May 2020

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 22, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CALPORTLAND COMPANY

Docket No. WEST 2019-205-M

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DIRECTION FOR REVIEW AND STAY ORDER

BY: THE COMMISSION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). In the underlying case, Docket No. WEST 2018-402-DM, a Commission Judge found that mine operator CalPortland Company ("CalPort") had discriminated against miner Robert Thomas, in violation of section 105(c) of the Act, 30 U.S.C. § 815(c). 40 FMSHRC 1503 (Dec. 2018) (ALJ). Upon CalPort's subsequent petition in that case, the Commission agreed to review the Judge's decision.

While that review was pending, the Secretary of Labor initiated a penalty proceeding in this docket. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary filed a petition for assessment of penalty against CalPort for its violation of section 105(c). The case was assigned to the same Judge who had decided the discrimination case.

The Secretary and CalPort subsequently moved the Judge to approve their proposed settlement of the penalty, with CalPort agreeing to pay the penalty only in the event that its liability for discriminating against Thomas was eventually upheld by the Commission (and, potentially, in any subsequent federal court appeal by CalPort). In a decision issued March 21, 2019, the Judge approved the settlement agreement and conditionally ordered CalPort to pay $17,500 in accordance with the agreement between the parties.

On January 29, 2020, the Commission issued a decision reversing the Judge's discrimination decision. 42 FMSHRC 43 (Jan. 2020). Consequently, two days later the Secretary filed an unopposed motion to vacate the conditional penalty and dismiss this proceeding. When the Judge did not act on that motion, the Secretary and CalPort, on April 8, 2020, jointly moved for the requested relief. In an order dated April 17, 2020, the Judge denied the motion, stating that her authority to take action in the case had ceased upon the issuance of her March 2019 order.

Consequently, on May 7, 2020, CalPort filed with the Commission its Motion to Reopen and Petition for Discretionary Review (hereinafter "PDR"). Therein, CalPort states that the Secretary does not oppose the Commission granting review, vacating the conditional penalty,

and dismissing this proceeding. PDR at 1. According to the PDR, the parties agreed that, in the event any Commission decision vacating the Judge's decision is itself later vacated on court review, the Secretary at that point would initiate a renewed penalty proceeding. *Id*. at 16.

Having considered the PDR, and reviewed the Judge's decisions and orders in this proceeding, we grant review and stay further proceedings, including briefing.

The decision of the Commission in the underlying discrimination case is presently the subject of court review. *Thomas v. CalPortland Co. and FMSHRC*, No. 20-70541 (9th Cir. docketed Feb. 26, 2020). Consequently, the parties are instructed that, if upon final resolution of court review in that case the decision of the Commission is upheld, they should jointly move the Commission to lift the stay in this proceeding, vacate the conditional penalty, and dismiss the proceeding. Conversely, should the Commission's discrimination decision be vacated as a result of court review, upon the return of that case to the Commission, we shall, sua sponte, lift the stay here and consolidate the penalty proceeding with the discrimination case, before conducting such further proceedings that are necessitated upon remand.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
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May 19, 2020

SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-0099 AC No. 12-02374-424654
v.	
SOLAR SOURCES MINING, LLC Respondent.	Mine: Shamrock Mine Mine ID: 12-02374

DECISION ON REMAND

Before: Judge William B. Moran

The above-captioned matter is before the Court on remand from the Commission. The docket involves a Petition for Assessment of a Civil Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 815(d), ("Mine Act"). The Court issued its original Decision and Order on March 29, 2018. Thereafter the Commission granted review on May 8, 2018 and a Commission majority[1] issued its decision remanding this matter to the Court on March 12, 2020. The Majority affirmed the Court's previous decision in this matter regarding the fact of violation, its gravity, and negligence, but remanded the case for this Court to further elaborate on the bases for assessing a penalty. *Solar Sources, Inc.*, 42 FMSHRC ___, slip op., No. LAKE 2017-0099, 2020 WL 1890528 (March 12, 2020) (hereinafter "Majority Decision" or "Remand").

The Commission majority determined that this Court "clearly failed to follow Commission precedent and fell far short of making adequate findings," in that the Court failed to make adequate findings for each of the penalty criteria in section 110(i)

[1] The Commission majority consisted of Chairman Marco Rajkovich, and Commissioners Michael Young and William Althen. Commissioner Arthur R. Traynor, III, joined Parts A and B with the majority but agreed *in result only* as to those two parts for the purpose of this Court making "specific findings regarding the operator's history of violations and demonstrated good faith in achieving rapid compliance and for the Judge to assess a civil penalty." *Solar Sources*, 42 FMSHRC ___, slip op. at 23-30, 2020 WL 1890528 at *17-24 (Commissioner Traynor, concurring and dissenting). Commissioner Mary Lu Jordan dissented from the majority opinion in its entirety, concluding that the Court's penalty assessment should be affirmed. *Id.* at 31-39, *24-31 (Commissioner Jordan, dissenting).

and therefore remanded this matter for the Court to "complete [its] penalty criteria findings and reassess a penalty." *Solar Sources*, 42 FMSHRC ___, slip op. at 1-2, No. LAKE 2017-0099, 2020 WL 1890528 at *1.[2]

The Commission Majority's Decision Upon Remand

To increase the likelihood that the Court's decision upon remand will meet the Majority's remand instructions, the Court will recount the particulars of the remand decision. As alluded to above, the Majority in its remand directed the Court:

> to make specific findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, … [and then] review th[o]se factors taking into account the findings on the other penalty criteria. The Judge must then consider his penalty criteria findings along with the record evidence, reassess a civil penalty, and explain his rationale in an independent and reasoned manner.

Id.. at 8, *6.

The Respondent, in its challenge to the Court's initial decision, contended that the Court "failed to make adequate findings for each of the penalty criteria in section 110(i), 30 U.S.C. §830(i), of the Mine Act as part of his analysis." *Id.* at 1, *1.

As the Majority determined:

> [t]he Judge concluded that the violation was S&S, the result of high negligence, and an unwarrantable failure to comply with the safety standard. The Secretary had proposed a $68,300 civil penalty through his special assessment protocol at 30 C.F.R. § 100.5. The Judge assessed the exact same amount as the proposed penalty, finding it to be "consistent with the record and the evidence introduced at hearing." *Id.*at 495.

Id. at 2, *2 (citing *Solar Sources*, 40 FMSHRC 462 (Mar. 29, 2018) (ALJ)). However, the majority noted "Commission Procedural Rule 30(a) instructs Judges that their decisions 'shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.'" *Id.* at n. 5 (citing 29 C.F.R. § 2700.30(a)).

The Commission did not take issue with this Court's analysis for two of the six statutory penalty factors, stating that, "it is obvious that the Judge limited his analysis discussion to only two of six statutory factors in the text." *Id.* at 7, *5. As to those two factors, the Commission referenced the Court's decision recounting that the Court "found that the violation identified in

[2] While the Court is embarrassed that it "fell far short," there is some comfort that its shortcoming has company. As the Commission noted in that regard, it "need not plow through a tedious review *of the dozens of remands* of penalty assessments due to the failure of Judges to make the necessary findings." *Solar Sources*, 42 FMSHRC ___, slip op. at 5, 2020 WL 1890528 at *4 (emphasis added).

Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated [and] that no cognizable mitigation was advanced …" *Id.*

In light of those expressions, the majority directed that:

> the Judge [ ] make specific findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. [The Judge] must review these factors taking into account the findings on the other penalty criteria. The Judge must then consider his penalty criteria findings along with the record evidence, reassess a civil penalty, and explain his rationale in an independent and reasoned manner.

Id. at 8, *6.

The majority then turned to Part B of its decision, which has as its heading "The Judge Need Not Reconcile the Differences Between His Penalty Analysis and the Secretary's Narrative Findings for a Special Assessment." *Id*. at 9, *7. Addressing one of the specifics in Solar Sources' appeal before the Commission, the majority noted that the Respondent identified:

> discrepancies between the Judge's findings and the Secretary's allegations. Specifically, the Secretary alleged that the operator knew or should have known of the poor condition of the berms because a certified person had performed an on-shift examination prior to the accident. *Notably, the order alleging an inadequate on-shift examination was vacated by the Judge.* Furthermore, the Secretary's narrative alleged that the berms were constructed of slurry while the Judge found that, originally, the berms had been constructed of shot rock.

Id. (emphasis added).

Regarding the majority's remark that it found it notable that the order alleging an inadequate on-shift examination was vacated by the Court, that statement by the majority marks a significant misunderstanding of the Court's March 29, 2018 decision. Because it is important, the Court needs to clarify the misperception it created for the majority in their remand decision. It is true that the Court found that the berm was *originally* constructed of shot rock, but that only tells part of the story, because, over time, as the operator was dumping its soupy slurry at the dumping site and because it failed utterly to monitor the effect of that practice on the soundness of the berm dump site, it altered the original soundness of the dump site and berm, resulting in its collapse.[3]

[3] As the Court made clear in its March 2018 initial decision findings of fact, Inspector Noel stated that for what remained of the berm, it was "mostly mud. It was a muddy consistency throughout the entire berm, like, kind of like slicing a Twinkie in -- with a knife, and once you (continued…)

There also appears to be a second noteworthy misperception concerning the significance of the Court's determination to vacate the alleged sister violation in this matter, a section 104(d)(1) order, for an inadequate on-shift examination. *To be clear*, the Respondent escaped responsibility for that order *only* because it had the whole shift on the day of the accident to complete its on shift exam. The berm collapsed before the shift ended. The testimony *at the hearing* from pit foreman Keith Lutgring was that he only *glanced* at the berm that day, and that his glance was *before the shift began.* There was no *testimony* to refute the claim that, whatever Lutgring actually did that morning, it was *before* the shift started. The cited standard requires an inspection "[a]t least once *during* each working shift." And, *for that reason only*, Solar Sources escaped liability for that order.

However, it should not go without mention that a notably different story was presented by Solar Sources, *shortly after* the truck toppled down the slope from the berm's collapse. In a letter

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[3] (…continued)
slice the Twinkie, you can see the inside of the Twinkie. Kind of like the same thing with the berm here." Tr. 64 Noel informed that, using his hands, he examined the consistency of the berm material, confirming its muddy makeup. Tr. 70. He added to that description that it was a "consistency [that] really reminds me of similar to cottage cheese. The texture of it, it's kind of-- it's got a little bit of lumpy mud in it, but it's -- it's heavily saturated with water. … it's just real gooey, mushy. … it was just a -- a real fine mud." Tr. 71-72. Upon consideration of all the evidence, the Court finds that in fact the berm material was as described by the inspector." 40 FMSHRC 462, at 465. Although the foregoing information in this footnote makes it clear enough just what the Court found, it is also noted that Inspector Noel expressed his view that when the berm was *initially constructed* it was made of substantial material but that "[a]fter hauling this slurry material that they were hauling to this dump, it landed -- they would have spillage onto the berm, and that spillage would cause, you know, the -- the water that's in that slurry would leach down into the -- the berm and weaken the berm. It would saturate the berm. So the berm really wasn't at the consistency of the slurry, but it was a -- of a muddy consistency and -- and it weakened the berm, as a result." *Id.* at 465. Further, as also found by the Court as fact, Inspector Noel explained that the material which is hauled and then dumped into the pit is "real soupy. … if the [truck] operator would slam on the breaks real hard, it would slosh out." Tr. 80. As the Court remarked, relating to the inspector's description, "[*t*]*his description is not in dispute*." *Id.* at 466 (emphasis added). With these findings, the Court then expressed that, based on the testimony of Inspector Noel, which the Court found to have been derived upon his significant experience and knowledge concerning berms and which testimony the Court also found to be credible, there were at least two significant shortcomings by the mine operator at work in this instance. First, by dumping the soupy slurry mix, such activity worked to destabilize the berm. That action effectively poured liquid over the berm, saturating it and in that process weakening it. A second shortcoming was the mine's failure to be attentive to the truck hitting the berm, a second source of damaging its integrity. That action weakened the berm by damaging its cohesion. Thus, the mine was deficient by not retraining its miners to stop that damaging practice. It also meant that the mine had to rebuild the berm because of that damage to its integrity. The "muddy mixture" which the inspector also described as "mushy material," and which he observed on both sides of the breached area, demonstrated that it had not been properly maintained.

to MSHA dated July 11, 2016, *that is to say, less than 2 weeks after the event occurred,* Solar Sources told MSHA "[t]he mine foreman acknowledged he observed the berm in place **when he was performing his inspection** prior to the gob truck dumping in this area… **[t]he foreman indicated that he examined the berm** and that it was in place." Ex. P. 8. Had the Secretary amended the complaint to allege that there had been an inadequate on shift exam on the *previous* working shift, based on the evidence of record, which evidence supports a finding that the deplorable condition of the berm could not have occurred so suddenly, the Court would surely have upheld that Order. The Commission case law is quite clear: the Secretary could have moved for such an amendment of that Order. *See, e.g., Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 38 (Jan. 1981) and *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1631, (July 2016). The Court did not feel it was its place to suggest during the hearing that the Secretary seek an amendment of the complaint to conform to the evidence.

Returning to the majority's statement, above, that the Court need not reconcile differences between its penalty analysis and the Secretary' narrative findings for a Special Assessment, the majority expressed in Part B of its remand that there was not error in the Court's "failing to reconcile any differences between his findings and the Secretary's pre-hearing allegations, but instead [it] was in failing to exercise his own responsibility to conduct an independent and reasoned analysis, using *the record evidence.*" *Solar Sources*, 42 FMSHRC ___, slip op. at 9, 2020 WL 1890528 at *7 (emphasis in original).

Both Parts B and C of the majority's opinion speak to its view of Special Assessments in the context of the judge's penalty analysis. Both Parts advise that the judge need not reconcile differences between his original *penalty analysis* and the Secretary's Special Assessment narrative findings, per subsection B, nor, as set forth in subsection C, with the judge's *reassessed penalty* and the Secretary's proposed penalty amount under his Special Assessment procedure.[4]

For purposes of the Court's duty "to complete [its] penalty criteria findings and reassess a penalty," it is unnecessary to recount in great detail the majority's expressions on these two, related, topics. *Id.* at 1-2, *1. This is because, for Part C in particular, the wealth of the majority's expressions on these topics address its view that the United States Court of Appeals for the District of Columbia Circuit mused[5] that the "Commission's case law '*seems to point in two*

[4] Per the heading for subsection B, the majority states "The Judge Need Not Reconcile the Differences Between His Penalty Analysis and the Secretary's Narrative Findings for a Special Assessment," and per the heading for subsection C, the majority states "The Judge is Not Required to Reconcile His Reassessed Penalty with the Amount Proposed by the Secretary According to his Special Assessment Procedures. *Solar Sources*, 42 FMSHRC ___, slip op. at 9-10, 2020 WL 1890528 at *6-7.

[5] The Majority took the opportunity to address a musing by the United States Court of Appeals for the District of Columbia Circuit in that court's *American Coal* decision, 933 F.3d 723, 728 (D.C. Cir. 2019). Speaking to the DC Circuit's "apparent impression of an inconsistency in Commission law," and feeling that "[i]t was incumbent on the Commission to

(continued…)

directions' regarding Commission Judges' use of the Secretary's penalty proposal as any sort of reference point." *Id.* at 10, *7 (emphasis in original). For that reason, the majority spoke to the D.C. Circuit's "apparent impression of an inconsistency in Commission law [which they believe]

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[5] (…continued)
correct the [D.C. Circuit] court's misapprehension of [the Commission's] precedents and the operation of the Secretary's special assessment program," the majority explained that the federal "courts must understand the fundamental importance of the Commission's penalty directives-especially because the 'two directions' noted by the court *are not* separate, divergent paths." *Solar Sources*, 42 FMSHRC ___, slip op. at 10, 19, 2020 WL 1890528 at *8, 15. (emphasis in original). The majority's clarification to address the D.C. Circuit's "apparent impression of an inconsistency in Commission law" begins with discussing the "fundamental distinction between regular and special assessments." *Id.* at 10, *8. They note that the Secretary's penalty proposal is not a starting point for the judge to use as a guidepost, while acknowledging that a judge must explain a penalty which substantially diverges from the proposed penalty. *Id.* at 13, *10. These are not, the majority expresses, "divergent paths." *Id*. at 10, *8. The substantial divergence principle is in place in order to establish general uniformity in the assessment of penalties. However, the substantial divergence principle does not apply, the majority expresses, to *Special Assessments* because those are not grounded "on the general transparency and consistency of MSHA's process for developing *regular assessment* proposals." *Id.* at 12, *9 (emphasis in original).

"MSHA's regular penalty system represents the agency's professional judgment on the relative importance of the facts of violation and each of the penalty factors and sub-factors. … [affording the mine operator with] a basis for determining how the penalty was calculated." *Id.* at 13, *10. Thus, the majority expresses that, in comparison with Special Assessments, the regular assessment procedure provides fairness and transparency in penalty assessments. The majority recognizes that Special Assessments substantially increase penalties "in order to address agency enforcement priorities." *Id.* at *11. But the majority is critical of this approach because it adds "points to the negligence and gravity elements, without accounting for other statutory penalty criteria or considering the specific facts of the violation." *Id*. at 14, *11.

The majority also expressed that MSHA's Program Policy Manual ("PPM") does not cure the deficiencies it identifies with the Special Assessment process and, speaking to the Special Assessment narrative, they find fault with that narrative by "not explain[ing] *why* MSHA singled out this particular citation for special assessment." *Id.* at 16, *12. However, the Court believes that some might conclude that the MSHA's presentation of its view of the facts in the narrative itself could be construed as a self-evident explanation for the agency's decision.

Acknowledging that "[m]any Commission decisions state, directly or indirectly, that the Secretary's penalty proposal is not a baseline or starting point, while other decisions require Judges to explain any substantial divergence from the penalty proposal of the Secretary," the Majority stated these are not really "divergent paths, [as] they work together to preserve the credibility of the administrative scheme and avoid the appearance of arbitrariness. In their proper context, each of these principles is correct. They are complementary approaches that serve the same important objective." *Id.* at 11, *8.

demands prompt clarification." *Id.*, *8. The majority then discusses from page 10, the beginning of subsection C of its decision, through the end of their decision at page 21, an extensive expression of their views on this.[6]

The majority continued that

> the Judge limited his analysis discussion to only two of six statutory factors in the text [and they noted] [i]n a footnote, he summarily discharged the 'other statutory factors' as 'duly considered.' This abrupt footnote is no demonstration that he considered all criteria sufficiently. In addition to the overall short shrift given these statutory criteria, the Judge's decision was totally deficient of any evaluation of "the operator's history of previous violations' and 'the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation." *See* 30 U.S.C. § 820(i); 29 C.F.R. § 2700.30(a). The record contains highly relevant evidence regarding the operator's violation history. Yet, the Judge did not engage in any analysis and did not make any finding on the possible significance of such evidence. The Judge merely references Government Exhibit P-2.

Solar Sources, 42 FMSHRC ___, slip op. at 7, 2020 WL 1890528 at *5-6.

"On remand, the Judge is directed to independently reassess a penalty in accordance with *AmCoal I.* The Judge must then explain the rationale for his penalty assessment using the statutory penalty criteria and the record evidence." *Id.* at 10, *7. The Commission went on to state that "the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." *Id.* at 10, n. 14, *7.

As described below, in the Findings of Fact and Discussion section of this decision upon remand, providing findings for each of the penalty criteria in section 110(i), the Court will make the required independent and reasoned analysis using the record evidence.

Drawing a contrast between regular assessments and Special Assessments, the majority instructed that when the penalty assessed by the Judge substantially diverges from a proposed, *regularly assessed* penalty, the Commission *requires* Judges to provide an explanation for the divergence to avoid an appearance of arbitrariness in penalty assessments. *Id.* at 13, *10.

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[6] Very briefly, at least as the Court reads them, the majority's expressions in this regard note that the Secretary's penalty proposals don't bind the Commission, as it assesses penalties *de novo*, that a judge must make findings of fact for each of the six penalty criteria and that a judge must explain any substantial divergence from a regular penalty assessment, but *not* for Special Assessments. In reaching these conclusions, the majority included an extended discussion of regular assessments and the "normative benefits" that such assessments provide, as contrasted with the majority's view of the deficiencies of Special Assessments. *Id*. at 10-21, *10-16.

The majority's view of and approach toward Special Assessments is quite distinct. They described the Special Assessment process as one which works by "adding points to the negligence and gravity elements, without accounting for other statutory penalty criteria or considering the specific facts of the violation." *Id.* at 14, *11. Considering the Special Assessment process to be "opaque," the majority expressed that there is no requirement for a judge to explain divergences from such assessments. *Id.* at 19- 20, *15.

Where a Special Assessment is sought, "the Judge must base a decision only upon a complete review of the evidence pertaining to each of the penalty factors, a weighing of those factors in the context of the facts, and a final resolution based only upon such careful and fully explained review." *Id.* at 18, *13.

However, the Commission did not assert that a Special Assessment is inherently defective, expressly stating that "[o]f course, it is entirely appropriate for a Judge to fully consider the agency's proposal to treat a given violation as especially egregious for enforcement purposes. The agency may argue that a violation is exceptional and deserves an enhanced penalty by explaining its decision before the Judge and supporting the explanation with evidence." *Id*. at 18, *14. As explained below, the Court has concluded that this violation was "especially egregious."

Within Part C, the majority, in subpart C, sets forth their "Guidance to Judges on Special Assessments." *Solar Sources*, 42 FMSHRC ___, slip op. at 17, 2020 WL 1890528 at *12. Calling a Special Assessment "an especially large penalty" and "an extraordinary penalty" the majority states that MSHA "must justify its litigation proposal with evidence on each of the penalty factors." *Id.* at 17, *13. The second part of the guidance from the majority is that the judge "must base a decision only upon a complete review of the evidence pertaining to each of the penalty factors, a weighing of those factors in the context of the facts, and a final resolution based only upon such careful and fully explained review." *Id.* at 18, *13. The Court will, of course, do just that. [7]

Given, at least in the Court's estimation, the lengthy narrative provided by MSHA it was surprising to read that the majority has determined that "[n]o significance attaches to MSHA's penalty which is specially proposed for litigation purposes." *Id.* at 18, *14. While the majority then adds that "[t]he agency may argue that a violation is exceptional and deserves an enhanced penalty by explaining its decision before the Judge and supporting the explanation with evidence," apparently the agency's explication for the enhanced penalty in its three page narrative is outside of the Court's consideration. *Id*.

Of course, the Court fully understands that the reasons presented in the narrative must be backed up by evidence from the hearing, but this is true in any civil penalty proceeding, under a regular or Special Assessment.

[7] Part D from the majority opinion, covering pages 18 through 21 is not addressed in this Decision Upon Remand, as Part D speaks only to the majority's view that "the concerns in the dissenting opinions [of Commissioners Traynor and Jordan] are misplaced." *Id.*at 18.

II. The Court's Decision Upon Remand addressing the remaining statutory factors and its reassessment of a civil penalty

Solar Sources' petition for discretionary review is of a limited nature in that its challenge was that the Court "erred in assessing the penalty because [the Court] failed to make adequate findings for each of the penalty criteria in section 110(i), 30 U.S.C. §820(i) of the Mine Act as part of [the Court's] analysis." *Solar Sources*, 42 FMSHRC ___, slip op. at 1, 2020 WL 1890528 at *1. That the Court's reading of the limited subject matter for this remand is correct was confirmed in the very next sentence from the Commission majority's opinion which stated "we vacate the Judge's penalty assessment and remand the case to the Judge *to complete his penalty criteria findings and reassess a penalty*." *Id.* at 1-2, *1. (emphasis added).

Thus the Commission did not disturb, nor did Solar Sources' petition for discretionary review seek to reverse, this Court's determinations that the violation was **significant and substantial**, the result of **high negligence**, and an **unwarrantable failure** to comply with the safety standard.

Although the majority also noted that Judges are accorded *broad discretion* to assess civil penalties, it added that their decisions must reflect proper consideration of the section 110(i) penalty criteria.[8] Thus, in the context of its penalty determination, the Court must do two things: fully consider each of the statutory criteria and adequately explain the basis for the penalty assessed. *Id.* The majority then added that such an adequate explanation is to include, "when appropriate, how the penalty criteria *interplay* [9]with one another." *Id*. at 4-5, *4 (emphasis added). Elaborating about this interplay, the majority stated this may include "analyzing any relationships between the [penalty] criteria that may affect the ultimate penalty assessment. Thus, for example, a discussion of the size of a mine and the frequency of violations in juxtaposition may be informative to the reasoning behind a penalty evaluation more fully than looking at each criterion as a distinct element of a penalty." *Id.* at 5. Removing any doubt, the majority then added that the Judge has to "fully consider[ ] the penalty criteria individually and *in relationship to one another*." *Id.* at 6, *5.

[8] Setting apart Special Assessments from the procedure employed when the Secretary utilizes its proposed regular assessments, the majority stated that in the latter instances, the judge must provide an explanation if the penalty assessment substantially diverges from the Secretary's. Review in such regular assessment instances and such review is conducted under an abuse of discretion standard. *Solar Sources*, 42 FMSHRC ___, slip op. at 4, 2020 WL 1890528 at *3.

[9] The idea put forth by the majority of considering how the "penalty criteria interplay with one another," which they alternatively describe as the "juxtaposition" between the penalty criteria, is new. The Court was unable to find a single Commission decision employing either of those terms in connection with penalty determinations.

FINDINGS OF FACT UPON REMAND AND DISCUSSION

A. The Court's Findings regarding the statutory penalty factors.

To begin, so that it is not forgotten in the ensuing discussion of the penalty factors which the Court has been directed to address upon this remand, the Court wants to take a moment to refresh the readers' recollection of the seriousness of this violation, and the Court's attendant findings that the gravity was found as "occurred." The event resulted in significant injuries to the truck driver, Shawn Standish, in his leap for life from the immense dump truck, just before it toppled over the collapsed berm and careened down the slope.

The majority has acknowledged that the Court's analysis discussed the penalty factors of negligence and gravity, but in contrast it stated that "the Judge's decision was totally deficient of any evaluation of 'the operator's history of previous violations' and 'the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation'" *Id.* at 7, *5.

While not in any way challenging the majority's expressions regarding a judge's analysis of the penalty factors and the penalty advocated by the Secretary where a Special Assessment is involved, for the sake of completeness it is noted that the Special Assessment standard provides, in relevant part that:

"MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment. [ ] *When MSHA determines that a 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, (a), (b). (emphasis added).

Special Assessments have been around for a long time, in fact, **for some forty-two** (42) **years**. *See, for e.g., Coal Employment Project v. Sec'y of Labor*, 889 F.2d 1127, 1129 ("The special assessment, which was also originally established in 1978, 43 Fed.Reg. 23,516, 23,519, and somewhat modified in 1982, 47 Fed.Reg. 22,292, 22,296, is designed for particularly serious or egregious violations."). *See also, Southern Ohio Coal*, 4 FMSHRC 1458 (Aug. 1982).

Recognizing that the majority was likely speaking generically, their remark that Special Assessments do not "*consider*[ ] *the specific facts of the violation*," at least for this case, does not apply. *Id*. at 14, *11. (emphasis added). The Secretary's Narrative Findings for a Special Assessment is nearly three pages long and, at least as the Court reads the document, it does speak to the specific facts. Pet. for Assessment of Civil Penalties at 7-9, which is part of the official record. This determination is that, based on the official record, MSHA complied with its own standard in that it elected to waive the regular assessment upon determining that a Special Assessment was warranted and that its proposed penalty was based on the six criteria set forth in § 100.3(a). *Id.* at 7.[10] However, it is true, as reflected below, that apart from negligence and

[10] This observation is not in conflict with the majority's expressions since they noted that under section 110(i) of the Mine Act, "the Commission independently assesses a civil penalty de novo based on findings of fact and consideration of six penalty factors." *Solar Sources*, 42 FMSHRC ___, slip op. at 3, 2020 WL 1890528 at *3 (emphasis in original).

gravity, MSHA made only brief reference to the other criteria before its statement that "[b]ased on the six criteria set forth in 30 CFR 100.3(a) and the information available to the Office of Assessments," it arrived at the proposed penalties in this case.

It is also worthy to call attention to the full text of the Secretary's lengthy Narrative Findings for Special Assessment, [11] which provided:

> Under 30 CFR 100.5, the Mine Safety and Health Administration may elect to waive the regular assessment formula contained in 30 CFR 100.3 in determining the civil penalty for a violation of the Federal Mine Safety and Health Act of 1977, if it deems that conditions concerning the violation warrant. **MSHA decided to propose a special assessment in accordance with 30 CFR 100.5 for the following violations because the violations resulted from the operator's unwarrantable failure to comply with mandatory standards and resulted from the operator's high negligence. The combination of these factors indicated the need for greater deterrence than the regular assessment penalty would provide.**
>
> MSHA carefully evaluated the conditions cited and the inspector's relevant information and evaluation. The proposed penalty reflects the results of an appraisal of all the facts presented.
>
> On June 30, 2016, MSHA issued Section 104(d)(1) Citation 9102704 at the Shamrock Mine. Solar Sources, Inc. was cited for a violation of 30 CFR 77.1605(1) because berms, bumper blocks, safety hooks or similar means were not adequately constructed in order to prevent overtravel and overturning at dumping locations. The gravity of the violation was considered serious and the violation contributed to the cause of a power haulage accident. A mobile equipment operator received serious injuries as he jumped from a haul truck that overtraveled and overturned at a dumping location. The violation resulted from the operator's high degree of negligence. A power haulage accident occurred which resulted in serious injuries to an equipment operator as he jumped to dismount an overturning haul truck. The haul truck operator was attempting to dump a load of slurry material at the west end of the gob dump at the 001 pit. The haul truck's rear tires overtraveled the berm and began to sink causing the haul truck to overturn. The truck traveled down an approximate 42 foot embankment and came to rest upside down in a slurry pit filled with mud and water estimated to be approximately 30 feet in depth. As the driver realized that the haul truck was overturning, he jumped a vertical distance of approximately 13 feet as a last resort to escape the vehicle before it overturned. The truck driver suffered broken heels on both feet and a broken ankle as a result of the accident. The material used to construct the dumping point berm was described as "gob material" consisting of high moisture content which could not be adequately compacted. The berm was not structurally sufficient to support the weight of the loaded haul truck. The truck subsequently overtraveled the berm and overturned. Berms are required to be

[11] The text of the Special Assessment Narrative was not included in the Majority's Decision.

constructed to a minimum height equal to the center axle height of the heavy equipment being used at the facility. The height of the berm was approximately 26 inches and the center axle height of the haul truck was 39 inches. The berm height was approximately 13 inches lower than the required minimum height. Management knew or should have known that the berm construction was inadequate and made no effort to correct the hazardous condition. The dump area had been examined within one hour prior to the accident and no hazardous conditions were noted in the examination records. On the same day, MSHA issued Section 104(d)(1) Order 9102705 at the same mine. The operator was cited for a violation of 30 CFR 77.1713(a) because the operator failed to conduct an adequate on-shift examination of the gob dump area at the 001 pit. The gravity of the violation was considered serious and the violation contributed to the cause of a power haulage accident. A mobile equipment operator received serious injuries as he jumped from a haul truck that overtraveled and overturned at a dumping location. **The cited standard is identified as a "*Rules to Live By*" standard. These are the safety and health standards most frequently cited during fatal accident investigations; the conditions or practices cited as violations of these standards are those that most commonly contribute to fatalities in the mining industry. *The mining industry has been made aware of these standards and operators should have heightened awareness in identifying and correcting associated hazardous conditions.* The violation resulted from the operator's high degree of negligence. A power haulage accident occurred which resulted in serious injuries to a haul truck driver as he jumped to dismount an overturning haul truck at the gob dump area.** Several hazards were identified and cited relative to the construction of the berm at the dump location and a determination was made that the inadequate berm construction contributed to the accident. The on-shift examination of the dump area had been conducted within one hour prior to the accident and no hazardous conditions were noted in the examination records. **Management failed to identify and correct obvious hazardous conditions related to the berm construction and allowed dumping operations to continue while exposing miners to the uncorrected hazards.**

The violations were cited during an investigation of a serious power haulage accident that occurred at the above mine on June 29, 2016. The number of previously assessed violations and inspection days at this mine, and the size of the mine and company appear on the attached Proposed Assessment. In accordance with 30 CFR 100.3(h), MSHA presumes that the operator's ability to continue in business will not be affected by the assessment of a civil penalty." The Secretary then continued that "[b]ased on the six criteria set forth in 30 CFR 100.3(a) and the information available to the Office of Assessments," it proposed a civil penalty in the amount of $68,300.00 for each of the two violations alleged in this docket, with No. 9102704 being a (d)(1) citation and No. 9102705 a (d)(1) order.

Pet. for Assessment of Civil Penalties at 7-9 (emphasis added).

The Majority expressed that "[p]roviding a rationale for a special assessment is essential to providing more clarity to the Judge, and to the Commission on review, and the Secretary is obliged to provide more than an opaque process and a secret theory of the case." Majority Remand at 9, n. 13. While the majority has identified this Court's shortcoming in not detailing consideration of the penalty factors *other than negligence and gravity*, and for which the Court takes ownership, it respectfully disagrees that the Secretary had, in any manner, a "secret theory of the case." Both the testimony and exhibits at the hearing, as discussed at length in the Court's 35 page Decision and Order, and the full text of the Special Assessment Narrative, as quoted next above, refute that – clearly, from the Special Assessment's words, there was no "secret theory."

As reflected above, the Special Assessment explains that its genesis was the allegation that the operator failed to have an adequately constructed berm to prevent overtravel and overturning at dumping locations. This of course was found to be the fact in the Court's March 29, 2018 decision. Regarding the penalty factors and beginning with the gravity, the Narrative Findings inform that the gravity was considered to be serious and that the violation contributed to the cause of a power haulage accident.

The Narrative continues that the "mobile equipment operator received serious injuries as he jumped from a haul truck that overtraveled and overturned at a dumping location." Pet. for Assessment of Civil Penalties at 7. This too was found by the Court as irrefutable. The narrative then addressed the factor of negligence, describing the violation as "result[ing] from the operator's high degree of negligence." *Id*.

No obscure theory was presented. The Narrative detailed the basis of its claim, expressly stating that "[t]he material used to construct the dumping point berm was described as 'gob material' consisting of high moisture content which could not be adequately compacted. The berm was not structurally sufficient to support the weight of the loaded haul truck." *Id.* at 7-8. It would be difficult to be more plain about the basis for the Special Assessment and the theory behind it.[12]

Further, the Narrative clearly articulates its view that "[m]anagement knew or should have known that the berm construction was inadequate and made no effort to correct the hazardous condition."[13] *Id.* at 8.

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[12] Although the testimony at hearing refined the deficiency of the berm by explaining that it was *the failure to maintain* the berm in the face of the deleterious effect of dumping of the slurry, such details about the *timing* of the deterioration do not undermine the essential charge.

[13] While at the time the Narrative was drafted, MSHA believed that "[t]he dump area had been examined within one hour prior to the accident and no hazardous conditions were noted in the examination records," as explained in this Decision Upon Remand, there was a very legitimate basis for that belief, and as also explained in this Decision, had the Secretary moved to amend the section 104(d) order, Order No. 9102705, to conform to the evidence, based on the credible evidence of record from Inspector Noel, that failure to conduct an adequate examination would almost certainly have been upheld.

Additionally articulating the basis for moving forward as a Special Assessment, the narrative noted that:

> [t]he cited standard is identified as a "Rules to Live By" standard. *These are the safety and health standards most frequently cited during fatal accident investigations*; the conditions or practices cited as violations of these standards are those that most commonly contribute to fatalities in the mining industry. *The mining industry has been made aware of these standards and operators should have heightened awareness* in identifying and correcting associated hazardous conditions.

Id. (emphasis added).

It is true, as the Majority has noted, MSHA's consideration of the other penalty factors was quite brief. However, in that regard, the Narrative did identify the mine's violation history and its size, stating, "[t]he number of previously assessed violations and inspection days at this mine, and the size of the mine and company appear on the attached Proposed Assessment." *Id*. at 9. Further, MSHA presumed, and correctly as the burden is on the mine operator, that "the operator's ability to continue in business will not be affected by the assessment of a civil penalty." *Id.* If one is keeping count, that means that, except for the "good faith" factor, MSHA identified the basis for each penalty factor, and augmented its rationale both with detail and by highlighting that the alleged violation involved one of the agency's Rules to Live By. Accordingly, at least this Court does not view the Narrative as an impenetrable opaque process. Nor is it reasonable in the early stage of the assessment process for the Secretary to provide chapter and verse all of the reasons for its determination to specially assess violations. Any reasonable mine operator reading the Special Assessment would not be in the dark about the Secretary's grounds for the Assessment nor, for what is the Secretary's prerogative, the decision to issue a Special Assessment because of those grounds. That a mine operator may not like that decision is another matter.

Respondent, Solar Sources, did contend, and the majority has so found, that the Court insufficiently discussed some of the penalty factors. The Court now remedies this deficiency, at least as to the identified penalty factors *other* than negligence and gravity.

It's no understatement to say that the parties spent only a *very* small fraction of the two day hearing on the penalty factors involving good faith, history, size, and ability to continue in business. Instead the wealth of the attention at the hearing, as well as that given in the post-hearing briefs, were all about contentions regarding the issues relating to the fact of violation, whether there was an unwarrantable failure, whether the violation was significant and substantial and whether it should've been specially assessed. The Court fully understands that *speaking for the moment only to those former factors of good faith, history, size, and ability to continue in business*, the Secretary, as with *each* factor, has the burden of proof.[14]

[14] Of course, the Secretary has the burden to establish the fact of violation and all related penalty factors associated with the alleged violations. But, at this stage, this case is well beyond those issues as, per the remand, the Court is only addressing good faith, history, size, and ability to continue in business.

The Court has reviewed Commission decisions referencing the statutory penalty criteria. For each penalty factor, this decision upon remand will discuss the pertinent Commission decisions for a given factor and then apply that information to the Court's findings of fact and conclusions therefrom in light of the record evidence and its section 110(i) findings.

The Court first takes note that the majority, in referring to the its statement that the Court gave "short shrift" to consideration of some of the statutory criteria, expressed its own view about two of the criteria: the operator's history of previous violations and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Good faith

The Commission's decisions regarding the penalty criterion of the operator's good faith in attempting to achieve rapid compliance.

In its review of Commission cases which refer to the "good faith" factor, the Court has found some guidance, although none of it comes to the aid of Solar Sources to warrant a penalty reduction in this case.

In *U.S. Steel*, the Commission did not agree with the judge's conclusion that the mine's actions in sending a less experienced attorney to abate the violation negated the mine's claim of good faith. Instead, the Commission, expressed that "good faith" should be judged in terms of objective attempts to achieve rapid compliance after notification of a violation. It also noted that the parties stipulated that U.S. Steel demonstrated good faith in abating the citation at issue within the time provided. *U.S. Steel v. Sec'y of Labor*, 6 FMSHRC 1423, 1434 (June 1984).

In *Madison Branch Management,* the Commission acknowledged that in determining whether an operator had demonstrated good faith in attempting to achieve rapid compliance, it examines "the scope of the citations and the actions required for abatement." *Madison Branch Management v. Sec'y of Labor*, 17 FMSHRC 859, 865–67 (June 1995).

So too, while the Commission recognized that where an operator demonstrates "*much more* than ordinary good faith," a judge *may* give much more weight than normal to the good faith criteria in assessing a penalty, *Coal River Mining, LLC*, 32 FMSHRC 82, 2010 WL 594840, at *11–12 (Feb. 2010) (emphasis added). In *Coal River,* the judge in that case found that the operator did act quickly to do more than necessary *to abate the violation* in question.

However, the Court has determined that such a nod to an operator's actions do not apply in this Solar Sources matter, where the subject matter of the citation, here the collapsed berm, vanished in a rubble down the dump site slope. As explained below, that is not the sole basis for the Court's determination that the operator is due no penalty reduction on that account.

In *Hidden Splendor Resources*, former Commissioner Cohen, in his concurring opinion, noted that the foreman ordered miners out of the mine, and did not wait until receiving a citation to do so. *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3108–09 (Dec. 2014). Thus, the foreman took prompt action *to avert* a hazard. The Court notes that no such like action occurred here with Solar Sources; no hazard was averted.

In *Sunny Ridge Mining*, speaking to whether the operator "demonstrated good faith ... in attempting to achieve rapid compliance after notification of [the] violation," [the Commission remarked that] the record merely indicates that the violation was abated approximately 4 hours after the order was issued when Sunny Ridge "removed the height of the spoil material." … Accordingly, [the Commission found] that Sunny Ridge demonstrated neither good faith nor bad faith in abating the violation. *Sunny Ridge Mining Company, Inc*., 19 FMSHRC 254, 263 (Feb. 1997). Thus, *Sunny Ridge* is indicative that even where abatement actions occur, good faith does not automatically inure to the benefit of an operator.

Discussion of the good faith factor

Good faith contentions raised by the Respondent

Respondent's Counsel contended at the hearing that "the changes that [the Respondent] made in operations and efforts to prevent a reoccurrence would factor in when [the Court makes its] final penalty assessment. And we're happy to argue that in a brief." Tr. 347. The Court sought clarification, inquiring, "under good faith?" Respondent's Counsel responded, "Yes. And the expense they've taken to go to a different system." Tr. 348. Respondent's Counsel then added, "And I've also had cases where when an operator goes to expense and does changes, that that factors into the penalty as well. There's a number of cases on that."[15] Tr. 349.

Respondent's Counsel then asked of his witness the following leading question: "But basically, what you've done, Mr. Atkinson, you-all have designed a system now that prevents what happened here of a berm collapse from occurring?" to which the witness answered, "Yeah." Tr. 349.

Later, the Court reminded Respondent's Counsel of his assertion that he knew of cases that supported his view of good faith abatement, noting at the hearing that he "[al]luded to the scope that I can consider in terms of good faith abatement. [The Court then added] "[b]e sure that you highlight the cases. You weren't sure if they were administrative law judge or commission level cases. And that was in the context of what Mr. Atkinson did in terms of revising the berm scenario, you know, the diagram, et cetera, okay? Highlight that in your brief so I can consider that and look up those cases myself." Tr. 367. Respondent's Counsel answered, "Thank you, sir." *Id*.[16]

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[15] The Secretary's Counsel did not agree with the Respondent's view of the scope of good faith, believing that it applies to "efforts made before the citations were issued." Tr. 349.

[16] The Court held a recorded conference call with the parties on Wednesday, April 22, 2020 for the purpose of making sure that it had not overlooked any contentions made during the hearing or in the parties' post-hearing briefs regarding the four penalty factors the majority stated were insufficiently addressed in the Court's initial decision. Counsel for Respondent confirmed during that conference call that in fact he never did identify such cases during the hearing, nor cite to such cases in his post-hearing briefs. However, he did try to interject such a case citation during the call. The Court would not accept this attempt to supplement his brief as the opportunity had long since passed. The conference call was transcribed and has been made a part of the official record.

The Respondent never provided any cases at hearing, nor in its post-hearing briefs, although during the Court's conference call *post the majority's remand decision*, Respondent's counsel tried to cite a case, at a time more than two years after its post-hearing briefs were submitted. *See* n.16, *infra*.

Good faith factor contentions raised by the Secretary of Labor

In contrast, at the hearing the Secretary's Counsel expressed a different view about this penalty factor, stating she "believe[d] good faith has to go to efforts made before the citations were issued." Tr. 348. That, the Court believes, cannot be true, as the applicable words for the factor provide that the demonstrated good faith of the operator charged pertains to attempting to achieve rapid compliance *after notification* of a violation. While that contention is therefore rejected, the Court still stands by its conclusion that whatever efforts were made to address future berm collapses they are not applicable to this violation. The subject berm, having collapsed and shedded down the slope, it was not possible to achieve rapid compliance for it as it was non-recoverable. Beyond that, as explained in this decision, even under a more generous interpretation of this factor, the Respondent's response to the violation was utterly devoid of good faith.

The Secretary's Post-Hearing Brief

The Secretary said virtually nothing about good faith in its post-hearing brief. Instead the Secretary referred to the Narrative Findings for the Special Assessment. The same is true of the Secretary's Reply Brief; the Secretary did not speak to that factor. However, as described *infra*, there was very probative testimony adduced by Respondent's own witness on this subject.

Respondent's Contentions regarding good faith during the hearing.

As mentioned above, at the hearing, Respondent's Counsel remarked on the issue of good faith that he "believe[d] the changes that [the mine] made in operations and efforts to prevent a reoccurrence would factor in when you do your final penalty assessment. And we're happy to argue that in a brief." Tr. 347. Adding that he was speaking on the topic of good faith, he affirmed, "Yes. [and then added][a]nd the expense they've taken to go to a different system. I mean, we can obviously put something in a brief …" Tr. 348.[17] Respondent's Counsel continued

[17] As alluded to in the preceding footnote, *one* case was cited during the April 22nd conference call and the Court rejected the attempt to supplement Respondent's briefs, years later, with that cite. Beyond that, no case, in the Court's estimation, can resuscitate the Respondent's claim of good faith because the facts from Respondent's own witness refute it.

that he has "had cases where when an operator goes to expense and does changes, that that factors into the penalty as well. There's a number of cases on that."[18] *Id.*

Respondent's contentions regarding good faith in its post-hearing briefs

Respondent notes that Section 100.3(d) states that "[m]itigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards." Resp't Br. at 27. Respondent contends that there were mitigating circumstances, in that "it has taken steps to prevent another such accident from happening." *Id.* As set forth below, the Court notes that, when taken in context, that is an incomplete recounting of the actions taken by the Respondent. Respondent's Brief continued:

> As explained by Mr. Atkinson, Solar Sources completely redesigned how it dumped gob and slurry into the pit after this accident and submitted a modified ground control plan. There is now a chute with a berm and area just below it that is also 'bermed off.' Tr., Vol I, p. 344-347; *see also* R-22. Once material accumulates, a dozer pushes the material into the pit. *Id.* at 345. This keeps the truck operator behind two berms, some 20 feet away from the edge of the bank, and also leave a much larger and more stable base that will not collapse as occurred here. *Id.* at 345; *see* also R-22, modified Ground Control Plan.

Id. Respondent also stated that "the record establishes the mine had instituted a new Ground Control Plan that no longer has trucks dumping near the edge of a pit to prevent a reoccurrence of this event and should be considered in setting a penalty." Resp't Br. at 35. The Respondent's post-hearing reply brief added nothing to the subject of good faith.

[18] Respondent's Counsel then asked of his witness the following extremely leading question: "But basically, what you've done, Mr. Atkinson, you-all have designed a system now that prevents what happened here of a berm collapse from occurring?" To that, the witness only answered, "Yeah." Tr. 349. The witness's answer, while correct as to the way the question was posed, presents a very inaccurate portrayal of the circumstances surrounding Solar Sources post-accident actions. More will be said about this *infra* as revealed through the testimony of Respondent's safety director.

The Court's Discussion and findings on the subject of the Good Faith factor[19]

The Court takes note that the "good faith" factor too often is truncated to those two words. Yet it must be remembered that, in full, the text of the statutory provision is directed toward a particular demonstration of good faith, namely *the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation*. 30 U.S.C. §820(i), (emphasis added).

The Court is of the view that, both the facts in this matter as well as the Commission cases cited above illustrate, by way of counterexamples, the Respondent is entitled to no reduction in the penalty imposed because, to put it simply, there was no good faith in attempting to achieve rapid compliance under this penalty criterion. After all, the berm vanished upon its collapse, taking the huge truck along with it. No rapid compliance was thereafter available.

As the berm no longer existed, a result brought about by the operator's failure to have been vigilant about its condition and by its failure to properly maintain it, there could be no rapid compliance to correct the violation.

Working very much against a finding of crediting Solar Sources' claim of good faith, in the Court's view, is *Lehigh Anthracite Coal, LLC*. There, the operator took proactive steps *prior to MSHA being notified*. In the case before this Court, such like action would have involved recognition of the deteriorating effects on the berm's integrity by the process of dumping the soupy slurry material. After all, management knew that their berms required constant attention. The Court notes the testimony of MSHA Inspector Jason Noel at Tr. 43, 135, 143, 144, 145, 146, 149, 189, and pit supervisor Lutgring's admission that berms need maintenance after being constructed, Tr. 396 and his acknowledgement that he told Inspector Noel that "[*b*]*erms are a constant problem with these dumps*." Tr. 397 (emphasis added). By comparison, *no proactive steps occurred*, nor could there have been any actions undertaken after the event, as the berm, having completely collapsed, no longer existed. Cf. *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 284 n.14 (Apr. 2018).

Commission level decisions support the Court's determination that good faith, at least under the use of that phrase in the Mine Act, was not present in this matter. Again, with the berm gone, taking the truck along with it, it was too late for any such attempt to achieve rapid compliance.

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[19] Pertaining to the good faith factor, the majority stated: "The Judge also erred in stating that the parties had entered stipulations with respect to two penalty factors. 40 FMSHRC at 495 n.15 ("[f]rom the parties' stipulations, it is noted that the factors of good faith and ability to continue in business did not impact the penalty determination."). It is clear from the record that they *had not* entered into such stipulations. The parties' joint stipulations have no reference at all to either good faith abatement or the impact of a $68,300 penalty." *Solar Sources*, 42 FMSHRC ___, slip op. at 8, 2020 WL 1890528 at *6. *The Court erred in its remark that there were stipulations on those two factors. There were not such stipulations*. However, regarding one of those two factors, the Commission then added that "Solar Sources did not contend that payment of the penalty would affect its ability to stay in business," leaving the need to further address "the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation." *Id.* at 7 and n.10.

Although, in the Court's view, this is sufficient to find that no reduction in the penalty is warranted in this instance on good faith grounds, the testimony of the Respondent's own witness further demonstrates the correctness of this conclusion. Solar Sources Safety Director, Steven Fields, testified, regarding what changes occurred following the incident, that "MSHA ***made us*** submit a ground control plan or revised ground control plan. …that's what **we had** to do. ***We had to*** revise that so it basically put[] at least 20-foot or minimum 20-foot between the berm and then another berm and then the spoil bank." Tr. 516-517 (emphasis added). Although his answer was clear (and unhelpful to any claim of good faith), Counsel for Respondent continued, "[t]hen why would you -- why did you do that?" *Id*. Fields repeated, "**They made us do it**." *Id.* (emphasis added). With another self-inflicted wound, Counsel asked, "[d]o you believe personally that it's a better system?" *Id*. (emphasis added). "Yes," Fields responded with a thud. *Id.*

Violation History

This penalty factor provides "[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations." 30 U.S.C. §820(i).

The majority has expressed that the "record contains highly relevant evidence regarding the operator's violation history. Yet, the Judge did not engage in any analysis and did not make any finding on the possible significance of such evidence. The Judge merely references Government Exhibit P-2."[20] *Solar Sources*, 42 FMSHRC ___, slip op. at 7, 2020 WL 1890528 at *6.

In this respect, that is, the Respondent's violation history, the majority did not disguise their view that a history as the Respondent's here:

> may be highly relevant to incentivizing compliance [and that at least in this case] it is error to ignore the history of violations in imposing a penalty merely by noting an exhibit in the record…. [and that] an operator's history of few violations is relevant in considering the assessment of higher penalties.

Id. at 7, n. 9, *6, n.9. And so, the majority stated this, i.e. the significance of the history of violations, is a question of fact for the Court to resolve.

[20] Even as to that exhibit, P-2, the majority commented that "[i]ronically, that exhibit reveals a positive compliance record in that the operator had not had a berm violation in six years and only two such violations in its entire history. It did not have any unwarrantable failures in the 15 months preceding the citation. In fact, the operator had received only 19 citations under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for which it was penalized a total of $13,276." *Solar Sources*, 42 FMSHRC ___, slip op. at 7, n.8, 2020 WL 1890528 at *6, n. 8. In that regard, the majority stated that an operator's past history of significant violations should be considered in considering assessing higher penalties. …[and that] [b]y parity of reasoning, an operator's history of few violations is relevant in considering the assessment of higher penalties." *Id.* at 7-8, n.9, *6, n.9.

Commission cases regarding the violation history factor

The Commission has stated that it is appropriate to broadly consider an operator's general history of all violations:

> the language of section 110(i) does not limit the scope of history of previous violations to similar cases. …'section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component.

Secretary of Labor and United Mine Workers of America v. Jim Walter Resources, Inc., 18 FMSHRC 552, 556–57, (citing *Peabody Coal Co.,* 14 FMSHRC 1258, 1264 (Aug. 1992))("*Peabody*")(emphasis in original). Thus, in a case involving interference with walkaround rights, the operator's history is not only to include other violations involving discrimination but the mine's general history of violations is to be included, as well.[21] In the same case, the Commission also inferentially remarked on the appropriateness of considering the operator's general history of previous violations, observing that the " judge failed to consider the operator's general history of previous violations submitted into evidence by the Secretary as the Assessed Violation History Report." *Id.* at *557.

The Commission has also indicated that it wants more particularity from a judge when evaluating this factor. In *American Coal* (2016), it was critical of summarily addressing a violation history. In its remand, the Commission instructed that the Judge must make a finding as to the history of violations pertaining to the cited violation. *The American Coal Co.*, 38 FMSHRC 1987, 1997–98. In that case, the Commission also expressed that a review of the general history of violations is appropriate, and if the judge had not considered a specific violation history, it was in that case harmless error. Thus, the mine's general history is to be considered, "not just to violations of a kind similar to the one giving rise to the penalty assessment." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 995 (Dec. 2006).

Consistent with the majority's overall language about the judge's role in assessing a penalty, then Chairman Commissioner Jordan and former Commissioner Nakamura expressed that although Wade challenged whether the Secretary appropriately calculated its violation history, it was unnecessary to address that contention as the Administrative Law Judge made an independent determination of the penalty which was supported by substantial evidence and within the judge's discretion. *Wade Sand & Gravel,* 37 FMSHRC 1874, 1881–83 (Sept. 2015). Thus the key upon review is whether the judge determined the penalty pursuant to section 110(i) of the Mine Act, independently of the Secretary's Part 100 regulations. In favoring a wider aperture of a mine's violation history, the concurrence in *Wade* took note of:

> **the deterrent purpose** behind the Mine Act's penalty procedures. The D.C. Circuit's discussion of the legislative history behind this criterion in *Coal*

[21] The Commission did seem to place a partial limitation on the appropriate breadth of this criterion, remarking that, "[t]he appropriate weight, if any, to be attached by the judge to older violations should be based on relevancy." *Id.*at *557. The Court addresses the relevancy of the Respondent's other berm violations in this Remand Decision.

> *Employment Project v. Dole*, 889 F.2d 1127 (D.C. Cir. 1989), highlights this point. … [observing that] "[t]he court stated that Congress "was intent on assuring that the civil penalties provide an effective deterrent against offenders *with records of past violations*" and concluded that the Mine Act and legislative history required MSHA to consider *all* violations under the history of violations criterion.

Id. at 1133, 1138. (emphasis added).

In its *Cantera Green* decision, a case in which a mine did not have a recent history of similar violations, and had 18 violations in the previous two years, consistent with the cases cited above, the Commission therein noted that "the language of section 110(i) does not limit the scope of history of previous violations to similar cases." 22 FMSHRC 616, 623–24 (May 2000) (citing *Sec'y of Labor on behalf of Johnson v. Jim Walter Resources, Inc*., 18 FMSHRC 552, 557 (Apr. 1996)). The Commission added that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component." *Id.* at 623 (citing *Peabody Coal Co*., 14 FMSHRC 1258, 1264 (Aug. 1992)) (emphasis in original). The Commission expressed that a judge should evaluate whether that history was high, moderate, or low. *Id.* (citing *Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co*., 20 FMSHRC 1293, 1305, n.14 (Dec. 1998)).

Of relevance to this Solar Sources matter, the Commission expressed that a history of similar violations may demonstrate that the operator had *prior knowledge of the specific safety or health standard cited*. It rejected the argument that it amounted to an improper consideration of the history of violations by counting it twice -- once when considering the general history criterion and a second time in consideration of the negligence criterion -- explaining that such consideration was not improper or duplicative because the purpose of the two criteria are different. *Peabody* 14 FMSHRC 1258, at 1264, (Aug. 1992).

Hearing references to the Operator's History of Violations.

Counsel for the Secretary referenced Ex. P 2, which is MSHA's certified history of violations.[22] Tr. 12. Respondent's Counsel did not challenge the admissibility, nor the accuracy of Ex. P 2. Rather, Respondent pointed to Ex. P 2 in support of Solar Sources' contention that its violation history should constitute a favorable element in any penalty determination. In that regard it noted that the Respondent had only four unwarrantables in its history. During the second day of the hearing, the Respondent revisited the violation history issue. Steven Troy Fields[23], has been the Respondent's safety director since 2008. Tr. 486. Asked about similar violations at the Shamrock Mine *in the recent past*, Fields responded there had not been any in

[22] Respondent's attorney challenged that this violation was specially assessed, believing that it should not have been, in part because of the mine's low violation history. Tr. 31- 32. Per the majority opinion, the Court's consideration of the mine's violation history is based on that history alone. That is to say, the Court does not, in considering that factor (or any of the penalty factors), weigh, in that evaluation, that the violation was specially assessed.

[23] Mr. Fields, during a portion of his career, had been an MSHA inspector. Tr. 486.

the recent past. Tr. 498. However, there had been such similar violations in 2008 "and possibly, like, 2010, 12 or '11." *Id.*

In the Respondent's post hearing brief, though speaking in the context of whether there was an unwarrantable failure, the Respondent stated:

> The purpose of evaluating the number of past violations is to determine the degree to which those violations have 'engendered in the operator a heightened awareness of a serious . . . problem.' *San Juan Coal Co*., 29 FMSHRC 125, 131 (Mar. 2007), citing *Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1232 (June 1994). … [and] even if the Court should agree that the berm did not comply with [the] cited standard, there is no evidence that Solar Sources was on notice that greater efforts are necessary for compliance. There is no evidence of any berm violations in this operator's history, at least since 2010 or 2011. Tr. Vol. II, pp. 498. Inspector Noel admitted he found no other berm citations in the mine's recent violation history. Tr., Vol. I, p. 272.

Resp't Br. at 29-30. Respondent added on this topic that "there is no excessive history of violations or repeated noncompliance with the cited standard. In fact, the only evidence of any berm violations occurred in 2008 and 2010-2011, according to the Director of Safety, Troy Fields. Tr., Vol. II, pp. 498-499." Resp't Br. at 34.

In Respondent's post hearing reply brief, it essentially repeated its previous arguments on this factor, again with an eye toward its displeasure that the violation was specially assessed, remarking that:

> [t]he Mine's Citation History, attached as the Secretary's Exhibit P-2 further establishes this citation should not have been specially assessed. In the 15 months prior to this citation, the mine had 19 104(a) citations assessed at a total of $13,276. There were no unwarrantable failures in that 15-month period; only nine citations were significant and substantial and six citations were assessed at the minimum $100 penalty. In fact, only two citations were assessed above $1,000. (Secretary Exhibit P-2).

Resp't Reply Br. at 17.

Discussion of the history of violations factor

There is no evidence of any berm violations in this operator's *recent* history, at least since 2010 or 2011. Tr. Vol. II, pp. 498. Inspector Noel admitted that he found no other berm citations in the mine's recent violation history. Tr., Vol. I, p. 272. Resp't Prehearing Br. at 29. Then, later in R's Brief: "Third, there is no excessive history of violations or repeated noncompliance with the cited standard. In fact, the only evidence of any berm violations occurred in 2008 and 2010-2011, according to the Director of Safety, Troy Fields. Tr., Vol. II, pp. 498-499." Resp't Prehearing Br. at 34. Depending how one defines "recent history," one must bear in mind that *the berm collapse here occurred in June 2016*. Thus, while not recent, berm violations in 2010 or 2011 are not ancient either.

The Court has considered the testimonial evidence and the lone exhibit regarding this issue. Based on the record and the contentions, the Court finds that the Respondent's violation history does not warrant a reduction in the penalty assessed for this violation. At most, any reduction should be minimal. There are a number of reasons for this. First, as Respondent admits and one of its witnesses acknowledged, the mine *has* in fact been cited for berm violations in the past. That there were no berm violations in the *recent* past is not a winning argument, at least to this Court. By having any berm violations in its history, and noting that those violations were not ancient by any means, the Respondent should not be awarded with a penalty reduction on that account. From that point on, with a witness for the Respondent stating that there had been such similar violations in "2008 and possibly, like, 2010, 12 or '11," the Respondent was obligated to be vigilant to berm issues. Tr. at 498. Testimony of Steven Troy Fields, Respondent's safety director since 2008. Such berm awareness should not have a *de facto* expiration date. Thus, the Court does not agree with the assertion that Solar Sources was not on notice that greater efforts were necessary for compliance, on the grounds that there was no evidence of any berm violations in this operator's history, at least since 2010 or 2011.

Further, while the Respondent has noted that it has few unwarrantables in its history, one must recall that "unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Sec. v. Consol Pennsylvania Coal Co*., 39 FMSHRC 1893, 1908 (Oct. 2017). Thus, one does not effectively receive a violation history award by having few unwarrantables. They're not supposed to happen and negligence itself is not tantamount to well-received conduct. Last, the Court has already found that *there was an unwarrantable failure* with *this* berm violation.

Just as the majority has emphasized that, while *the Secretary's* violation history may look at a two year history, *it's up to the Court*, in its role of being the first to independently consider any penalty factor, to decide *on its own* the appropriate range of a mine's violation history. Further, in the Court's view, given the extreme gravity and negligence involved, reducing the penalty on that basis, at least under these facts, would distort an appropriate penalty. Thus, per the majority's view, the Court is considering the interrelationship between the mine's violation history and the other penalty factors. In addition, the applicable provision, 30 U.S.C. §820(i) directs only that "the Commission shall *consider*" the operator's history of previous violations. This does not mean that a history which has a modest or small number of violations necessitates a lower penalty. *Id.* (emphasis added). The Court has considered the operator's violation history and reached the conclusion, for the reasons just articulated, that a penalty reduction is not warranted on that account.

Size of the operator: the appropriateness of such penalty to the size of the business of the operator

This factor and the next, the effect on the operator's ability to continue in business, will only require a very brief discussion.

The penalty factor of size provides "[i]n assessing civil monetary penalties, the Commission shall consider … the appropriateness of such penalty to the size of the business of the operator charged." 30 U.S.C. §820(i).

Government Exhibit A, an official government business record reflecting the Respondent's size, informs under "Mine Tonnage" **1,181,122 tons**, and for "Controller Tonnage," **2,195,076 tons**. (emphasis added). Government Exhibit A was not challenged by the Respondent. There were no other references in Volume 1 or 2 of the transcript to this penalty factor. As mentioned, on April 22, 2020, the Court convened a conference call with the parties to discuss the penalty factors for which the Commission directed greater attention by the Court upon remand. Email responses to those factors were received by the parties in advance of the conference. Responding to this factor, the Respondent cited to the figures in Government Exhibit A and the Secretary referred to the figures in that Exhibit as well.

Per 30 C.F.R. §100.3(b), "[t]he appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year." Solar Sources Shamrock Mine is a surface coal mine. Under Table I and II, a mine that produces over a million tons of coal is a large mine, earning 14 penalty points on a scale where points can range from 1 to 15 points and a controlling entity of the Respondent's size earns 4 penalty points on a scale where points can range from 1 to 10.

However, the Court is not wedded to Part 100's tables. Instead, as with each of the penalty factors, the Court independently evaluates this factor, consistent with Commission decisional law. In so doing, the Court finds that a mine which produces over a million tons of coal per year is undeniably a large mine. This unchallenged million-plus tons figure is taken into account by the Court, and as a consequence in determining the penalty factor of size, the Court concludes that the Shamrock Mine is a large mine. Thus, this factor weighs toward a larger penalty in considering size among the statutory penalty factors.

Accordingly, by any measure, Respondent Solar Sources is a large mine and so that factor does not work to provide a downward figure in the penalty to be assessed in this case.

Ability to continue in business.

This last factor for consideration under the remand is set forth in Section 110(i) of the Act, which speaks to the effect on the operator's ability to continue in business.

In this regard, the Commission specifically raised the ability to continue in business criterion, stating:

> [b]ecause Solar Sources did not contend that payment of the penalty would affect its ability to stay in business, the mistake as it relates to that particular penalty criterion was harmless error. In *Sellersburg* , [citation omitted] the Commission

> held, 'In the absence of proof that the imposition of authorized penalties would adversely affect its ability to continue in business, it is presumed that no such adverse effect would occur.

Solar Sources, 42 FMSHRC ___, slip op. at 8, n.10, 2020 WL 1890528 at *6, n. 10. Here, while the Court is unable to determine what the Commission was referring to when it stated that "*the mistake* as it relates to that particular penalty criterion was harmless error," it apparently meant *the Court's mistake* but that, as Solar Sources did not contend the penalty would affect its ability to continue in business, such error was harmless. *Id.* (emphasis added).

In response to the Court's conference call inquiry regarding this factor, the Respondent answered that "Solar Sources did not contest the ability to continue in business." This admission is consistent with the response from the Secretary asserting that the Respondent waived this argument when they did not argue it in their briefs. They noted that it is one of the penalty elements, but did not argue the Respondent would not be able to continue in business if the penalty remained. Although these comments are sufficient to put to bed any claim that this factor needs to be weighed in assessing the penalty here, the Majority itself has acknowledged that it is a non-issue.

The Court's considered redetermination of the penalty for the berm violation

Before getting into the details of the Court's penalty determination, it is important to refresh the reader about some critical facts involved in this matter.

As stated in the Court's initial decision,

> On June 29, 2016, while backing in, a dump haul truck [driver, Shawn Standish] overtraveled the berm at a dumping location, [with the truck] going over the embankment to the slurry pit some 47.75 feet below, [and] landing upside down. The driver jumped from the haul truck before it went over the embankment but received significant injuries from his escape.

Solar Sources, 40 FMSHRC 462 (Mar. 29, 2018) (ALJ).

Words can only convey so much and for that reason the Court has included in the Appendix to this Decision Upon Remand two photos. Those photos convey the significant size of the dump truck and where it ended up in the slurry pit. It does not take much imagination to comprehend Mr. Standish's certain fate had he not leaped from the truck as the berm collapsed.

Mr. Standish's testimony included the following description of his harrowing escape, testifying that he:

> made a decision to set the blade back down, throw it in neutral, and grab my seat belt off at the same time and grabbed the door handle. I had a quick thought to jump off, but I knew I couldn't -- I didn't think I could get off the chain, so I thought, no, I had to go off the front. And it's a real quick thinking, … so straight out the door. And then the seat belt kind of -- I remember feeling it on my shoulder kind of catch. And I had to move my arm back like such kind of down

> back behind me a little bit, and then I -- I ran completely off the end of the catwalk.

Tr. 460.

Mr. Standish continued:

> [a]fter I landed, my right foot was out in front of my left foot, because I was just running off like an American Olympic, and I rolled to my right. And when I did, I turned my head and looked back, and then I saw the front of the truck going on over down the pit.

Id.

The Court then inquired: "And d[id] you actually see it flip over as it heads off?" Standish replied, "Yes." Tr. 461. The Court continued that it was "impressed that [he] had the presence of mind to jump off the truck. That was a good move, right? *Because as you say, not only was the risk of if you stayed in the truck, but apparently, you could have been engulfed in material even if you were in one piece when the truck finally came to rest, right? That was -- the material sucks you up, you could have suffocated*?" Again, Standish responded, "*Yes*." Tr. 465 (emphasis added).

Speaking to the seriousness of his injuries, Standish related that he "had operation[s] on -- on two feet with steel and casts on both of [his] legs. I was on some very, very strong medication." Tr. 478. Having observed Mr. Standish take the witness stand, the Court then asked, "Are you having trouble walking because of your heel still, or is this residual from your heels?" Standish responded, "Yes, sir. …**There's two donors bone and a steel plate with ten screws that holds this foot together.** And like this morning, it takes a little bit to get going in the mornings, sir." Tr. 483-484 (emphasis added). Observing the witness, as the Court did, as he took the stand, Mr. Standish's remark that "it takes a little bit to get going in the mornings" was an understatement.

It is also of note that the Court's finding of a violation was upheld. In this Court's decision, the section 104(d)(1) citation alleging a violation of 30 C.F.R. §1605(1), pertaining to berms was affirmed. That standard, titled, "Loading and haulage equipment; installations," provides at subsection (1) "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

The Citation alleged that:

> [t]he berm where the overtravel occurred was constructed of the slurry material. This material would not compact enough to create a substantial means of stopping overtravel. The mine operator has engaged in aggravated conduct by failure to ensure adequate berms were in place in an area known to have constant problems with maintaining berms. This violation is an unwarrantable failure to comply with a mandatory standard.

40 FMSHRC 463.

As further explained in this Remand Decision, the Court found that though initially the berm was constructed of substantial material, Solar Sources failed to maintain it, resulting in its collapse.[24] *Id.* at 465, 492.

Accordingly, this decision upon remand speaks primarily to the penalty factors identified by the majority as insufficiently addressed by this Court and the Court's redetermination of the penalty, all as instructed by the majority for it to perform.

There is a second important matter which needs to be addressed before the Court speaks to its penalty determination. In view of the Remand's directions, the Court initiated a conference call with the parties for the purpose of confirming that it had all the parties' submitted information from the hearing testimony and their post-hearing briefs, *regarding the four penalty factors* the Court has been directed to consider in this Decision Upon Remand. Though *not* requested by the Court, in advance of the April 23, 2020 conference call, Counsel for the Respondent nevertheless included his contention "MSHA Should Be Required To Produce The Special Assessment Worksheet That Shows The Regular Assessment." Resp't Email to the Court, April 17, 2020.

Respondent's Counsel continued:

> As noted by the Commission, the Secretary refused to produce the special assessment worksheet, that establishes the regular assessment based on the Part 100 table. This Court should order the Secretary to produce the Special Assessment Narrative Form before deciding the revised penalty here. [citing] Commission Decision, p. 9, footnote 13. While the Commission decision on remand clarifies the Special Assessment does not control the process, the Commission notes you should have the calculation form that shows the regular assessment amount.

Id.

The Commission footnote cited by Respondent's counsel stated:

> The portion of the Secretary's "Special Assessment Narrative Form" used to derive the amount of the special assessment penalty proposal does not appear in this record. It was, however, provided to the mine operator in *AmCoal I*. 38 FMSHRC at 1996. The Secretary bears the burden of justifying his penalty proposal under the criteria, and "[w]hen a violation is specially assessed that obligation may be considerable." *Id.* at 1993. Providing a rationale for a special assessment is essential to providing more clarity to the Judge, and to the Commission on review, and the Secretary is obliged to provide more than an opaque process and a secret theory of the case. *See Sellersburg*, 5 FMSHRC at

[24] As this Court found in its initial decision: "It is also worth noting that the issue is not whether the berm originally was made of shot rock; the Secretary agrees that, as originally constructed, it was likely substantial and made from shot rock. Rather, it's a question of whether it was properly maintained or allowed to deteriorate, *with the Court finding that the latter occurred*." *Id*. at 492 (emphasis added).

292-93 (explaining that requirement to discuss penalty criteria is necessary to provide adequate foundation for review).

Solar Sources, 42 FMSHRC ___, slip op. at 9, n.13, 2020 WL 1890528 at *7, n. 13.

There are several problems with Respondent Counsel's assertion. To begin, the footnote from the majority in their remand for this matter, which Respondent's Counsel relies upon, *does not* say that the Secretary should supply a regular Part 100 assessment. And, the citation by the majority in that footnote to the Commission's decision in *Sellersburg* doesn't suggest that either. Why is that the case? Because, for starters, as far as one can tell, that case did not have a Special Assessment, at least neither the judge, in his decision, which was all of four pages, made no reference to that. Nor, for that matter, did the judge refer to Part 100 at all in his decision. *See,* 4 FMSHRC 1362-1366 (July 1982).[25]

Nor did the Commission, in its *Sellersburg* decision on appeal of the trial judge's decision, suggest that there were any Narrative Findings for a Special Assessment. It is true that the Respondent in that case did "request[] that new penalty calculations and findings consistent with 30 C.F.R. Part 100 be made." *Sellersburg* at 290. But the Commission was having none of it. Instead, it explained how the penalty process works when a mine operator contests a proposed assessment, informing:

> it is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties *are* <u>*separate and independent*</u>. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a penalty based on record information developed in the course of an adjudicative proceeding.

Id. at 291 (emphasis added).

Accordingly, it is more than a stretch to assert that the Commission Majority in this remand is now suggesting that it can require the Secretary to submit a regular penalty assessment calculation when the Secretary has decided to use his Special Assessment procedure. That the majority has been critical of the Special Assessment method vis-à-vis regular assessments is one thing, but at least to this Court, it would be an entirely different matter for the majority to direct the Secretary to provide a regular assessment calculation, when the Secretary has decided against that route. The Secretary and the Commission each have their own domains. Besides, as the *Sellersburg* decision informs, "in a contested case the Secretary's penalty proposals are not binding on the Commission or its judges. Thus, the penalties assessed *de novo* in a Commission proceeding appropriately can be greater than, less than, or the same as those proposed by the Secretary." *Id.* at 293.

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[25] The Court made an email inquiry with the Commission's docket office in search of the underlying documents for the *Sellersburg* dockets. The docket office informed that no such documents were available, being advised that "e-CMS doesn't go back that far. Nor does CTS for that matter. … the petitions for all of dockets that old have been destroyed. The Commission's docket retention is only six years after disposal." Email response from Docket Office April 27, 2020.

Summary of the Court's Independent Assessment of the Penalty Factors

In assessing penalties de novo, it is within the discretion of the Commission, and thus of its judges acting in the first instance, to accord different weights to the six penalty factors. "[T]here is no requirement that equal weight must be assigned to each of the penalty assessment criteria … [but] all six statutory criteria must at least be considered in assessing civil penalties…" *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). The Court has applied greater weight to the negligence and gravity penalty factors and determined that the modest violation history over the past two years should not operate to bring about a net negative reduction in the penalty assessed, especially when considered with the other statutory penalty factors, all as set forth with detail in this decision upon remand.

Negligence

The Court in its March 2018 decision detailed its findings regarding Solar Sources' negligence. Those findings, which the majority did not take issue with, are reaffirmed here. As the majority noted, this Court analyzed two of the six statutory criteria: operator negligence and the gravity. *Solar Sources*, 42 FMSHRC ___, slip op. at 7, 2020 WL 1890528 at *5. Finding the negligence to have constituted an unwarrantable failure, the negligence associated with this violation was of the highest order for this penalty factor and thus points to the highest penalty the Court may impose.

Gravity

Here too, as with the negligence factor, the gravity factor, as found by the Court in its March 2018 decision was of the highest level. If not for Mr. Standish's wise decision to exercise self-help, in what was literally a leap for life moment, a fatality would almost certainly have been the result. The photographs in the Appendix and the testimony leave no other rationale conclusion. Further, his leap did not leave him unscathed, not by a long shot. His testimony and his difficulty ambulating as he took the witness stand plainly established that he has significant health residuals. Accordingly, for this factor too, the gravity associated with this violation was also of the highest order for this penalty factor and thus points to the highest penalty the Court may impose.

Good faith

As described in detail above, to put it simply, the Respondent displayed zero good faith, as that term is described among the statutory penalty factors. Accordingly, the Respondent is entitled to nothing in terms of any penalty offset or reduction based on that penalty factor. The Respondent sealed its own fate in this regard, noting that the actions it took subsequent to the berm collapse resulted because MSHA *made it* take those steps. Therefore, the idea of a good faith penalty reduction in this instance is inimical to the concept.

Size of the Operator

Here, little needs to be said for this penalty factor. There is no disagreement between the parties: Solar Sources, by measure both of mine and by controller tonnage is a large mine. Attachment A to the penalty petition. Therefore, there is no downward penalty impact for this factor regarding this operator.

Ability to Continue in business

Respondent has conceded that, even when there were originally two violations involved, a (d)(1) citation and a (d)(1) order, each assessed at $68,300 by the Secretary, such proposed penalties would not threaten its ability to continue in business. Accordingly, there is no downward impact on the penalty imposed upon consideration of this penalty factor.

History of Violations

Regarding the operator's violation history, the majority expressed that Gov. Exhibit P 2 reflects:

> a positive compliance record in that the operator had not had a berm violation in six years and only two such violations in its entire history. It did not have any unwarrantable failures in the 15 months preceding the citation. In fact, the operator had received only 19 citations under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for which it was penalized a total of $13,276.

Solar Sources, 42 FMSHRC ___, slip op. at 7, n.8, 2020 WL 1890528 at *6, n. 8.

On this topic, the Commission also stated that "consistent with the graduated enforcement scheme of the Act, an operator's past history of significant violations *should be considered* in considering assessing higher penalties. … . By parity of reasoning, an operator's history of few violations is relevant in considering the assessment of higher penalties." *Id*. at 7-8, n. 9, *6, n.9 (emphasis added). As set forth in this decision, the Court has *considered* the operator's two year violation history.

In this respect, that is, the Respondent's violation history, the majority did not conceal their view that, as noted earlier, a history as the Respondent's here,

> may be highly relevant to incentivizing compliance [and that at least in this case] it is error to ignore the history of violations in imposing a penalty merely by noting an exhibit in the record…. [and that] an operator's history of few violations is relevant in considering the assessment of higher penalties.

Id. at 7, and n. 9, *6, n.9.

And so, the majority stated this, i.e. the significance of the history of violations, is a question of fact for the Court to resolve.[26] The majority has indicated that a downward penalty impact should be "considered." The Court has considered the operator's violation history, but, as explained, in performing its independent review of that history, it rejects the merit of the perspective that it deserves a downward penalty adjustment for that factor, *as applied in this instance*.

As described in greater detail above, it is true that in the past two years Solar Sources has had a modest number of violations, with Ex. P 2 reflecting some 19 violations over that period. However, just as the majority has noted, the Court is to independently determine the relevant violation history and come to its own conclusions about that history in evaluating that penalty factor. From the Court's perspective, the violation history does not especially aid the Respondent when considering this factor. The reason for this is the Respondent's admission that it has had prior berm violations, apart from the monumental berm violation involved here. Those prior berm violations are not, in the Court's independent evaluation, ancient history, as they occurred in 2008 and 2010-2011, according to Respondent's witness Mr. Fields, as described above. In the Court's view, those relatively recent berm violations should have triggered continued vigilance about the mine's berms. While not within the past two years of this violation, the Court does not consider them to have passed an expiration date, as it were. Although the Secretary has apparently decided to look at a two year period, as the majority has made clear, the Commission and its judges are not so constrained. The Court concludes that only a small downward penalty adjustment is due upon consideration of this factor. Further, that is more than offset by consideration of the other five penalty factors, each of which points in the opposite direction.

The Court's Determination of an Appropriate Civil Penalty

The Majority has noted that:

> [i]n assessing a penalty *de novo*, a Judge is neither bound by the Secretary's Part 100 regulations nor by the originally proposed penalty. *See Sellersburg Stone Co.*

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[26] It is noted that Commissioner Jordan, in her dissent, took issue with this expression by the majority, stating:

> Regarding the operator's history of violations, in *Sellersburg*, the Secretary had entered an exhibit into evidence indicating the number of violations charged and penalties for violations paid during the relevant two-year period. *Sellersburg Stone Co*., 5 FMSHRC 287, 294 (Mar. 1983). The Commission determined that therefore the operator had at least a moderate history of previous violations. *Id.* In this case, the Secretary entered a similar exhibit into evidence, Ex. P- 2, to which the Judge referred when referencing the operator's violation history. Solar Sources has never challenged the accuracy of this information. Although my colleagues assert that the Commission cannot make its own findings on this factor, slip op. at 8, I conclude that, given that there remains no factual dispute regarding the violation history, the parties' disagreement as to the significance of the uncontroverted evidence is not a reason to remand the case.

Solar Sources, 42 FMSHRC ___, slip op. at 33, n. 5, 2020 WL 1890528 at *26, n.5.

> *v. FMSHRC*, 136 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983)("*Sellersburg*"). Judges are accorded broad discretion to assess civil penalties, but their decisions must reflect proper consideration of the section 110(i) penalty criteria. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). The Judge must provide an explanation if the penalty assessment substantially diverges from the Secretary's proposed regular assessment.[27] *Sellersburg,* 5 FMSHRC at 293. The Commission reviews the Judge's penalty determination under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000).

Solar Sources, 42 FMSHRC ___, slip op. at 4, 2020 WL 1890528 at *3.

Referring to *Sellersburg*, the Commission stated that the Judge:

> must make [f]indings of fact on ***each of the statutory criteria*** [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.

Id. at 4, *3 (citing 5 FMSHRC at 292-93) (italics in original, bold added).

However, the majority then noted that "the findings and explanations relating to a penalty assessment do not have to be exhaustive, [but] they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." *Id.* at 4, 10, n. 14, *3, 7, n.14 (citing *Cantera Green,* 22 FMSHRC 616, 621 (May 2000)). The majority also referred to Commission Procedural Rule 30(a) and its provision that Judges' decisions "shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid." *Id*. at 5, n. 5, *4, n.5. *See also,* 29 C.F.R. § 2700.30(a).

In subpart 3(c) "Special assessments," and its "Guidance to Judges" in the majority's opinion, it endorsed that a Special Assessment is a "litigation proposal." As such, favorably considering "the agency's proposal for a high penalty is subject to the Secretary's presentation of proof of facts warranting a high penalty." *Solar Sources*, 42 FMSHRC ___, slip op. at 17, 2020 WL 1890528 at *13. In taking that stance, the majority stated that the principle in *Sellersburg* regarding "substantial divergence" does not apply where a Special Assessment is used. In such instances, the majority instructs that "the entire focus of a Judge's independent penalty inquiry must be on the factual findings as they relate to the penalty criteria, rather than on the amount sought by MSHA." *Id*.

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[27] One needs to be acutely aware of the context for this quote in the Majority's Remand. Both in this quote and where the "substantially diverges" phrase appears a second time in the Remand, the Majority is speaking about a *regularly assessed* penalty and doing so as a baseline explanation of the penalty proposal process. *See Solar Sources*, 42 FMSHRC ___, slip op. at 13, 2020 WL 1890528 at *10. There was *no* proposed regular assessment in this case and, for the reasons explained, it is not the affair of the Commission to direct the Secretary as to which procedure he decides to employ, regular or Special Assessments, in proposing penalties.

This translates into the majority's view that, in Special Assessments, "MSHA 'bear[s] the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria.'" *Id.* Then, the majority adds, "[w]hen a violation is specially assessed, that obligation may be considerable." *Id*.

In discussing its Special Assessment guidance to judges, the majority again references the D.C. Circuit's opinion in *American Coal*, 933 F.3d at 727, referring to that court's remark that "MSHA did not bear any 'burden' with respect to a penalty and backhanded MSHA's penalty assessment as if it were unimportant – an impotent litigating position." *Solar Sources*, 42 FMSHRC ___, slip op. at 17, 2020 WL 1890528 at *13. The majority then explained that:

> [i]t is necessary to understand, therefore, that when the Commission used the term 'burden' in *AmCoal*, 38 FMSHRC at 1993, it did not do so in terms of a preponderance of proof standard of review. Instead, the Commission meant that, in seeking to sustain the litigating position regarding a special assessment-that is, an especially large penalty-the Secretary must present evidence to sustain, in the Judge's discretion, the need for a large penalty.

Id.

In *Mining & Property Specialists,* a case in which the judge's conclusion regarding operator negligence, which conclusion was supported by substantial evidence, the judge gave greater weight to the negligence factor, an action plainly permitted by Commission case law. 2011 WL 6326020 (Dec. 2011) (citing *Spartan Mining Co*., 30 FMSHRC 699, 724, 725 (Aug. 2008))("*Spartan*") (upholding judge's increase of Secretary's proposed penalty **by 711%, (seven hundred and eleven percent) from $3,700 to $30,000**, in which the judge gave increased weight to the factors of gravity and negligence and because the judge explained his disagreement with Secretary's conclusions as to gravity and negligence and gave those factors increased weight). *Spartan* at *22.

The majority, in its remand, noted *Spartan* with approval. The Majority added that "[i]t is not possible to enunciate a precise formula for recitation of penalty factors that would fit all cases. Consequently, as must be obvious, the evaluation of compliance with the requirement for an adequate review of all criteria is case-specific." *Solar Sources*, 42 FMSHRC ___, slip op. at 6, 2020 WL 1890528 at *5. The majority added, "Each decision must be case-specific, and the Commission's decision turns on whether the Judge's exposition of the penalty factors permits the Commission to determine that the Judge has fully considered the penalty criteria individually and in relationship to one another." *Id.*

All penalty factors are not created equal. Especially in an egregious case as this one, the negligence and gravity factors must dominant the penalty analysis. This only makes sense. For example, if a mine was a new operation and had no history, yet in short order it allowed a berm to deteriorate and the end result was an enormous accident with near fatal results, the impact of the history of violation, while considered, should be at the vanishing point.

As the Commission also stated in *Spartan*:

> [t]he judge [ ] adequately explained the bases for his decision to assess a higher penalty than originally proposed. We held in *Lopke Quarries, Inc.,* 23 FMSHRC

> 705, 713 (July 2001), **that a judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria**. *Similarly, we hold here that it was certainly appropriate for the judge to raise the penalty significantly based on his findings of extreme gravity and unwarrantable failure*. 29 FMSHRC at 486-87, (emphasis added). Accordingly, we hold that the judge was well within his discretion in assessing a penalty of $30,000 for the section 75.313(a)(3) violation.

Spartan, 2008 WL 4287784 at *23 (emphasis added) (Commissioner Young, joining Commissioners Jordan and Cohen).[28]

The Court believes it has complied with this standard of penalty factor evaluation. And, in particular the Court believes that it has carried out this task *both* from examining the criterion individually and examining the factors *in relationship to one another*. Thus the Court's evaluation of the operator's history independently looked at that issue from both perspectives, concluding that no penalty reduction is due for that factor.

This approach is in line with the majority's direction that the Court is "to exercise his responsibility to conduct *an independent and reasoned analysis*, *using the record evidence*." *Solar Sources*, 42 FMSHRC ___, slip op. at 22, 2020 WL 1890528 at *16, (emphasis added).

> That analysis is to include findings of fact or meaningful explanation on each of the statutory penalty criteria, and particularly in this case, to make findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. The Judge should then reassess a civil penalty in accordance with the established Commission precedent of *AmCoal I*.

Id.

[28] "The judge found that Spartan violated section 75.313(a)(3) because Foreman Sada did not order his crew to retreat from the working section during the mine fan stoppage. …He determined that "[i]f McNeely had been withdrawn from the working section, instead of being allowed to repair an electrical cable while mine fan power was lost, he would not have been electrocuted." … Although the judge disagreed with the Secretary's conclusion that the violation was not S&S, he was not authorized to modify the order. ... The judge found that the gravity of the violation was "extremely serious" because permitting mine operations to continue during the hazardous period of no mine ventilation exposed eight miners to serious or fatal injuries. ... The judge concluded that the violation was properly designated as a result of unwarrantable failure because Sada's failure to withdraw the miners from the working section constituted reckless disregard of safety procedures. The judge assessed a penalty of $30,000, instead of the $3,700 proposed by the Secretary, [**a 711% penalty increase**] because of the grave nature of the violation and the reckless and conscious failure to withdraw miners from the working section. *Spartan* at *4 (citations omitted) (emphasis added).

The Court believes that in this decision upon remand it has carried out these responsibilities.

Upon consideration of the six statutory penalty criteria, and recognizing that the Respondent could have been subject to civil penalty up to $70,000.00, a figure available apart from the Secretary's Special Assessment figure of $68,300.00, the Court assesses a civil penalty of **$69,000.00**. Thus, the Court has followed the majority's instruction that it is to exercise its own responsibility to conduct an independent and reasoned analysis, using the record evidence.

Summary

The Court concludes that there has been substantial evidence to support its conclusions about the facts surrounding the violation and the associated special findings regarding the statutory penalty facts and the Court's basis for the penalty imposed. It is noted that in reviewing the judge's factual findings supporting the consideration of the various penalty criteria, the Commission applies the substantial evidence test. *Hubb Corp*., 22 FMSHRC 606, 609 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). The Commission has also recognized that in reviewing a judge's penalty determination, it need not come to the same conclusion as the judge, where it finds that substantial evidence supports the judge's finding. *Sec. v. Coal River Mining, LLC*, 32 FMSHRC 82, (Feb. 2010), 2010 WL 594840, at *12.

The majority has expressed that the test is "the Secretary's presentation of proof of facts warranting a high penalty," which it then restated as the obligation for "the Secretary [to] present evidence to sustain, in the Judge's discretion, the need for a large penalty." Remand at 17, 2020 WL 1890528 at *13. These responsibilities, the Court has concluded, the Secretary has met *writ large*.

The appropriateness of the penalty imposed can be highlighted with this example: If one were to hypothesize that all of the following obtained: a large mine, facing a penalty for which it is able to continue in business without effect, and with no significant violation history. Considering those assumptions, and then adding that there was no good faith at all on the operator's part and that the gravity was marked as highly likely, and the injury or illness that could reasonably be expected to be fatal, and the violation as S&S and the negligence as high, constituting an unwarrantable failure, it is the Court's view that there can be no doubt that the consideration of those two factors, gravity and negligence, should be the dominant drivers of the penalty determination. Taking into account the impact of a modest recent violation history, but as the Court is not restricted to only the previous two years of violations, it has determined that the penalty should not be reduced on that score in light of the fact that the mine had prior berm violations.

Per the majority's March 12, 2020 Decision remanding this matter to the Court, having carried out the instructions from that remand, the Court has reviewed its undisturbed findings regarding the gravity and negligence involved in this matter. Further, it has undertaken the *independent review* of the other four statutory factors, namely the appropriateness of such penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business, the operator's history of previous violations, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

The Court is appreciative of the majority's admonition that all of the statutory penalty factors must be considered and a rationale provided for the Court's independent conclusions about those factors. This close attention to each of the factors has borne fruit in this case. The Court should have looked more closely at the good faith factor in particular before issuing its initial decision. Now having independently more completely examined that factor, the Court realizes that the lack of good faith should have been discussed more fully, a correction made in this decision upon remand.

As described above, the operator is large and this is not contested. Similarly, it has been conceded that, even when there were originally two penalties involved, *each* then with a proposed assessment of $68,300.00, the operator did not contend that such penalties would have an effect on the operator's ability to continue in business.

In terms of the operator's violation history, the Court has concluded that no penalty reduction is warranted, on the basis of that factor, because the operator had previous berm violations, which violations the Court does not consider to have been ancient. Further, speaking to the majority's instructions that the Court is to consider the interrelationship between the penalty factors, the Court finds that both the gravity and the negligence weigh heavily against awarding a reduction on the basis of the operator's violation history. In particular, the Court notes that the Respondent admitted to being aware that berms were a constant problem, requiring constant attention. Further, even if one were to assume for the sake of argument that a reduction of some amount should be awarded on the basis of a modest penalty history, the Court, employing the majority's view that the interrelationship between the penalty factors should be considered, finds that the lack of any good faith more than offsets such a reduction.

Finally, addressing the factor of the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation, the Court has found, as described above, that there was no such demonstrated good faith. The Respondent's own witness admitted that the actions they took after the berm collapse were brought about because *it had to take those actions*, per MSHA's instructions. Accordingly, any reduction on that basis is undeserved and inimical to the meaning of the factor.

Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated and that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, **a penalty of $69,000.00 is imposed.** Cognizant that, at the time of this violation, the maximum penalty was $70,000.00, the Court does not believe that such an amount should be reserved to fatalities, though in this instance a fatality would almost certainly have resulted, but for the wise decision of Mr. Standish to take self-help by leaping from the huge dump moments before it fell down the slope to the slurry pit nearly 50 feet below. The Court finds that this violation was "especially egregious" for enforcement purposes.

ORDER

It is hereby ORDERED that the **Citation No. 9102704** in this decision is **AFFIRMED** as written. Respondent is **ORDERED** to pay the civil penalty in the total amount of **$69,000.00** within 30 days of this decision. [29]

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[29] Penalties may be paid 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.

APPENDIX

The truck involved. Photo reveals its undisputed large size by comparing it to the person and cars in the photo.

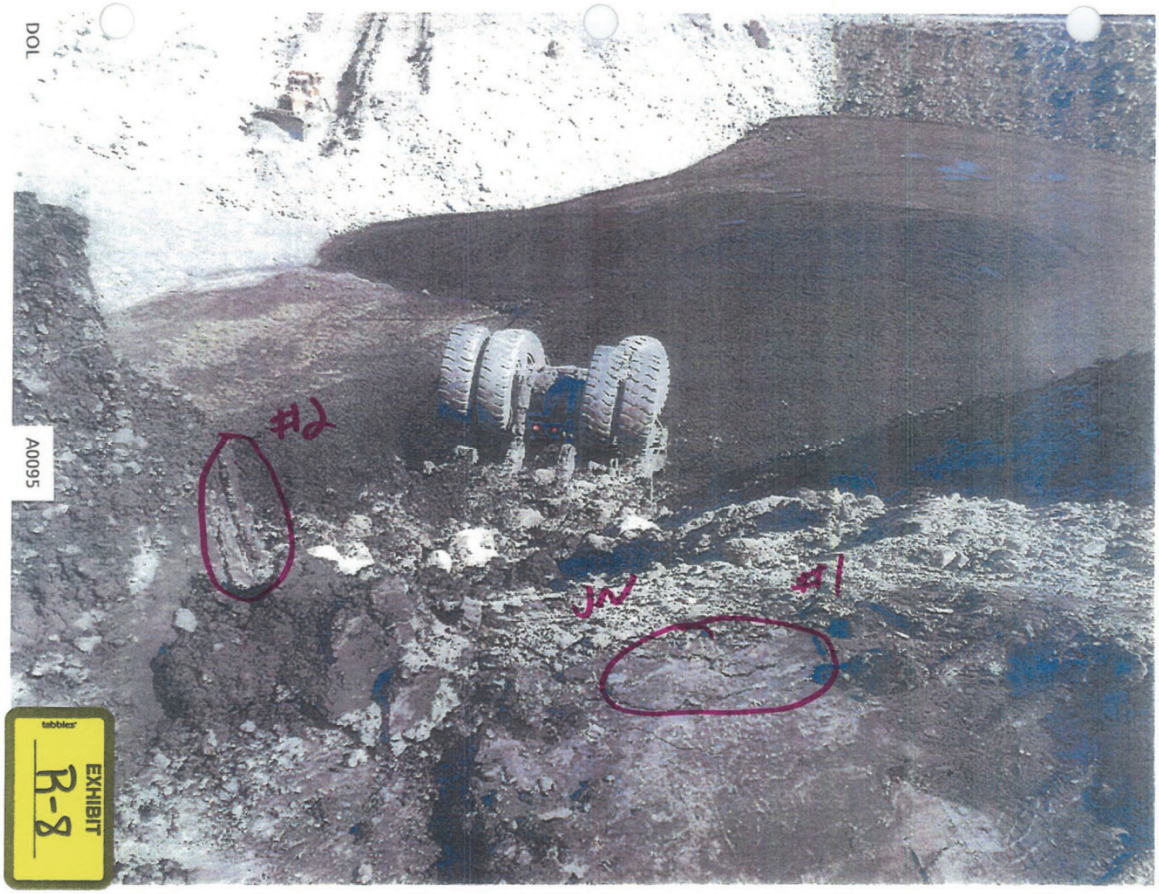

Photo showing where the truck ended up in the slurry pit, upside down.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES MCGAUGHRAN, Complainant, v. LEHIGH CEMENT COMPANY, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. PENN 2019-0144-DM MSHA Case No. NE-MD_19-05 Mine: Nazareth Plant I Mine ID: 36-00190

ORDER TOLLING TEMPORARY REINSTATEMENT

Before: Judge Rae

This matter comes before the Court on Respondent's Motion for Tolling of Economic Temporary Reinstatement. For the reasons set forth below, the Respondent's Motion is granted, and the Order Granting Temporary Economic Reinstatement is tolled, effective May 22, 2020.

I. BACKGROUND

On August 20, 2019, I issued an Order Granting Temporary Economic Reinstatement, whereby Lehigh Cement Company, LLC ("Respondent") was ordered to temporarily economically reinstate James McGaughran ("Complainant" or "McGaughran"), in accordance with all terms set forth in the parties' Joint Motion to Approve Settlement Regarding Temporary Reinstatement. Subsequently, this matter was set for hearing from June 2 through 4, 2020.[1] In the interim, the COVID-19 pandemic caused the Commission to suspend in-person hearings, including the hearing scheduled for this docket. In light of this development, the Commission offered Zoom videoconferencing as an alternative for conducting hearings.

On May 5, 2020, the Secretary of Labor ("Secretary") filed a Motion to Oppose Remote Hearing, indicating that it did not wish to participate in a hearing using Zoom videoconferencing, and requested that the hearing for this docket be continued to a later date. By email, the Respondent agreed to a hearing via Zoom videoconferencing, and requested that the matter proceed to hearing. On May 5, 2020, I held a conference call to discuss the positions of the parties. During the conference, the Secretary raised numerous objections to using Zoom, including the potential for various technological problems and issues associated with assessing credibility via video. However, the Respondent indicated its desire to proceed to hearing using Zoom because of the continued temporary economic reinstatement obligation that Respondent had towards McGaughran, as well as uncertainty regarding the resumption of in-person hearings.

[1] The associated Discrimination Proceeding is docketed as PENN 2020-0015.

On May 11, 2020, the Respondent filed an Opposition to the Secretary's Motion to Oppose Remote Hearing, along with a Motion for Tolling of Economic Temporary Reinstatement.

II. DISCUSSION

A. Temporary Reinstatement Under the Mine Act

Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") provides that "[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [the Mine Act] may . . . file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). Further, Section 105(c)(2) provides for temporary reinstatement of a miner "if the Secretary finds that such complaint was not frivolously brought," whereby "the Commission . . . shall order the immediate reinstatement of the miner pending final order on the complaint." *Id.*

The Mine Act's temporary reinstatement provision was included "[t]o protect miners from the adverse and chilling effect of loss of employment while such matters are being investigated." H.R. REP. NO. 95-655, at 52 (1977) (Conf. Rep). Congress viewed the temporary reinstatement provision as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. REP. 95-181, at 37 (1977).

B. Commission Precedent Regarding Temporary Reinstatement

Aside from the entry of a final order on the complaint, the Mine Act does not explicitly identify any conditions that interrupt the mine operator's reinstatement obligation. However, Commission precedent has established that the obligation may be tolled or dissolved in several situations. "The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee." *Sec'y of Labor on behalf of Gatlin* v. *KenAmerican Res., Inc*., 31 FMSHRC 1050, 1054 (Oct. 2009) (citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989)). Further, "the judge may appropriately consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions *or similar conditions*." *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res*., LLC, 35 FMSHRC 394, 397 (Feb. 2013) (emphasis added) (citing *Gatlin*, 31 FMSHRC at 1054).

The Commission has crafted a remedy with respect to reducing any award for back pay by the amount of the complainant's unrelated interim earnings. *See Meek v. ESSROC Corp*., 15 FMSHRC 606, 617 (1993); *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 994-995 (1982). However, we are faced with an unprecedented situation due to the COVID-19 pandemic, which has suspended travel and continues to cause unforeseen difficulties—without an end date. No Commission case law directly addresses such a situation.

C. Tolling McGaughran's Temporary Economic Reinstatement

I conclude that the Respondent's obligation to temporarily economically reinstate McGaughran must be tolled. The purpose of temporary reinstatement under the Mine Act is to make the miner whole while the case is pending on the merits, not for the purpose of unjustly enriching a complainant at the operator's expense. Tolling McGaughran's Temporary Reinstatement does not cause a chilling effect or an inability for the Complainant to pursue the discrimination complaint, nor does it run afoul of the spirit or intent of the Mine Act. Respondent has represented through email conversations with the court—and without contradiction by the Secretary—that the Complainant admitted during depositions he is earning approximately $107,000 per year in his current position, and is therefore suffering no economic loss.

I find that the unusual and unexpected pandemic and associated travel restrictions have created a situation where the Respondent is put in a position of an economic hardship, pending the lifting of restrictions at some unknown date. Recognizing that ordering a three-day hearing with multiple witnesses without the willing consent of both parties would be difficult—at best—and not an expeditious resolution of the matter, I granted the Secretary's request for a continuance over the objection of the Respondent. Therefore, I find it unfair to put such a burden on the Respondent due to circumstances not of its making, and that tolling the temporary economic reinstatement would not be contrary to the spirit and purpose of the Mine Act in this particular situation.

ORDER

It is **ORDERED** that the Order Granting Temporary Economic Reinstatement is tolled effective May 22, 2020.[2]

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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[2] The tolling of the Order Granting Temporary Economic Reinstatement will remain in effect until a decision is made on the merits.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 26, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2020-0027 A.C. No. 17-00661-503641
v.	Mine: Unit #63 Portec 1047J
	Docket No. YORK 2020-0031 A.C. No. 17-00663-503642
GORHAM SAND & GRAVEL INC, Respondent	Mine: Unit #65 Komatsu BR550 JG CRSHR

ORDER REGARDING JOINT MOTION FOR SUMMARY DECISION

Before the Court is a Joint Motion ("Motion") requesting that these matters be addressed by summary decision. The Motion was filed by an attorney for the Solicitor of Labor. The Respondent is not an attorney. Though not cited in the motion, summary decision is addressed under the Commission's procedural rules pursuant to 29 C.F.R. §2700.67, which is titled "Summary decision of the Judge." The Motion advises that the "parties share the view that the citations at issue are straightforward and well-documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed to work remotely until further notice during the current national health crisis." Motion at 1.

The Motion also seeks to have the "the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion." *Id.* For the reasons which follow, the Court grants the request but only to the extent of allowing the parties to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision. For the reasons set forth below, the submission of an appropriate, properly supported filing will be due by **Friday, June 5, 2020**.

For such a relatively non-complex matter, these dockets have been handled very poorly. To begin, both dockets were assigned to this Court on March 25, 2020. On April 24th, the Court emailed the parties, in response to an email on that same day from the Department of Labor

Attorney assigned to this matter ("DOL Attorney") seeking resolution of these dockets through summary decision. After the Court inquired about its inability to locate one of the dockets through e-CMS, the DOL Attorney advised that one docket number was incorrectly listed.

With that problem solved, the Court advised on the same date, April 24, 2020, that:

> In a motion for summary judgment the parties will need to state what the salient agreed-upon facts are, all of them, and on that basis that there are NO factual disputes, leaving only a legal ruling on the applicability of the cited standard(s) for [the Court] to resolve and if the Secretary prevails [the Court] will then issue a penalty or penalties, as appropriate, following [its] ruling(s). **[The Court] will give the parties 2 weeks to both determine and agree that there are no factual disputes and to submit the motion no later than May 8th. Please be sure that the motion complies with 29 CFR 2700.67.**

April 24, 2020 email to the parties.

May 8th came and went, all without any compliance to the Court's email. On May 20, 2020, the Court emailed the parties the following message: "Re: Gorham Sand & Gravel Inc YORK 2020-2007 and YORK 2020-0031 (YORK 2020-2007 erroneously listed docket by the Secretary). The parties are directed to respond to this Court … by tomorrow, May 21, 2020, why they have not responded to the Court, nor filed through e-CMS per the Court's directive to them on Friday April 24, 2020, as repeated below."

An apology followed on May 21st, admitting the filing had been overlooked. The Court accepted the apology. A promise to file the motions that same day accompanied the DOL Attorney's apology. The motions were filed but were woefully inadequate, in small and large, aspects.[1] Docket No. YORK 2020-0027-M erroneously lists another judge as presiding and also gives the wrong assessment control number in the caption.

Of more concern, both Motions utterly failed to meet the requirements of § 2700.67, which as noted, speaks to the Summary decision by the Judge. That rule provides, in relevant part, that "[a] motion for summary decision shall be granted only if the entire record, including

[1] The entirety of both motions, differentiated only by the docket numbers, stated: "The undersigned counsel, after telephonic discussion, jointly request [sic] that this matter be resolved by means of the Commission's Summary Decision mode of resolution in lieu of a hearing. The parties share the view that the citations at issue are straightforward and well- documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed to work remotely until further notice during the current national health crisis. The Solicitor's Office suggests that the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion. For these reasons, the parties jointly urge the Court to grant this request as an efficient and time-saving alternative to a live hearing." JOINT MOTION OF THE PARTIES TO REQUEST THAT RESOLUTION OF THIS MATTER BE MADE BY SUMMARY DECISION at 1-2.

the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b), "Grounds."

Of particular importance here, 29 C.F.R. § 2700.67, subsection (c) details the "Form of motion," providing that "[**a**] **motion *shall* be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.**" (emphasis added).

Neither motion complies with the procedural rule, subsection (c). The Court made it clear back on April 24, 2020 that it gave "the parties 2 weeks to both determine and agree that there are no factual disputes and to submit the motion no later than May 8th." It also expressly reminded the parties to "[p]lease be sure that the motion complies with 29 CFR 2700.67." April 24, 2020 email to the parties (emphasis added).

The Solicitor's attorney is a seasoned employee in that office, but even if the individual were not experienced, the Commission's procedural rules make the requirements for submission of a motion for summary judgment quite plain. At this point, despite being informed that a motion fully compliant with 29 CFR 2700.67 was to be filed by May 8th, and in the face of failing to file the motion by that date, now the DOL Attorney would like at least *another* 30 days to file the motion. Further dawdling is entirely unwarranted.

Accordingly, the parties are directed to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision by Friday, June 5, 2020.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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