FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 13, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GMS MINE REPAIR, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2021-0431 A.C. No. 46-09029-537541 MVK Mine: Mountaineer II Mine

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION
ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER TO PAY

Before: Judge Lewis

On November 19, 2021, The Secretary of Labor ("Secretary") and GMS Mine Repair ("Respondent") filed with the undersigned cross-motions for Summary Decision in Docket No. WEVA 2021-0431. The Respondent filed its Reply Brief on November 23, 2021, and the Secretary filed its Reply Brief on December 10, 2021. The sole issue in question concerns the method of calculating an operator's violation history for purposes of proposing a penalty amount, and whether citations/orders that were issued prior to the 15-month period preceding the citation/order, but became final within the 15-month period, may be included in the operator's violation history.

Undisputed Facts

The parties submitted the following joint stipulations:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.
2. GMS Mine Repair is an operator under Section 3(d) of the Act.
3. Operations of GMS Mine Repair are subject to the jurisdiction of the Act.
4. GMS Mine Repair is a contractor who performs services at various mines.
5. Pursuant to contract with Mingo Logan Coal, LLC, the operator of the Mountaineer II Mine, GMS Mine Repair was performing services at the mine on April 20 and 27, 2021 when the citations at issue in this proceeding were issued.

6. MSHA Inspectors Andrew Bell and Paul Fought were acting in their official capacity and as authorized representatives of the Secretary of Labor when each of the citations at issue in this proceeding were issued.

7. The total proposed penalty amounts for the five citations at issue in this matter have been proposed by MSHA pursuant to 30 U.S.C. Section 820(a) of the Act and 30 CFR Part 100.3.

8. Payment of the total proposed penalty amount, $7,331, for the five citations at issue in this matter would not affect the ability of GMS Mine Repair to remain in business.

9. Copies of the citations at issue in this matter, along with all continuation forms and modifications, were served on GMS Mine Repair or its agent as required by the Act.

10. The copies of the five citations that were included with the Secretary's penalty petition, attached as part of Exhibit A, are accurate and authentic copies of those citations, with all modifications and abatements, and may be admitted into the record in this matter.

11. The violations cited in each of the citations at issue in this matter were abated in good faith and were subject to a 10% penalty reduction.

12. The Respondent agrees to accept all five citations at issue in this docket as issued, including any findings of gravity and negligence.

13. The only issues being contested by Respondent in this proceeding are the method of calculating the proposed penalty amounts used by the Secretary and the total amount of the proposed penalties.

14. The Respondent agrees that the penalty point computations shown on Exhibit A are correct except for the number of points assigned for history of violations in the column "VPID Pts."

15. "VPID" refers to violations per inspection day.

16. For a contractor, such as Respondent, the overall history of violations points is calculated based upon the total number of citations and orders issued to the contractor at all mines at which it operates which is different from a mine operator which only considers citations/orders issued at a particular mine.

17. In assessing the penalty points for the VPID criteria MSHA considers all citations or orders that became final during the 15-month period immediately preceding the issuance of the citation or order being assessed.

18. For the four citations in this case that were issued on April 20, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 20, 2020 through April 19, 2021.

19. For the remaining citation in this case that was issued on April 27, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 27, 2020 through April 26, 2021.

20. The dispute in this case is over which citations and orders are to be included in determining the Respondent's history of violations.

21. Under the Secretary's approach, all citations and orders that became final during the relevant 15-month period are included in the determination of an operator's violation history.

22. The Respondent argues that only citations and orders that were both issued during the relevant 15-month period and became final during that period should be included in the determination of the Respondent's violation history.

23. If the Secretary's approach is ultimately upheld, the penalty points for the VPID criterion is correct and the penalty amounts are correct as shown on Exhibit A.

24. Under the Respondent's approach to calculating the history of violations criterion for each of the citations at issue in this proceeding, five previous citations would be considered which corresponds to 0 penalty points.

25. Under the Respondent's approach to calculating the history of violations criterion for each of the citations in this docket, with 0 penalty points for history of violations, the following penalty amounts would be applicable per Part 100, 100.3:

Citation	Total Points	Penalty (including good faith reduction)
9298012	86	$1,006
9298012	86	$1,006
9298015	46	$125
9298016	46	$125
9293663	86	$1,006
Total		$3,268

26. Regardless of the administrative law judge's decision addressing this dispute, both parties reserve the right to appeal any decision to the Commission.

Secretary's Motion for Summary Decision, 3-6.

Summary Decision Standard

The Court may grant summary decision where the "entire record…shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc*., 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc*., 498 F.3d 1258, 1263

(11th Cir. 2007) (citation omitted). The court must evaluate the evidence "in the light most favorable to … the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party's claims. *Celotex*, 477 U.S. at 323. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

Analysis

Section 110 of the Mine Act, in relevant part, provides:

> (a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 [currently $73,901] for each such violation.
>
> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 USC § 820(a)(1)(i).

The Secretary has promulgated regulations, which implement the statutory requirements contained in Section 110 of the Mine Act, which state in relevant part:

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

> (1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

30 CFR §100.3(c).

The dispute in this case concerns what precisely gets counted as the operator's violation history in the 15-month period. There is no disagreement that citations and orders that have become final in the 15-month period are included. However, the Respondent argues that in order to count towards the operator's history, the violation must have both occurred and been paid, adjudicated, or have become a final order of the Commission during the 15-month period. The Secretary argues that all citations and orders that have become final in the 15-month period are counted, regardless of when they were issued.

On its face, the regulation is ambiguous and can be read to support either party's position. Based on the language of the regulation, it is unclear if the second sentence is intended to limit the violations mentioned in the first sentence to those that were issued and finalized in the preceding 15-month period, or if it is intended to clarify that the 15-month period is only in reference to the finalization date. Both competing interpretations are reasonable.

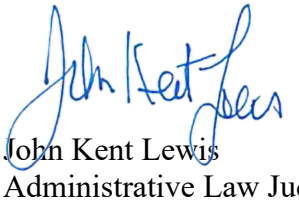
MSHA is entitled to deference of an MSHA regulation as long as its interpretation is not "plainly erroneous or inconsistent with the regulation." *MSHA v. Spartan Mining Co.*, 415 F.3d 82, 84 (D.C. Cir. 2005)(quoting *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)); *see Secretary of Labor v. Excel Mining, LLC,* 334 F.3d 1, 6 (D.C.Cir.2003). "In fact, deference is appropriate when the agency advances a permissible interpretation even if that interpretation diverges from what a first-time reader of the regulation would conclude is the best interpretation of the regulation." *MSHA v. Hecla Ltd*., 38 FMSHRC 2117, 2122 (Aug. 2016).

In support of its interpretation, the Secretary submits language from the Preamble to the Final Rule, as well as MSHA's Program Policy Manual. Courts have held that agency interpretations that lack the force of law, such as those in opinion letters and policy manuals, are not entitled to Chevron-style deference when used to interpret ambiguous statutes, but do receive deference under *Auer* when interpreting ambiguous regulations. *See Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). In response to some commenters' concerns about the changes, the Final Rule states, "As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final." *Secy. Mot.*, Exhibit B, at 13604. MSHA's Program Policy Manual states that "Overall history is based on the number of citations/orders issued to the mine operator at the applicable mine that became final orders of the Federal Mine Safety and Health Review Commission (Commission) in the 15 months preceding the occurrence date of the violation being assessed." *Sec'y Mot*., Exhibit C.

Various passages of the Preamble also support the Respondent's argument. *See Resp. Mot.* at 4. In response to some commenters' concerns about the Final Rule shortening the relevant time-period from 24 to 15 months, MSHA replied that the agency determined that it took approximately three months for a penalty assessment to become final, so the 15-month period would provide the agency with a full year of data. *Secy. Mot.*, Exhibit B, at 13604. Furthermore, the agency justified the shortening of the time-period by stating that it would provide the agency with "a more recent compliance history" and that "MSHA believes that operators who violate the Mine Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior." *Id.* However, it is not for this Court to determine which interpretation is the most reasonable. The Supreme Court has held that "it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991)(citations omitted).

Furthermore, Respondent's interpretation of the regulation would likely lead to an absurd application of the statutory provision in the Mine Act concerning an operator's history of previous violations. Section 110(i) of the Act makes clear Congress's intent that an operator's history of previous violations is one of the criteria that must be considered in assessing a penalty. 30 USC 820(a)(1)(i). However, under the Respondent's interpretation of the regulation, most (if not all) violations would not be considered in the penalty assessment. This is due to the fact that when an operator contests a citation or order, it rarely becomes final within 15 months. *See Secy Mot.* at 13-16. Respondent's interpretation would likely lead to a perverse incentive for operators to simply contest every citation and order until the expiration of 15 months as a way of lowering assessed penalties by placing most previous violations out of the realm of consideration. This framework would wholly negate the clear congressional mandate that the operator's history of previous violations be considered in assessing penalties.

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's Motion for Summary Decision is **DENIED**. Furthermore, Respondent GMS Mine Repair is **ORDERED** to pay the Secretary of Labor the sum of $7,331.00 within 30 days of this order. [1]



John Kent Lewis
Administrative Law Judge

[1] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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