now discuss the legal framework of the Mine Act's penalty procedures, as well as the Commission's rules regarding the scope of discovery and its limitations, before ruling on the parties' competing motions.

---

[1] In response to CONSOL's Topic No. 20 in the deposition notice, "[t]he Secretary states that there is no such policy[,] and the undersigned is aware of several pending accident cases with 104(d) violations that were not specially assessed. The Secretary has offered to attempt to provide a written response to the question of how many high negligence/accident violations are specially assessed, if such an interrogatory was asked." (Sec'y Mot. at 2 n.1.)

[2] Commission Procedural Rule 10(d) provides that "[a] statement in opposition to a written motion may be filed by any party within 8 days after service upon the party." 29 C.F.R. § 2700.10(d). Additionally, Commission Procedural Rule 8(a) provides that "when the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and federal holidays should be excluded in determining the due date." 29 C.F.R. § 2700.8(a). The Secretary filed her motion on Tuesday, February 25, 2025. Consequently, CONSOL had until Friday, March 7, 2025, to file its opposition to the Secretary's motion. On Thursday, March 13, 2025, CONSOL filed its "Motion to Compel Rule 30(b)(6) Deposition *and Response to Secretary's Motion for Protective Order Regarding Deposition*." (Resp't Mot. (emphasis added).) Evidently, CONSOL seeks to tack on its response to the Secretary's motion alongside its Motion to Compel Rule 30(b)(6) Deposition. Yet, CONSOL did not seek leave from the Court when it filed its untimely response to the Secretary's motion on Thursday, March 13, 2025, per the requirements of Commission Procedural Rule 9(a)–(b). 29 C.F.R. § 2700.9(a)–(b). Nevertheless, for completeness, given the multiple motions and arguments raised by CONSOL regarding special assessments, I will address CONSOL's affirmative statements supporting its motion to compel the deposition, as well as its responses to the Secretary's motion for a protective order.

II. PRINCIPLES OF LAW

A. The Mine Act's Penalty Scheme

1. The Secretary Proposes Civil Penalties

When an "authorized representative" of the Secretary finds a violation of the Mine Act or "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Mine Act]," 30 U.S.C. § 814(a), the Secretary may propose a civil penalty. 30 U.S.C. § 815(a). Six statutory factors guide the Secretary's enforcement discretion in deciding whether to assess a penalty and, if so, in what amount. Those factors are: (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 gravity of the violation"; and (6) "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 815(b)(1)(B). The Mine Act is explicit that, in proposing penalties, "the Secretary may rely upon a summary review of the information available to h[er] and shall not be required to make findings of fact concerning the above factors." 30 U.S.C. § 820(i).

2. The Commission Assesses Penalties *De Novo*

Under section 105(d) of the Mine Act, if an operator contests an order, citation, or proposed penalty assessment, the Commission must provide an opportunity for a hearing, and thereafter a Commission Administrative Law Judge ("ALJ") must "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." 30 U.S.C. § 815(d). Section 110(i) of the Mine Act delegates to the Commission the authority to assess all civil penalties based on the same six statutory factors that informed the Secretary's penalty proposal and the information relevant thereto developed in the course of the adjudicative proceeding. 30 U.S.C. § 820(i).

Commission ALJs possess independent authority to assess all contested penalties *de novo* and are not bound by the Secretary's proposed penalty assessment. 30 U.S.C. § 820(i); 29 C.F.R. § 2700.30(b) ("[i]n determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary"); *see also Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 727 (D.C. Cir. 2019) (holding that "once violations are found, the determination of the appropriate remedy is left to the Commission's independent, *de novo* judgement"); *Solar Sources Mining, LLC*, 42 FMSHRC 181, 183 (Mar. 2020) (holding that "the Commission *independently assesses* a civil penalty *de novo* based on findings of fact and consideration of [the] six penalty factors"); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (holding that "in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary[, r]ather . . . the amount of the penalty to be assessed is a *de novo* determination"); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014) (holding that "Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act"); *Cantera Green*, 22 FMSHRC 616, 622 (May 2000) (holding that "the Commission and its judges are required to assess penalties de novo"); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000) (holding

that "[t]he principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established"); *Shamrock Coal Co.*, 1 FMSHRC 469 (June 1979), *aff'd* 652 F.2d 59 (6th Cir. 1981) ("holding that de novo assessment of penalties is within the authority of the Commission and its judges"). Moreover, Commission ALJs are not bound by the Secretary's penalty regulations in 30 C.F.R. Part 100. *Am. Coal Co.*, 933 F.3d at 727; *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (holding that the Part 100 regulations "are not binding in any way in Commission proceedings").

Accordingly, the D.C. Circuit has held that whatever "remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point," because the ALJ will independently determine the penalty by applying the statutory factors in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Am. Coal Co.*, 933 F.3d at 727. Consequently, "the Secretary is under no obligation to 'prove' h[er] decision to suggest a special assessment rather than a regular assessment" as "[t]hat decision is just part and parcel of the Secretary's internal deliberations about what penalty to *recommend*." *Id.* The D.C. Circuit concluded that "under regulations past and present, the Secretary's proposal is nothing more than h[er] own chosen litigating position." *Id.*

B. Scope of Discovery

Under Commission Procedural Rule 56, parties may use depositions, written interrogatories, requests for admissions, and requests for documents or objects to "obtain discovery of any *relevant*, *non-privileged* matters that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b) (emphasis added). Commission Procedural Rule 57(a) also provides that, "[a]ny party, without leave of the Judge, may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories." 29 C.F.R. § 2700.57(a).

Commission ALJs may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Federal Rule 30(b)(6) permits a party to depose a governmental agency, which must then designate one or more officers, directors, managing agents, or other persons to testify on its behalf about information known or reasonably available to the governmental agency. Fed. R. Civ. P. 30(b)(6).

1. Relevancy

Under Federal Rule 26(b)(1), a party may discover "any nonprivileged matter that is *relevant* to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1) (emphasis added). The scope of discovery under the Federal Rules is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Additionally, under the Federal Rules of Evidence, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401.

2. Deliberative Process Privilege

Parties withholding otherwise discoverable information or documents on the basis of privilege must expressly make such a claim and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). The Secretary asserts that the information CONSOL seeks in its Rule 30(b)(6) deposition notice is protected by the federal government's deliberative process privilege. (Sec'y Mot. at 3–7.)

The deliberative process privilege is intended to protect the "'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Jordan v. U.S. Dep't of Justice.*, 591 F.2d 753, 772 (D.C. Cir. 1978) (citation omitted), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1053 (D.C. Cir. 1981); *see also United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980) (holding the privilege protects the "thoughts, ideas, and analyses that encompass the process by which an agency reaches a decision").

In order for a document to be protected under the deliberative process privilege, it must: (a) be "pre-decision;" (b) pertain to communications between subordinates and supervisors; and (c) relate to "deliberative" communication—i.e., the process by which policies are formulated. *See In re: Contests of Respirable Dust Sample Alteration Citations* (*Dust Cases*), 14 FMSHRC at 992 (quoting *Jordan*, 591 F.2d at 774). "A document is 'pre[-]decisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Senate of P.R. ex rel. Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

The Commission has held that, "purely factual material that does not expose an agency's decision making process" is not protected by the deliberative process privilege. *Dust Cases*, 14 FMSHRC at 993 (citing *Exxon v. Doe*, 585 F. Supp. 690, 698 (D.D.C. 1983)). However, even if the factual information can be segregated, the party opposing disclosure can prevent disclosure by showing "that the material is 'so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of deliberative information that is entitled to protection.'" *Consolidation Coal Co.*, 19 FMSHRC 1239, 1246–47 (July 1997) (quoting *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992)).

The Commission has held that even if the deliberative process privilege applies, it is qualified and subject to the balancing test set forth in *Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. Under this test, if "disclosure is essential to the fair determination of a case, the privilege must yield." *Bright Coal Co.*, 6 FMSHRC at 2523 (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). Application of this test requires analysis of the case's particular circumstances, including whether the Secretary is in sole control of the information, the nature of the violation, possible defenses, and the impact of the information. *Dust Cases*, 14 FMSHRC at 988; *Bright Coal Co.*, 6 FMSHRC at 2526. The party seeking disclosure has the burden of proving the facts necessary

to establish that the information sought is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526.

C. Limitations on Discovery

Under Commission Procedural Rule 56(c), "a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). Rule 56(c) grants ALJs considerable discretion to regulate the course of discovery. *See also* 29 C.F.R. § 2700.55 (empowering ALJs to regulate the course of hearings, order depositions, and dispose of procedural requests). The Commission's rule is similar to Rule 26(c) of the Federal Rules of Civil Procedure, which states, in pertinent part, that the judge may limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

The Commission has not defined "good cause" or "undue burden or expense," but ALJs have relied on Commission Rule 56(c) to limit needless, hypothetical, or unrelated discovery. *See Marfork Coal Co.*, 28 FMSHRC 742, 743 (Aug. 2006) (ALJ) (limiting "needless discovery" in the interest of efficient use of judicial resources and avoiding undue burden or expense where contest cases had been stayed pending civil penalty proceedings and settlement discussions might obviate the need for discovery); *Newmont Gold Co.*, 18 FMSHRC 1709, 1713–14 (Sept. 1996) (ALJ) (limiting the scope of permissible deposition questions to prevent "broad, complicated, or lengthy hypothetical questions of . . . witnesses that do not relate directly to the facts at issue").

III. RULE 30(b)(6) DEPOSITION TOPICS

CONSOL served notice of a Rule 30(b)(6) deposition to the Secretary and listed 23 topics as follows, verbatim:

> 1. The scope and identification of "information available to the Office of Assessments" upon which the Special Assessments are "based," as described in the "Narrative Findings for a Special Assessment" filed with the Petition for Assessment in this matter.
>
> 2. The Author of the "Narrative Findings of Special Assessment" and all information upon which it is based.
>
> 3. The manner in which the Office of Assessments determines that a citation should be specially assessed.
>
> 4. Whether the Special Assessment Review Form and procedure require action from the Assistant District Manager and the District Manager and whether this procedure was followed for the citation and order.
>
> 5. The procedure for determining the propriety or amount of special assessment.

6. The factors considered in determining the propriety or amount of the special assessment.

7. The promulgating party for the "Special Assessment General Procedures" and the basis for the Procedures outlined therein.

8. The basis for any tables set forth in the "Special Assessment General Procedures," which list increased penalties for specially assessed violations.

9. The specific factual bases upon which MSHA determined that the citation and order in this case should be specially assessed.

10. The specific factual basis for the monetary amount of the special assessment selected for the citation and order in this case.

11. The extent to which the Office of Assessments exercised any judgment in determining appropriateness or amount of any special assessment for the citation and order herein.

12. The manner in which the Office of Assessments determined to increase the special assessment by 25% as reflected in the "Special Assessment Narrative Form for Lost Workdays Accidents" and whether this process was followed for the citation and order.

13. The person or persons from the Office of Assessments responsible for making a determination of the propriety or amount of a special assessment and whether that person is an authorized representative of the Secretary.

14. The Secretary's discovery responses related to special assessments provided herein.

15. The Office of Assessment's policies, procedures, and personnel utilized to make a determination whether MSHA will propose a special assessment.

16. Whether the Office of Assessments has elected not to follow the recommendation of a District related to Special Assessments in other cases or whether recommendations are followed in every circumstance.

17. The manner in which the statutory criteria in 30 C.F.R. § 100.3 were factored into the proposed special assessment.

18. The manner in which the regular penalty criteria related to special assessments.

19. Whether the Office of Assessments has every [*sic*] evaluated the extent to which the Special Assessment General Procedures result in double penalties in certain evaluated areas.

20. Whether every accident involving an injury and purported high negligence is specially assessed.

21. The manner in which the proposed assessments "reflect MSHA's appraisal of all the facts presented" and the identity and source of said "facts."

22. The reason why the Special Assessment tables in the Special Assessment Procedures make no distinction in the points, based on the type of accident, or lack thereof, to be proposed for Likelihood (Special Assessment Procedures, p. 5) or Severity, based on the type of accident, or lack thereof (Special Assessment Procedures, p. 6).

23. Whether there are other versions of the "Special Assessment Narrative Form for Lost Workdays Accidents" for other types of citations or is this the only such form.

(Sec'y Mot., Ex. 1.)

The Secretary seeks a protective order prohibiting a Rule 30(b)(6) deposition on these topics, whereas CONSOL seeks an order compelling a Rule 30(b)(6) deposition on these topics.

IV. PARTIES' ARGUMENTS

In her motion, the Secretary argues that because the Commission has *de novo* authority to assess all civil penalties, the Secretary's reasoning for proposing special assessment penalties is irrelevant and therefore not subject to discovery. (Sec'y Mot. at 8–9.) Additionally, the Secretary argues that CONSOL's deposition topics are improper because they require testimony about matters protected from disclosure by the deliberative process privilege. (Sec'y Mot. at 5–7.) Furthermore, the Secretary contends that CONSOL's Rule 30(b)(6) deposition should be barred because the topics are overly broad and unnecessary. (Sec'y Mot. at 7.) The Secretary asserts that requiring a witness to become familiar with the particularities of each of the proposed topics would be unduly burdensome. (Sec'y Mot. at 8.) The Secretary also argues that CONSOL has had ample opportunity to obtain through discovery the non-privileged information described in the deposition topics. (Sec'y Mot. at 9.)

CONSOL in its motion asserts that under Commission Procedural Rule 56, 29 C.F.R. § 2700.56, the information sought in its deposition notice is subject to discovery because the information may be relevant or reasonably likely to lead to the discovery of admissible evidence. (Resp't Mot. at 3.) CONSOL argues that the requested information in its deposition notice is necessary to give CONSOL a full and fair opportunity to challenge the basis for the Secretary's proposed special assessment penalties at the hearing on this matter, as a matter of fundamental due process. (Resp't Mot. at 2–3.)

CONSOL also disputes the Commission's holding in *Solar Sources Mining, LLC* that Commission ALJs are not required to explain their divergence from a proposed special assessment penalty. (Resp't Mot. at 2 (citing *Solar Sources Mining, LLC*, 42 FMSHRC 181, 200 (Mar. 2020)).) Instead, CONSOL asserts that ALJs must explain the basis for any deviations from the Secretary's proposed special assessment penalties, and to do so here, I will need the requested information in its deposition notice. (Resp't Mot. at 2.) Regardless, CONSOL argues that I will need the information sought in its notice of deposition to determine the basis for the Secretary's proposed penalty assessment. (Resp't Mot. at 3.)

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Relevancy of Rule 30(b)(6) Deposition Topic Nos. 1–23

1. Topic Nos. 2 and 4–23 Regarding MSHA's Process of Calculating Proposed Special Assessment Penalties are Irrelevant

a. Analysis of the Secretary's Arguments

Under Commission Procedural Rule 56, parties may only use depositions to obtain discovery of *relevant* matters that is admissible evidence or appears likely to lead to the discovery of admissible evidence. 29 C.F.R. § 2700.56(b). As CONSOL admits, the purpose of Topic Nos. 2, 4–11 and 13–23 in its deposition notice is to determine how MSHA calculated the proposed special assessment penalties in this case. (Resp't Mot. at 1, 4, 5.) Likewise, Topic No. 12 seeks to determine, "the manner in which the Office of Assessments determined to increase the special assessment by 25% as reflected in the 'Special Assessment Narrative Form for Lost Workdays Accidents' and whether this process was followed for the citation and order." (Sec'y Mot. at 4.) I agree with the Secretary that MSHA's process for calculating the proposed penalties in this case is irrelevant, because I must independently assess an appropriate penalty *de novo* after a hearing. MSHA's internal procedures for determining its penalty proposals will have no bearing on my independent assessment. Thus, for purposes of relevancy, I determine that these deposition topics are of no "consequence in determining the action" because, as CONSOL admits, they "are related to the manner in which the proposed special assessment is *calculated*." Fed. R. Evid. 401; (Resp't Mot. at 4 (emphasis added).) Accordingly, I will make an independent *de novo* penalty assessment after the hearing based on the evidence presented.[3]

[3] In my recent Order Denying Respondent's Motion to Compel Unredacted Special Assessment Review Forms issued on April 2, 2025, I determined that the information in the redacted portions of the Secretary's SAR Forms was marginally relevant, because it describes the substantive facts and circumstances justifying the Secretary's decision to recommend special assessment penalties, which may provide insight into the evidence the Secretary will present at the hearing to justify her proposed penalties. (Order Denying Resp't Mot. to Compel Unredacted Special Assessment Review Forms at 8.) Here, my relevancy determination is distinguishable from that of my aforementioned order because CONSOL solely seeks to use Rule 30(b)(6) "to determine how MSHA *calculated* [its] proposed special assessment penalty," rather than seeking to determine the substantive evidence related to the alleged violations that the Secretary will present at the hearing to justify her penalty proposals. (Resp't Mot. at 5 (emphasis added).)

Additionally, the Secretary has already shared how MSHA calculated the proposed special assessment penalties in this case. For example, in her Petition for Assessment of Civil Penalty, the Secretary explains that—

> for citations/orders designated as 'unwarrantable failure' pursuant to [s]ection 104(d) of the Mine Act, 30 U.S.C. § 814(d), the minimum penalty is set by [s]ection 110(a)(3), 30 U.S.C. § 820(a)(3), as amended by [s]ection 8 of the Mine Improvement and New Emergency Response Act of 2006 ('MINER Act') and codified at 30 C.F.R. § 100.4. For citations/orders assessed pursuant to 30 C.F.R. § 100.5, which are indicated as "Special Assessment" in Exhibit A, a proposed penalty was assessed in accordance with the special assessment guidelines set forth in section 100.5.

(Sec'y Pet. for Assessment of Civil Penalty at 2–3.) Section 100.5(b) provides that "[w]hen MSHA determines that special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." 30 C.F.R. § 100.5(b). Each "Special Assessment Narrative Form" for the citation and order at issue in this case also detail how MSHA calculated the proposed penalties. (Sec'y Mot., Ex. C.) The "General Procedures," "Assignment of Special Assessment Penalty Points," and "Narrative Findings for a Special Assessment" supplied by the Secretary in her motion further bear this out. (Sec'y Mot., Exs. B, D.)

Moreover, MSHA provides publicly available guidance on special assessment penalties and their calculation. *See General Procedures*, MSHA (Jan. 1. 2021), https://www.msha.gov/sites/default/files/Compliance_Enforcement/Special%20Assessment_GENERAL%20PROCEDURES.pdf; *Volume III – 30 CFR Parts 40 through 50 and Parts 62 and 100*, MSHA (May 16, 1996), https://www.msha.gov/volume-iii-30-cfr-parts-40-through-50-and-parts-62-and-100. Although these documents are not legally binding and therefore need not comply with the Administrative Procedure Act, 5 U.S.C. §§ 551–559, they provide helpful guidance about special assessments to operators. CONSOL is clearly aware of this guidance as it has referenced the written documents in its filings, including its notice of deposition.

b. Analysis of CONSOL's Arguments

CONSOL argues that without the information sought in its Rule 30(b)(6) deposition notice, "this Court . . . has no way of determining the basis for the Secretary's proposed assessments or determining if CONSOL is being punished twice for the same conduct." (Resp't Mot. at 3.) However, only after the parties present evidence at a hearing pursuant to section 105(d) of the Mine Act will I determine an appropriate penalty in this case, which I will evaluate based on the criteria set forth in section 110(i), subject to the monetary limitations in section 110(a). 30 U.S.C. § 820(a), (i). Thus, it is incumbent upon the Secretary to present sufficient evidence at the hearing to prove violations that would justify the high penalties she proposes in this case. *See Solar Sources Mining, LLC*, 42 FMSHRC 181, 197 (Mar. 2020) (holding that "favorable consideration of the agency's proposal for a high penalty is subject to the Secretary's

presentation of proof of facts warranting a high penalty"). Rather than focusing on the Secretary's litigation position regarding her proposed penalty, CONSOL would be well advised to counter the Secretary's evidence. The evidence educed at hearing, not a proposed penalty, will be the basis for my determination to sustain, modify, or vacate the citation and order issued by MSHA in this case.

CONSOL also asserts that the Commission's holding in *Solar Sources Mining, LLC,* whereby ALJs are not required to explain their divergence from proposed special assessment penalties, is an incorrect application of the law. (Resp't Mot. at 2.) In *Solar Sources Mining, LLC*, the Commission affirmed the requirement that ALJs must explain significant deviations from proposed regular assessment penalties. *Solar Sources*, 42 FMSHRC at 194–95. However, the Commission found that MSHA's special assessments are "opaque" and therefore held that—

> *requiring* our Judges to explain divergences from opaque MSHA penalty assessments serves neither the goal of transparency and public trust nor the principles of fair and objective assessments. On the contrary, such a requirement would interject a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, whether or not the reason for the enhancement has been validated by the trial process. We thus agree that the fact that the penalty is specially assessed – standing alone – is completely irrelevant. Rather, the Judge must consider the proffered basis for the enhanced penalty and the evidence supporting it.

Solar Sources, 42 FMSHRC at 200. The Commission accordingly concluded that "[w]here the Secretary properly explains the basis for a special assessment, the Judge's independent assessment will be informed by the facts of the case, and not a perceived need to justify a variance from an opaque special assessment." *Solar Sources*, 42 FMSHRC at 201.

CONSOL nonetheless asks me to ignore the binding precedent of the Commission and instead explain any divergence from the Secretary's proposed special assessment penalties, based solely on its opinion that *Solar Sources Mining, LLC* "is an incorrect application of the law" and that it "makes no logical sense." (Resp't Mot. at 2); *Solar Sources*, 42 FMSHRC at 200. However, CONSOL's argument is solely that, its opinion. CONSOL provides no other compelling reasons or even case law to support its assertion that the Commission, in *Solar Sources Mining, LLC*, incorrectly applied the law. Moreover, *Solar Sources Mining, LLC* is well reasoned and based on an accurate understanding of the Mine Act and the Secretary's penalty proposal regulations. I therefore reject CONSOL's contention that the Commission's decision in *Solar Sources Mining, LLC* is an inaccurate application of the law. (Resp't Mot. at 2.)

I also reject CONSOL's assertion that the Secretary's proposed special assessment penalties "'anchor[]'" ALJs' penalty assessments, regardless of the Commission's directive to independently assess penalties. (Resp't Mot. at 2.) I am obligated to follow the Mine Act and the Commission's decisions regarding penalty assessments. *Compare Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ Paez) (upholding flagrant violation that sustained total penalties of $761,000), *with Blue Diamond Coal Co.*, 36 FMSHRC 541 (Feb. 2014) (ALJ Paez)

(vacating flagrant allegations with proposed penalty of $723,500 and reducing operator's total liability nearly ninefold to $85,940 and dismissing related section 110(c) case with penalty of $3,000). Accordingly, I will continue to follow the Commission's directive—i.e., that the fact the Secretary's proposed penalty is specially assessed, standing alone, is irrelevant—and, thus, only consider the evidence presented at the hearing to determine an appropriate penalty.

Ultimately, CONSOL misjudges the process of how Commission Judges assess penalties. CONSOL believes I am influenced by the Secretary's proposed special assessment penalties and, therefore, seeks to discover how the Secretary came up with the specific numbers so CONSOL can attack the proposed penalties and whatever criteria the Secretary used to calculate them. But the Secretary's numbers—i.e., the proposed special assessment penalties—are simply her litigation position, as aptly described by the D.C. Circuit. *See Am. Coal Co.*, 933 F.3d at 727. Delving into how the Secretary calculates her proposed numbers is as irrelevant as the Secretary seeking to depose CONSOL on its views of the Mine Act. Neither inquiry focuses on the facts in this case—e.g., those that prove or disprove the alleged levels of negligence and gravity, which are factors I must consider under section 110(i) of the Mine Act in assessing a penalty for any violation. The Secretary's litigating position regarding her proposed penalties is irrelevant to such an inquiry. CONSOL's attempts to frame its Rule 30(b)(6) deposition as a search for facts relevant to my ability to assess a penalty thus fail as they are off the mark.

In light of the discussion above, I determine that Topic Nos. 2 and 4–23 in CONSOL's deposition notice are irrelevant, because I will ultimately evaluate any penalty *de novo* after a hearing based on the evidence presented. As a result, the Secretary's reasoning and process in calculating her proposed special assessment penalties will have no bearing on my ultimate penalty assessment and are, therefore, irrelevant.

2. Topic Nos. 1 and 3 Regarding Evidence Related to the Six Statutory Penalty Criteria are Relevant

CONSOL argues that the information sought in the deposition notice is necessary to adequately contest the basis for the Secretary's proposed penalty assessments. (Resp't Mot. at 2–3.) As discussed above, subject to the monetary limits of section 110(a) of the Mine Act, I must independently assess an appropriate penalty in this case based upon the penalty criteria in section 110(i) and the corresponding evidence presented at hearing. Therefore, the only evidence that is relevant to CONSOL challenging the basis for the Secretary's proposed penalties in this case is the evidence related to the penalty criteria in section 110(i) of the Mine Act, as that is the only information I will consider in assessing an appropriate penalty. Accordingly, I determine that Topic Nos. 1 and 3 are arguably relevant.

B. Applicability of Deliberative Process Privilege to Relevant Rule 30(b)(6) Deposition Topics 1 and 3

Under Commission Procedural Rule 56, parties may only use depositions to obtain discovery of relevant, *non-privileged* matters that is admissible evidence or appears likely to lead to the discovery of admissible evidence. 29 C.F.R. § 2700.56(b). In my April 2, 2025, Order Denying Respondent's Motion to Compel Unredacted Special Assessment Review Forms, I

determined that the deliberative process privilege protected the redacted information in the Secretary's Special Assessment Review ("SAR") Forms in this case, because the forms contain the thoughts, ideas, reasoning, and analyses used by the MSHA inspectors and their supervisors in reaching the decision to propose special assessment penalties for the violations. (Order Denying Resp't Mot. to Compel Unredacted Special Assessment Review Forms at 9.) I also determined that the redacted information in the SAR Forms contained factual information that was inextricably intertwined with the MSHA inspectors' and their supervisors' analyses of whether the violations warranted special assessment penalties and, therefore, was still privileged. (Order Denying Resp't Mot. to Compel Unredacted Special Assessment Review Forms at 9.) Furthermore, I concluded that, because the Secretary is not in sole control of the information that CONSOL seeks in the SAR Forms, disclosure of the redacted information is not essential to the fair determination of this case and, therefore, CONSOL did not overcome the Secretary's assertion of the deliberative process privilege. (Order Denying Resp't Mot. to Compel Unredacted Special Assessment Review Forms at 10.)

Here, in evaluating the specific language of Topic Nos. 1 and 3, I determine that CONSOL similarly seeks to learn MSHA's deliberative decision-making process regarding special assessment penalties. Topic Nos. 1 and 3 do not simply address "the amount of a proposed penalty," as CONSOL asserts, but rather address the "thoughts, ideas, and analyses that encompass the process by which" MSHA reaches a decision to propose specially assessed penalties. (Resp't Mot. at 4); *United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980).

CONSOL contends that "if the basis of an assessment is protected by such a privilege, then a Respondent should likewise be prohibited from asking an Inspector about the basis of the citation or any aspect of it, such as gravity, severity and negligence." (Resp't Mot. at 4.) However, Topic No. 3 does not seek the basis of the Secretary's proposed penalty assessments but rather seeks information about "the *manner* in which the Office of Assessments, determines that a citation should be specially assessed." (Sec'y Mot., Ex. 1 at 3 (emphasis added).) Additionally, regarding Topic No. 1, CONSOL seeks information directly related to MSHA's task of determining whether a special assessment penalty, in the Secretary's view, is warranted for a violation. Because that information guides the Secretary's decision-making process, it must be privileged as well. Moreover, as discussed below, *see* discussion *infra* Part V.C, CONSOL already possesses much of the information regarding the Secretary's basis for her proposed penalty assessments in this case.

I therefore conclude that Topic Nos. 1 and 3 exceed the scope of discovery as they seek information regarding the advice, recommendations, and deliberations of MSHA in deciding whether to propose specially assessed penalties and are therefore protected from disclosure by the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

C. Undue Burden of Relevant Rule 30(b)(6) Deposition Topic Nos. 1 and 3

Under Rule 56(c), "a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). As previously discussed, *see* discussion *supra* Part II.C, the Commission has not

defined "good cause" or "undue burden or expense," but ALJs have relied on Commission Rule 56(c) to limit needless, hypothetical, or unrelated discovery.

CONSOL already possesses much of the information related to the six statutory factors of section 110(i) of the Mine Act for this case, which I must consider in determining an appropriate penalty and is, therefore, the only relevant evidence related to my assessment of the penalties. For example, I must consider "the operator's history of previous violations," "the appropriateness of such penalty to the size of the business of the operator charged," "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation," and "the effect on the operator's ability to continue in business." 30 U.S.C. § 820(i). CONSOL's history of previous violations, the amount of coal it produces, and when the citation and order at issue in this case were terminated, are publicly disclosed and can all be found on the Mine Data Retrieval System website. *See Mine Data Retrieval System*, U.S. DEP'T OF LABOR, https://www.msha.gov/data-and-reports/mine-data-retrieval-system. CONSOL is also in the best position to consider the effect of the proposed penalties on its ability to continue in business, based on its knowledge of its own business. *Sec'y of Labor v. Davis Coal Company*, 2 FMSHRC 619, 624 (Mar. 1980) (holding that "[t]he burden of proving that the penalties proposed will have an adverse effect on an operator's ability to continue in business is obviously that of the operator").

Most importantly, to evaluate a penalty for any alleged violation under section 104(d) of the Mine Act, I must consider "whether the operator was negligent," and "the gravity of the violation." 30 U.S.C. § 820(i). The Secretary has shared with CONSOL the citation and order at issue in this case, as well as photographs and the MSHA inspector's notes, which set forth in detail the justifications underlying the issuance of the citation and order. (Sec'y Pet. for Assessment of Civil Penalty; Sec'y Pre-Hr'g Report at 4.) The Secretary in her motion points out that the factual bases, upon which MSHA determined the proposed special assessment penalties, were already provided in the "Narrative Findings for a Special Assessment" document, which she shared with CONSOL. (Sec'y Mot. at 9.) MSHA explains in the "Narrative Findings for a Special Assessment," that it is proposing "a special assessment under § 100.5 because the violations exhibited a high degree of negligence and contributed to a serious accident." (Sec'y Mot., Ex. D.) Additionally, the Secretary points out that CONSOL has served—and the Secretary has answered—interrogatories, requests for admission, and a request for production of documents, and CONSOL has conducted depositions of all the inspectors who inspected the mine after the accident. (Sec'y Mot. at 9.) Thus, the Secretary has already shared with CONSOL evidence regarding the factual bases I will consider in assessing the negligence and gravity of the violations in this case to determine an appropriate penalty.

It is evident that the relevant information CONSOL could obtain from a Rule 30(b)(6) deposition on Topic Nos. 1 and 3 is already accessible to it. Moreover, in contrast to a standard deposition, a Rule 30(b)(6) deposition requires a governmental agency to adequately prepare an officer, director, or managing agent to be deposed on the subject matter listed in the notice of deposition. Fed. R. Civ. P. 30(b)(6). CONSOL demands this notwithstanding that the information it seeks is not directed at the facts underlying the alleged violations but at how the Secretary arrived at her proposed penalties. I therefore reject CONSOL's assertion that "[t]here is no more burden on a representative of MSHA to give a deposition on 23 topics than there is on

an Inspector to explain the Citation and Order." (Resp't Mot. at 4.) And reducing the number of topics from 23 to 2 does not obviate the time, energy, and resources required for the Secretary to designate and prepare an MSHA representative for a deposition that is admittedly of marginal relevance. Accordingly, I conclude that requiring the Secretary to prepare for a Rule 30(b)(6) deposition on Topic Nos. 1 and 3—i.e., to designate an MSHA representative who lacks first-hand knowledge of the facts regarding the negligence and gravity of the alleged violations, as opposed to the inspectors in this case, and who would simply relay to CONSOL those facts already contained in the citation, order, and inspectors' notes—is unnecessary and unduly burdensome.

In summary, for the reasons stated above I conclude that Topic Nos. 2 and 4–23 of CONSOL's Rule 30(b)(6) deposition are irrelevant. Additionally, I conclude that Topic Nos. 1 and 3 exceed the scope of discovery because they impinge on the deliberative process privilege and are unnecessary and unduly burdensome.

VI. ORDER

Based on the foregoing reasoning, the Secretary's Motion for Protective Order Regarding Rule 30(b)(6) Deposition is hereby **GRANTED**, and CONSOL's Motion to Compel Rule 30(b)(6) Deposition is **DENIED**.

Alan G. Paez
Administrative Law Judge

Distribution (Via Electronic Mail Only):

Monica W. Hanratty, Esq. & Mathew R. Epstein, Esq.
U.S. Department of Labor, Office of the Regional Solicitor,
1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19103-2968
(hanratty.monica.w@dol.gov)
(epstein.matthew.r@dol.gov)

James P. McHugh, Esq., Pence Law Firm PLLC
P.O. Box 2548, Charleston, WV 25329-2548
(jmchugh@pencefirm.com)
(alilly@pencefirm.com)

/MEK