**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

October 23, 2013

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2013-566<br>A.C. No. 15-10753-314453 F457 |
| v. | : | |
| MAXXIM REBUILD COMPANY, LLC, Respondent. | : | Mine: Mine #1 |

## DECISION

Appearances: Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, Nashville, TN on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, PA on behalf of Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") against Maxxim Rebuild Company, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The docket involves three citations issued by MSHA under section 104(a) of the Mine Act at Maxxim's fabrication shop at Mine No. 1, located in Sidney, Kentucky. Maxxim, in addition to disputing the violations, also disputes that MSHA has jurisdiction over this facility. The parties presented testimony and evidence at a hearing held on July 17, 2013 in Lexington, Kentucky.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Maxxim Rebuild, a subsidiary, or affiliate, of Alpha Natural Resources, owns and operates seven facilities in six locations in Kentucky and West Virginia. Prior to its affiliation with Alpha, Maxxim was owned by Massey Energy.

The facility addressed in the violations is a maintenance shop that repairs, rebuilds and fabricates mining equipment and parts for mining equipment. While the facility fabricates some additional parts for non-mining related purposes, the majority of the parts are used in mining equipment. The facility employs eight individuals, including one who travels to the mines, and includes two work bays in the shop area; one for welding, and one for fabrication.

Prior to January 2012 the Maxxim facility was located in Matewan, West Virginia. While located in West Virginia, the facility was not being inspected by MSHA. In January of 2012 the facility was relocated to a site in Kentucky that had previously been operated by Clean

Energy, also an Alpha affiliate, which had closed its operation and abandoned the site. Before Maxxim took over occupancy of the abandoned Kentucky site, the shop area was modified and updated. Further, at that time, engineers for Sidney Coal, also an Alpha company, occupied the upstairs offices in the building at the site.

Several of the Maxxim shops are inspected by MSHA and others are inspected by OSHA. This facility has been inspected twice since Maxxim took over occupancy of the Kentucky site. The first inspection resulted in two violations. The second inspection resulted in the three citations at issue in this docket. The shop facility includes a warehouse, which stores at least one piece of equipment for Alpha.

While Maxxim asserts that it is an "affiliate" of Alpha, and not subject to Mine Act jurisdiction, the Secretary contends that the facility is a wholly owned subsidiary of Alpha, and is within the jurisdiction of the Act. For the reasons that follow, I find that MSHA has jurisdiction in this matter and that Maxxim violated the standards as alleged.

*a. Jurisdiction*

Maxxim asserts that the Secretary does not have jurisdiction in this matter because the facility is not a "mine" as contemplated by the Act, its activities are too remote from the mining process, the facility repairs and rebuilds mining equipment for entities other than Alpha Natural Resources, and MSHA has inconsistently applied jurisdiction over the site and similarly situated repair shops. Contrarily, the Secretary argues that, due to the nature of the work performed at the facility, it is a "mine" and, accordingly, is within the jurisdictional reach of the Act.

The Maxxim rebuild shop repairs equipment that is used primarily in Alpha Natural Resources mines, but, in limited circumstances, has repaired equipment for non-Alpha mines. Maxxim's regional safety director oversees all Maxxim shops and works out of Alpha's headquarters. In the past year, the Alpha mines have provided enough work such that Maxxim has only done work for Alpha. Prior to relocating to the Kentucky site, the facility worked only for Massey Energy mines.

In addition to conducting repair work, the facility also fabricates parts for equipment. Most of the parts are used by Alpha mines, however, roughly 25% of the fabricated parts are sent to other Maxxim shops. Of that amount, a portion of the parts are sold either to mining operations or other businesses that use heavy equipment. (Tr. 44-45). While Maxxim repairs and fabricates equipment and parts for both underground and surface mines, it recently has had a surge in work for underground mines.

Maxxim presented testimony that MSHA had stopped inspecting the fabrication shop when it was located in West Virginia, after the mining operation had been abandoned and only the shop remained. Maxxim represents that MSHA had not inspected the West Virginia facility for two or three years prior to the facilities move to Sidney, Kentucky. Before moving the facility, the Maxxim manager had a number of conversations about MSHA jurisdiction with Alpha managers and he was told that, since Clean Energy, the operator of the Kentucky site, was in abandoned status, the shop would not be subject to MSHA inspection. There is no indication

that anyone at MSHA told the shop they would not be inspected and, rather, it appears that the information came from the higher ranks at Alpha. Additionally, Randall Canterbury, the manager for this Maxxim location, explained that given the machines, welders, drills and fabrication equipment used in the shop, the OSHA standards are more appropriate for the facility since the equipment is not specific to mining and can be used in any industry. Further, Maxxim argues that, because the shop works for a handful of mines other than Alpha, and moves approximately 25% of its fabricated parts to other shops who may sell them to non-Alpha mines and non-mines, it is exempt from MSHA inspection.

MSHA does not dispute that the producing mine at the Maxxim site has been sealed and abandoned, but argues instead that it is the nature of the work at the shop that places it in MSHA jurisdiction. Maxxim did not speak with MSHA about jurisdiction, but its overall safety manager, Martin, did explain that, while five of the Maxxim facilities are under OSHA jurisdiction, two are under MSHA, including this Sidney location and he believed this shop would be inspected by OSHA. The other shop subject to MSHA jurisdiction is on mine property, adjacent to the prep plant in Sidney.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" is subject to the provisions of the Act. "Coal or other mine" is defined under § 3(h)(1) of the Act to mean:

> an area of land from which minerals are extracted... and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits....

30 U.S.C. § 802(h)(1).

In *Jim Walters Resources, ("JWR")*, 22 FMSHRC 21 (Jan. 2000) the Commission addressed a situation similar to the instant one. There MSHA asserted jurisdiction over a general machine shop and a central supply shop located off of the mine premises. Following a hearing on the matter, a Commission judge found that the machine shop, which repaired and serviced electrical and mechanical equipment used in the JWR mines, was an integral part of the mining facility and properly fell under MSHA's jurisdiction. However, the judge found that the central supply shop, which housed safety glasses, hard hats, nails, conveyor belts, etc., was not a mine. In making his finding, the judge noted that MSHA's enforcement history was "inconsistent" because the agency had not previously sought to assert jurisdiction. Next, citing *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), the judge reasoned that some activities might be covered if on mine property, but would not be covered if outside mine property. The judge also noted that individuals performing supply activities were not exposed to hazards normally associated with mining.

In reversing the judge's decision regarding the central supply shop, the Commission held that the supply shop was a mine as defined by the Act. The Commission confirmed that the definition of "mine" is broad and must be given a sweeping interpretation, stating that a mine "'is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.'" 22 FMSHRC at 25 (citing *Harless Inc.*, 16 FMSHRC 683, 687 (Apr. 1994). The Commission concluded that the central supply shop was a "mine" because it was a dedicated off-site facility of a multiple mine operator where employees received, stocked, maintained, and delivered equipment, tools, and supplies used at JWR's coal extraction sites and preparation plants. In ruling that the judge erred in finding that the function provided by the supply shop was one normally done by a vendor not exposed to the hazards of mining, the Commission noted that the supply shop employees should not be differentiated because the mine operator has centralized the supply room operations of four of its mines at a single off-site warehouse. In reaching this conclusion, the Commission stated that "the hazards to which miners are exposed are not limited to the hazards of . . . mines, but include improperly maintained equipment and supplies that are used in mining." *Id.* at 27.

The difference between the facility at issue and the Jim Walters repair and supply shops is that Maxxim, on a limited basis, provides services to mines other than Alpha mines. Moreover, Maxxim fabricates parts for heavy equipment that, in some instances, are sent to other Maxxim shops and subsequently sold to outside mines or other owners of heavy equipment. Maxxim estimates that up to 25% of its fabricated parts are moved to other shops and a portion sold outside of Alpha mines. Given that fabrication takes up about half of the shop, it is reasonable to estimate that about 12% of the total work done at the Maxxim shop discussed here, may be attributed to non-Alpha mines and/or non-mining related entities. Still, given the facts here, the activities conducted at the Maxxim shop are an integral part of the mining process. While there are some differences, they are not significant enough to distinguish this facility from that which was addressed in *Jim Walters, supra.*

Maxxim also argues that the Secretary abused his discretion by inconsistently exercising jurisdiction over this facility and similarly situated facilities. Maxxim points to the fact that MSHA removed the facility from its inspection list when it was located in West Virginia, and has now has placed it back on the inspection list since it was moved to the Kentucky site. In response, the Secretary argues that Maxxim is a mine under the plain meaning of section 3(h)(1) of the Mine Act.

The Commission addressed these issues in *Jim Walters* and found that the statute is clear. There the Commission, in finding that the central supply shop qualified as a mine, stated that the language of the statute was clear and included facilities such as the supply shop. Just as the supply shop in Jim Walters was found to be "a dedicated off-site facility of a (multiple) mine operator where employees receive, stock, maintain, and deliver equipment, tools, and supplies used at JWR's coal extraction sites, preparation plants, and Central Supply Shop," *Id.* at 25, the Maxxim facility is a dedicated off-site facility of a mine operator where employees maintain, repair and fabricate equipment, used almost exclusively at Alpha's coal extraction sites and preparation plants. I find that there is Mine Act jurisdiction in this instance because a "mine"

includes "facilities" and "equipment . . . used in or to be used in" Alpha's mining operations or coal preparation facilities.

Finding that Maxxim is a mine as defined by the Act is consistent with other Commission case law. In *Harless Inc.*, the Commission upheld MSHA jurisdiction over a sand dredging operation, and stated that "[t]he definition [of 'coal or other mine']is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." 16 FMSHRC 683, 687 (Apr. 1994) (citation omitted). The Commission noted the legislative history of the Act and the Congressional intent "to regulate all mining activity." *Id.* Specifically, the Commission cited a Senate Committee report that "'what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act.'" *Id.* (citing S. Rep. No. 181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978)). Similarly, in *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994), the Commission held that MSHA properly cited equipment in a storage garage that was shared by a sand and gravel operation and an asphalt plant. The Commission rejected the argument that title to the cited equipment was determinative and found it significant that the cited equipment was "used or to be used in mining and that . . . the cited conditions could affect miners in the garage." *Id.*

In light of the above analysis, I find that Mine Act is clear and that the Maxxim facility is subject to MSHA jurisdiction.

*b. Citation No. 8260162*

On January 1, 2013, Inspector Randal Thornsbury issued Citation No. 8260162 to Maxxim for a violation of section 47.31(a) of the Secretary's regulations. The cited standard requires each operator to "[d]evelop and implement a written HazCom program[.]" 30 C.F.R. § 47.31(a). The citation alleged that "[t]he operator does not have a HazCom program at the mine shop." Thornsbury determined that an injury was unlikely to occur, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

Randall Thornsbury has been an MSHA inspector for 14 years. Prior to becoming an inspector, Thornsbury worked 20 years as a foreman and superintendent at various coal mines. (Tr. 50). While most of his inspections are of underground mines, he has operated, and is familiar with, all types of mobile equipment.

Thornsbury inspected the Maxxim facility and reviewed the available records. At hearing, he explained that, among other things, a HazCom program should include the training for HazCom, types of chemicals used or stored at the location, and the material safety data sheet ("MSDS") book, which contains information about each chemical or hazardous product. (Tr. 55). Thornsbury examined the filing cabinets and bulletin boards at the facility, and was unable to locate the required HazCom program.

Canterbury, who was assisting the inspector, searched the shop and office and was unable to locate a HazCom program. He was able to find some of MSDS, but he could not find the book containing all of the MSDS. Canterbury testified that some of the MSDS were onsite and that the workers are familiar with the chemicals and know how to safely use them. In order to abate the violation, Canterbury eventually called another location to send him a copy of a HazCom program that could be used at this location.

The mine is required to have on file, a written program that includes, among other things, a description of the manner and method of training, a list of chemicals and their location so that miners and inspectors who come on site know where chemicals are kept and the hazards associated with those chemicals. 30 C.F.R. § 47.32. Here, while some MSDS were on site, there was no program. Accordingly, I find that the Secretary has shown a violation of the cited standard. Moreover, while the facility did have some MSDS, no other apparent efforts were being made to remedy the violative condition. Accordingly, I find that the negligence was properly assessed as "moderate," and that the proposed penalty of $100.00 is appropriate.

*c. Citation No. 8260163*

Inspector Thornsbury issued Citation No. 8260163 to Maxxim for an alleged violation of section 71.402(a) of the Secretary's regulations. The cited standard requires the following:

> All bathing facilities, change rooms, and sanitary flush toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and the facilities shall be maintained in a clean and sanitary condition.

30 C.F.R. § 71.402(a). The citation described the violative condition as follows:

> The operator is not maintaining the change room, wash sinks, and flush toilets in a clean and sanitary condition. The change room has a layer of dirt present on the entire floor which ranges up to ¼ inch in depth. The hand wash sinks and flush toilets have a coating of soap/dirt film on them, black in color, which completely covers the units.

Thornsbury determined that an injury was unlikely to occur, that one employee was affected and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

Thornsbury inspected the facility's washroom and change room, which are used by everyone at the mine, numerous times each day, and found what he described as "terrible conditions." There was a film of black soapy solution throughout the room. The change room floor was covered with up to a quarter of an inch of dirt and material, and the general sanitation was as bad as anything he had ever seen. He described the change room and shower room condition as "very bad." (Tr. 66). While Thornsbury found that one of the bathrooms was in

good condition, the second was very bad and had a significant amount of dirt on floor. Thornsbury testified that, given the state of the area and amount of dirt, the condition had existed for at least several days. Moreover, he believed that the area had not been cleaned in a long time, perhaps 2-3 weeks. While Thornsbury believed that the condition created a health hazard, he nonetheless marked the citations as non-S&S.

Maxxim countered that the washroom, shower room and bathrooms are cleaned weekly by the staff. According to Maxxim, every Friday, the miners clean the shop, office, and change room. The mine asserted that the cited area had been cleaned the Friday prior to the inspection. Canterbury testified that he observed the dirty sinks and toilets. He justified the conditions by stating that the areas are used by men who are doing greasy mechanical work and, therefore, the dirt was not excessive. Canterbury attributed the condition of the second bathroom to a miner who left area just as Thornsbury arrived.

Thornsbury was confident that the conditions he cited were some of the worst he had observed and had existed for a significant period of time. I credit his testimony and find that the mine violated the standard as cited. I further find that the negligence was moderate and assess the $100.00 penalty as suggested by the Secretary.

*d. Citation No. 8260164*

Inspector Thornsbury issued Citation No. 8260164 to Maxxim for an alleged violation of section 77.1104 of the Secretary's regulations. The cited standard requires, "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." 30 C.F.R. § 77.1104. The citation describes the violative condition as:

> The rubber tired Caterpillar 988 Loader Co. No. 9628 has a coating of oil, diesel fuel, and dust at the back of the engine and in the center section area under the operators cab where the torque convertor, transmission, starter, and a tree of power leads are located. The power leads conduct 12 to 48 volts of DC power and are coated with the cited accumulations. This condition creates a fired hazard.

Thornsbury determined than an injury was reasonably likely to occur, that the injury could reasonably be expected or result in lost workdays or restricted duty, that the violation was significant and substantial, that one employee was affected and the negligence was moderate. A civil penalty in the amount of $224.00 has been proposed for this violation

On January 17, Thornsbury returned to the facility to complete his inspection. He looked at the shop area, including the equipment and machines that were in use. He did not inspect the equipment that was being worked on, as it was out of service. However, he did inspect the loader that the mine uses as a fork lift to unload heavy equipment.

While inspecting the loader he observed accumulations of combustible materials at the back of the engine and in an area under the operator's cab. Thornsbury explained that the cab of the loader sits directly above the transmission, and contains wiring that runs to the cab. In both areas, the accumulations consisted of oil, grease and dust. Given the condition he observed, Thornsbury calculated that the accumulations of dust and oil had been there for several weeks.

Thornsbury could see the conditions by walking around the loader and looking through an opening in the center section of the loader. No guards or covers were required to be removed to see the condition.

Thornsbury designated the citation as significant and substantial because it was reasonably likely that the accumulations, coupled with the electrical wiring would result in a fire on the equipment. If a fire were to occur, the equipment operator would suffer from exposure to smoke or a burn hazard. The equipment operator would have to climb down a ladder to escape from the cab and, in doing so, would be directly exposed to the fire. Given the amount of accumulations and the accumulations proximity to the 24 volt starter and lead, along with the fact that electrical equipment creates heat, Thornsbury opined that a fire was reasonably likely to occur and that it would result in a serious injury. Thornsbury has had experience with equipment fires. He explained that while working and operating a dozer, a hose burst and erupted into a fire. Although there were no broken hoses on this equipment, a fire can occur given the circumstances that he observed.

Canterbury explained that this front end loader is used to move equipment in and out of shop, and any dirt on the loader originated both the yard and shop. The mine, after the first day of the inspection, power washed the front end loader in preparation for the second day of the inspection and Canterbury believed that the equipment looked clean. Canterbury testified that, given their location under the cab and near the end of engine compartment, the accumulations were not easily seen. Canterbury, while not sure, thought that he had to remove a cover to see the accumulations on the motor. Moreover, he believes the power leads are not a fire hazard as they are enclosed in a jacket and he is not aware of any loader catching fire. I credit the testimony of Inspector in this regard, as he appears more knowledgeable and has had greater experience operating equipment.

"[I]n considering whether violations of section 77.1104 have occurred the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was 'allowed' to accumulate; and (3) that the accumulations are located in an area 'where they can create a fire hazard.'" *Northwestern Resources*, 21 FMSHRC 431, 438 (Apr. 1999) (ALJ). Here, the inspector has credibly testified that oil and diesel fuel, both of which are combustible had accumulated on the equipment. He indicated that, while the dust, most likely from the ground, may not have been combustible, the oil and fuel certainly are.

In *Northwestern Resources* the ALJ upheld a violation of this standard when an inspector issued a citation after observing hydraulic oil, lube oil, and some fine coal dust on the surfaces of the hose and frame of the engine compartment of a Hitachi backhoe. Similarly, in *Little Sandy Coal Co.*, an inspector observed several leaks in the hydraulic system of a Hitachi shovel used to load overburden into haulage trucks, and also observed pools of oil under and around the

operator's cab and oil on the equipment's frame. The judge found that there was a reasonable likelihood of an ignition of the accumulations of oil and grease. 17 FMSHRC 1638 (Sept. 1995) (ALJ).

Here, the accumulations were located in such proximity to the engine and the electrical wiring that it did create a fire hazard. Accordingly, I find that a violation of the cited standard existed as alleged.

Significant and Substantial Violation

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

I find this violation to be significant and substantial. I base my finding on the testimony of Inspector Thornsbury. Thornsbury explained that the accumulation of oil and fuel in the two distinct locations created a measure of danger. Specifically, given the heat of the engine, and the wires and equipment near the accumulations, the danger of a fire existed. Thornsbury has experience with fires on equipment and, given what he observed, he believed that it was likely that a fire would occur. If a fire were to occur under the cab, the operator would have to climb down through the smoke and fire area to escape, thereby making a serious injury reasonably likely.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Thornsbury is an experienced inspector and has very

specific experience with fires on mobile equipment. I credit his testimony and find that the violation was significant and substantial. I assess the $224.00 penalty proposed by the Secretary.

## II. PENALTY

The principles governing the authority of Commission Administrative Law Judges 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 and its judges "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. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
> 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once 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 of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a small machine and fabrication shop and, because it had only recently started at this location, has little history of assessed violations. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of each violation is discussed above and the operator demonstrated good faith in abatement. As noted above, I assess a total penalty of $424.00.

## III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess the penalties listed above for a total penalty of $424.00. Maxxim Rebuild Company, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of $424.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution:

Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

R. Henry Moore, Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222