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MSHA V. SELLERSBURG STONE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 11, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. LAKE 80-363-M
LAKE 80-364-M
v.

SELLERSBURG STONE COMPANY

DECISION
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981). The administrative law judge concluded that Sellersburg Stone Company violated three mandatory standards: 30 C.F.R. $ 56.6-106, 30 C.F.R. $ 50.10 and 30 C.F.R. $ 50.12. 1/ He assessed Sellersburg penalties

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1/ Section 56.6-106 provides:
Faces and muck piles shall be examined by a competent person for undetonated explosives or blasting agents and any undetonated explosives or blasting agents found shall be disposed of safely.
Section 50.10 provides:
If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, collect at (202) 783-5582.
Section 50.12 provides:
Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.
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of $7,500, $1,000 and $1,000, respectively. 4 FMSHRC 1362 (July 1982)

(ALJ). The issues before us on review are whether the judge's conclusion that a violation of section 56.6-106 occurred is properly supported and whether the penalties assessed by the judge for the three violations are excessive. 2/

Concerning the violation of 30 C.F.R. $ 56.6-106, the judge made the following enumerated findings of fact which are not controverted by the parties on review:

1. At all pertinent times, Respondent operated an open-pit, multiple-bench, crushed limestone operation in Clark County, Indiana; its products were regularly produced for sales or use in or substantially affecting interstate commerce.

2. After material was blasted from the side of the quarry ("primary blasting"), a front-end loader was used to gather boulders that were too large to go through the stone-crusher. These were moved to the floor of the quarry where they were exploded by "secondary blasting."

3. "Secondary blasting" involved: a) drilling a hole into a boulder with a jackhammer drill; the hole was about 1 inch x 18 inches; b) loading the hole with a 1-inch x 4-inch stick of dynamite; adding a primer cord; and packing the hole with fine stones; and c) detonating the dynamite, in blasts of about 20 boulders at a time. The boulders were piled or grouped in a rather close cluster for drilling and blasting.

4. In secondary blasting, at times a dynamite charge would not explode. After the blast, the standard safe practice in the industry was to inspect all boulders remaining to see whether any contained undetonated dynamite, and this inspection required turning the boulder over to [check] all sides for a drill hole. However, Respondent did not follow the practice of turning boulders over, and relied upon visual inspection of the top and sides of a boulder.

5. In secondary blasting, at various times some boulders would be turned over by the blast so that if a boulder were unexploded the drill hole might be on the bottom and not detectable unless the boulder was turned over for visual inspection.

6. The boulders were about two to four feet in diameter, and usually the drill hole did not exit, so that there would be only one hole visible on a boulder.

2/ On review Sellersburg does not contest the judge's determination of liability for the sections 50.10 and 50.12 violations.

7. On December 13, 1979, two men were assigned to do secondary blasting. Carl Sparrow, the blaster, had about four or five months experience in blasting and David Hooper the driller had about three months experience. Neither was carefully or well trained in the performance of his duties.

(a) That morning they inspected about 20 boulders; Hooper drilled them and Sparrow loaded them with dynamite and primer cord. At times Hooper helped pack or load a hole.

(b) They set off a blast of about 20 boulders, and went to lunch. When they returned, Sparrow worked around his truck and Hooper started inspecting and drilling boulders. The first boulder he inspected had no visible drill hole, but he could not see the bottom. The boulder was about four feet in diameter and too heavy to turn over without equipment, such as a front-end loader. Respondent had such equipment, but did not use it or make it available for turning over boulders for inspection. He started drilling a hole. When he was about halfway through the boulder it exploded. Hooper received permanent disabling injuries, including loss of the sight of one eye and a crippled leg.

4 FMSHRC at 1362-63. Based on these findings, the judge concluded that "Respondent did not properly examine the muck pile after secondary blasting, because after such blasting it drilled boulders without turning them over to examine each boulder for a dynamite drill hole on the bottom of the boulder." 4 FMSHRC at 1364 (emphasis added).

On review Sellersburg argues that the judge's conclusion that a violation of section 56.6-106 occurred is without proper foundation because his decision contains no finding of fact that the boulder which exploded was a "muck pile" or "a portion of a muck pile." 3/ Our review of the judge's decision leads us to conclude that he implicitly found that the boulder was part of a muck pile. His enumerated findings describing the grouping of boulders that was blasted, coupled

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3/ Sellersburg maintains the judge failed to make an expressed finding of fact and thus did not comply with Commission Rule 65(a) (which is patterned on section 8 of the Administrative Procedures Act (5 U.S.C. $ 557(c)) and provides:

The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented by the record, and an order.

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with his statement that "the muck pile" was not properly examined, provide a sufficient foundation upon which to conclude that he found that the boulder in question was part of a muck pile. Furthermore, unrebutted testimony of the Secretary's witnesses clearly support the conclusion that the boulder was a part of a muck pile. Tr. 90-91, 110-12, 135-136. 4/ Thus, we conclude that the judge's decision finding a violation of 30 C.F.R. $ 56.6-106 is properly supported. 5/

Sellersburg also argues that the penalties assessed by the judge for the three violations are excessive and constitute an abuse of discretion. Sellersburg's argument is premised largely on the judge's purported failure to follow MSHA's penalty assessment regulations set forth in 30 C.F.R. Part 100. Sellersburg cites the decision of the Fifth Circuit in Allied Products Co. v. FMSHRC & Donovan, 666 F.2d 890 (1982), in support of its argument, and requests that new penalty calculations and findings consistent with 30 C.F.R. Part 100 be made. Sellersburg and, we believe, the Fifth Circuit have misperceived the penalty assessment authority of the Commission and its judges under the Act. For the reasons that follow, we reject the contention that the judge's failure to follow the Secretary's penalty assessment regulations, in and of itself, constitutes an abuse of discretion.

In the Mine Act, Congress divided enforcement responsibility between two separate and independent agencies. The Secretary of Labor is granted authority to promulgate mandatory safety and health standards, to enforce such standards through inspections, and to issue citations and withdrawal orders for violations of the Act and mandatory standards. This Commission was established as an agency independent of the Department.of Labor and is authorized to adjudicate contested cases arising under the Mine Act. 30 U.S.C. $ 823. Consistent with this bifurcated enforcement structure, the Act's penalty assessment scheme divides penalty assessment authority

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4/ The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior (1968), in part defines "muck" as:

a. stone; dirt; debris .... d. Rock or ore broken in the process of mining....

5/ The Secretary argues that Sellersburg did not raise the issue of whether the boulders constituted a "muck pile" either at the trial or in its posthearing brief. Citing 30 U.S.C. $ 823(d)(2)(a)(iii), the Secretary avers that the judge was thus never afforded an opportunity to rule on this issue and therefore Sellersburg cannot raise it on

review. We disagree. Proof that the boulders were part of a muck pile is an element of the Secretary's case in proving a violation of the cited standard. In this regard, the Secretary's witnesses testified that the boulder that exploded was part of a muck pile. Accordingly, by virtue of the nature of the Secretary's case and the evidence proffered in support thereof, the judge was afforded the opportunity to address the muck pile question.
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between the two agencies. Section 105(a) of the Act provides that if the Secretary of Labor issues a citation or order, "he shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited and that the operator has 30 days within which to contest the ... proposed assessment of Penalty." 30 U.S.C. $ 815(a) (emphasis added). If an operator does not contest the Secretary's proposed penalty assessment, by operation of law the proposed assessment becomes a final order not subject to review by any court or agency. Id

If an operator contests the Secretary's proposed assessment of penalty, however, Commission jurisdiction over the matter attaches. 30 U.S.C. $ 815(d). When a proposed penalty is contested, the Commission affords an opportunity for a hearing, "and thereafter ... issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." Id. (Emphasis added). See also 30 U.S.C. $ 810(i)("The Commission shall have authority to assess all civil penalties provided in this Act"). Thus, it is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. 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. See Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 89, 632-635, 656-657, 666-662, 906-907, 910-911, 1107, 1316, 1328-29, 1336, 1348, 1360.

The respective governing regulations adopted by the Commission and the Secretary regarding penalty assessments clearly reflect the Act's bifurcated penalty assessment procedure. Commission Rule of Procedure 29(b) provides:

> In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary....

29 C.F.R. $ 2700.29(b). The Secretary's regulations in 30 C.F.R. Part 100 expressly apply only to the Secretary's proposed assessment

of penalties. See also 47 Fed. Reg. 22287 (May 1982)("If the proposed penalty is contested, the [Federal] Mine Safety and Health Review Commission exercises independent review and applies the six statutory criteria without consideration of these [MSHA penalty assessment] regulations.")

Thus, in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act (30 U.S.C. ~292
$ 820(i)) and the information relevant thereto developed in the course of the adjudicative proceeding. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F.2d 59 (6th Cir. 1981). Cf Long Manufacturing Co. v. OSHRC, 554 F.2d 903 (8th Cir. 1977); Clarkson Construction Co. v. OSHRC, 531 F.2d 451 (lOth Cir. 1976); Dan J. Sheehan Co. v. OSHRC, 520 F.2d 1036 (5th Cir. 1975); California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975).

Accordingly, we reject Sellersburg's argument that the judge abused his discretion in not following the Secretary's regulations governing proposal of penalties, including the Secretary's penalty point formula and special narrative findings procedures.

Our inquiry does not end here, however, because Sellersburg also raises broader challenges to the penalties assessed by the judge, i.e., whether the judge adequately considered and discussed the statutory criteria bearing on penalty assessments and whether the penalties assessed are otherwise consistent with the criteria or are excessive.

Section 110(i) of the Act mandates Commission consideration of six criteria in assessing appropriate civil penalties: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. 30 US.C. $ 820(i).

As to each of the three violations at issue, the judge's decision contains discussion and findings on only two of the six statutory criteria, i.e., the operator's negligence and the gravity of the violations. The decision is devoid of specific facts and findings bearing on the remaining four criteria. 6/ When an operator contests the Secretary's proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria must be made. 30 U.S.C. $ 815(d). Cf. National Independent Coal Operator's Assoc. v. Kleppe, 423 U.S. 388,

46 F.Ed 2d 580, 96 S.Ct. 809 (1976)(The 1969 Coal Act "does not mandate a formal decision with findings as a predicate for a penalty assessment order unless the operator exercises his statutory right to request a hearing on the factual issues relating to the penalty.... (Emphasis added.)) But see B.L. Anderson v. FMSHRC, 668 F.2d 442 (8th Cir. 1982). Findings of fact on each of the statutory criteria not only provide the operator with the required notice as to the basis u on which it is being assessed a particular penalty, but also provided the Commission and the courts, in their

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6/ The judge did generally state that the penalties assessed were [b]ased upon the statutory criteria for assessing a penalty."

review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient. Therefore, we conclude that the judge erred in failing to make findings of fact on four of the six statutory criteria bearing on his assessment of penalties against this operator. 7/

Also, in this case there is a wide divergence between the penalties proposed by the Secretary and those assessed by the judge. 8/ As we discussed previously, 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. However, the Secretary's proposed penalties are usually of record in a Commission proceeding. When based on further information developed in the adjudicative proceeding, it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. See Dan J. Sheehan Co. v. OSHRC, supra, 520 F.2d at 1040-1042; Clarkson Construction Co. v. OSHRC, supra, 531 F.2d at 456.

Based on the above considerations, one course to follow in the present case would be to remand this proceeding to the administrative law judge to cure his error and make the necessary findings pertaining to the remaining four penalty criteria. For the following reasons, however, we find that in the circumstances of the present case a remand for the entry of such findings by the judge is unnecessary and would unnecessarily prolong these proceedings.

The statutory penalty criteria on which the judge failed to make

findings are the following: the operator's history of previous violations; the appropriateness of the penalty to the size of the operator's business; the effect on the operator's ability to continue in business; and the good faith abatement of the violations. A

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7/ In the present case the operator requested a hearing and the case, in fact, proceeded through a full hearing to a decision on the merits. Thus, we are not presented with any question concerning the extent of the findings necessary where the parties have presented a proposed settlement that accords with the Commission's requirement for approval of penalty settlements. 29 C.F.R. $ 2700.30.

8/ The Secretary originally proposed penalties of $1,000, $78 and $78 for the three violations at issue. The judge assessed penalties of $7,500, $1,000 and $1,000, respectively.

review of the record indicates, however, that there was no controversy

between the parties concerning the record evidence bearing on each of these criteria. 9/ The parties stipulated that the operator demonstrated good faith in abating the violations. Relevant to the operator's size it was stipulated that the mine's annual production was about 450,000 tons and that between 14 to 20 persons were employed. Concerning the operator's history of violations, the Secretary entered an exhibit into evidence which indicates that 35 violations were charged and penalties for 29 violations paid during the period January 1978 through January 1980. The operator did not challenge this evidence. The operator refused to stipulate that payment of civil penalties would not affect its ability to continue in business, but did not offer any argument or evidence that its ability to continue in business would be impaired. See Buffalo Mining Co., 2 IBMA 226, 24748 (1973). Because the above information comprises all of the record evidence as to the penalty criteria on which the judge failed to make express findings, in the interests of judicial economy we enter the above as the required findings rather than remanding for the judge to do so.

The question remains as to whether, in light of the above findings on four of the penalty criteria and the express findings made by the judge concerning the remaining two, i.e., the negligence and gravity criteria, the penalties assessed by the judge are excessive. The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf Long Manuf. Co. v. OSHRC, supra, 554 F.2d at 908. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Regarding the statutory penalty criteria, the record reflects that

the operator has at least a moderate history of previous violations. It is a small to medium sized crushed limestone operation. 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 affect would occur. Buffalo Mining, supra. Good faith was demonstrated in abating the violations. As to the negligence and gravity criteria, regarding the violation of 30 C.F.R. $ 56 6-106 the judge found that the operator's blasting practice constituted gross negligence" and was a "most serious" violation posing a "grave risk" to employees. Concerning the violation of 30 C.F.R. $ 50.12 requiring the preservation of accident sites pending completion of an investigation thereof, the judge found that the operator was negligent in failing to comply with the standard and that this was a serious violation since it hindered MSHA's ability to conduct an appropriate investigation. As to the violation of 30 C.F.R. $ 50.10 requiring immediate contact with MSHA when an accident occurs, the judge found that the operator's notification by mail resulted from its negligence and seriously affected MSHA's ability to conduct an effective investigation.

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9/ The uncontroverted nature of the evidence bearing on these criteria may explain why the judge did not make express findings in his decision.

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On review the operator has not challenged the facts found by the judge concerning its blasting procedures, its preservation of the accident site, or its failure to immediately contact MSHA. Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record we cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, we find that the judge's penalty assessments do not constitute an abuse of discretion. Accordingly, the decision of the administrative law judge finding violations of 30 C.F.R. $$ 56.6-106, 50.10 and 50.12, and assessing penalties of $7,500, $1,000, and $1,000, respectively, is affirmed.

L. Clair Nelson, Commissioner

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