FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

MAR 04 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1130
v.	:	
SIGNAL PEAK ENERGY, LLC	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY: Nakamura, Acting Chairman; Cohen, Commissioner

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), and involves two citations issued to Signal Peak Energy by the Secretary of Labor in the wake of a roof fall (or "cave") and a resulting injury.

Citation No. 8463717 alleges that Signal Peak failed to immediately notify the Department of Labor's Mine Safety and Health Administration ("MSHA") of an accident, in violation of section 50.10 of the Secretary's reporting requirements. The Secretary alleges that the injury was reportable under section 50.10(b), or alternatively, that the roof fall was reportable under section 50.10(d).[1] Citation No. 8463718 alleges that Signal Peak failed to preserve the accident site in violation of section 50.12.[2] The Secretary designated Citation

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[1] Section 50.10 states in relevant part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred" involving:

> . . .
> (b) An injury of an individual at the mine which has
> a reasonable potential to cause death;
> . . . or
> (d) Any other accident.

30 C.F.R. § 50.10. For the purposes of subsection (d), the definition of "accident" includes "an unplanned roof or rib fall in active workings that impairs ventilation." 30 C.F.R. § 50.2(h)(8).

[2] Section 50.12 states in relevant part: "no operator may alter an accident site . . . until completion of all investigations pertaining to the accident." 30 C.F.R. § 50.12.

No. 8463717 as significant and substantial ("S&S"),[3] and attributed both cited conditions to reckless disregard.[4]

The Administrative Law Judge upheld both citations in their entirety and assessed penalties that were substantially higher than those proposed by the Secretary. 34 FMSHRC 1346 (June 2012) (ALJ). The Commission granted Signal Peak's petition for review with regard to all elements. For the reasons below, we affirm the Judge's findings with regard to Citation No. 8463717 with the exceptions of the finding of a violation of 30 C.F.R. § 50.10(d) and the assessed penalty. We affirm the Judge's findings with regard to Citation No. 8463718 in their entirety.

I.

Factual and Procedural Background

A. Factual Background

On December 23, 2009, a roof fall or "cave" occurred in the longwall gob at Signal Peak's Bull Mountain Mine No. 1 in Roundup, Montana. This was the initial roof cave on the first longwall panel at the mine. Caves in the gob are an expected part of longwall mining, and the initial roof cave on a panel is often larger than subsequent falls. Tr. 93-94. The cave caused a blast of air which damaged approximately 78 stoppings, and propelled miner Mike Stewart 50-80 feet. 34 FMSHRC at 1352; Tr. 62, 123. When Stewart was found by other miners shortly after the blast, he was in severe pain, had difficulty breathing and moving, had a significant lump on his back, and stated that he was not okay. He was loaded onto a backboard and slowly transported to the surface. 34 FMSHRC at 1356, 1358; Tr. 158, 162, 165, 429-32.

Shift foreman and EMT Ben Harcourt[5] performed an evaluation as Stewart was transported to the surface. He determined that Stewart had a cut on his head, noticeably broken ribs, pain in his chest and back, trouble breathing, and signs of shock. He stated that he found no obvious signs of concussion, internal bleeding, or a punctured lung, and found that Stewart had good respiration and circulation. Tr. 367-76. However, Harcourt was not able to take Stewart's pulse, blood pressure or oxygen level, and admitted that without these three critical components he did not have an accurate assessment of Stewart's vital signs. Tr. 391-92. He nevertheless concluded that the injuries were not life-threatening. Tr. 380-82. Although Harcourt's authority

[3] The "significant and substantial" language is found in section 104(d)(1) of the Act, which refers to "a violation of any mandatory health or safety standard . . . of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

[4] The Secretary's regulations for proposing penalties state that "reckless disregard" is "conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3, Table X.

[5] Harcourt had become certified as a basic level EMT only eight months earlier, and this was the first serious traumatic injury he had attended to. Tr. 356-57, 385-86.

included the ability to call MSHA in the event of a reportable injury, he decided not to do so. Tr. 389, 393.

Once Stewart was transferred to an ambulance, EMT Kerry Halverson performed another evaluation and observed largely the same injuries; however, he concluded that there was a reasonable potential for death, because Stewart's back pain and the distance he was thrown raised the possibility of spinal damage and internal injury. 34 FMSHRC at 1357; Tr. 247-50.

Signal Peak's Safety Director, Thomas Rice, was called at home and informed of the accident while Stewart was being transported out of the mine. Rice began driving to the mine, was called again and informed that Stewart was almost to the surface, and pulled over to wait for the ambulance, which he then followed to Roundup Memorial Hospital. Once at the hospital, Rice spoke with Harcourt, the ambulance personnel, and the attending physician. Rice testified that they all stated the injuries were not life-threatening, so he decided the injury was not reportable at that time. 34 FMSHRC at 1362-64; Tr. 452-58. Stewart was then transferred by life-flight to another hospital, in Billings, Montana, where it was ultimately determined that he had a burst thoracic vertebra, and other injuries including fractures of the left scapula, ribs, and sternum. 34 FMSHRC at 1349.

MSHA learned of the incident from a newspaper reporter who called five days later, on December 28, 2009, to inquire about an accident which had occurred at Signal Peak's mine. *Id.* MSHA Temporary Field Office Supervisor David Hamilton spoke with Rice on the phone that afternoon. The Judge credited Hamilton's testimony that Rice was not forthcoming with information regarding the roof fall or Stewart's injuries. *Id.* at 1354; Tr. 212-13.

The next morning, MSHA Inspector Wayne Johnson visited the hospitals to view Stewart's medical records and speak with medical personnel. The Judge credited Johnson's recollection of his conversation with Stewart's attending physician, in which the physician told Johnson that he considered Stewart's injuries to be life-threatening due to the risk of internal injury caused by the miner "being blasted 50 to 80 feet down an entry." 34 FMSHRC at 1349-50; Tr. 49-50.

Johnson traveled to the mine that afternoon. After speaking with Harcourt and other mine personnel regarding Stewart's initial condition and the extent of the blast, Johnson concluded that Signal Peak failed to timely report an immediately reportable accident. He then issued Citation No. 8463717. Specifically, Johnson concluded that Stewart's injuries were reportable because they were obviously life-threatening, and that the roof fall was reportable because it impaired ventilation throughout the mine. 34 FMSHRC at 1351-53, 1377; Tr. 66-67, 77-78, 88; Gov. Ex. 1. Johnson also discovered that Signal Peak had mined past the accident site before MSHA had an opportunity to investigate, and issued Citation No. 8463718, alleging that Signal Peak had failed to preserve the accident site. 34 FMSHRC at 1351-52; Tr. 90-91; Gov. Ex. 2.[6]

[6] Johnson also issued an uncontested section 103(k) withdrawal order. 34 FMSHRC at 1351 n.11. Section 103(k) states in part that "[i]n the event of any accident . . . an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. § 813(k).

Ultimately, MSHA Roof Specialist Pete Del Duca determined that the mine had a massive 200 foot thick sandstone roof, which, because it was not well-jointed, had trouble breaking up and caving in. By the time the initial cave occurred, mining had progressed 220 feet along a 1250 foot face, 10 to 12 feet high. 34 FMSHRC at 1378; Tr. 282-283, 296. When the initial cave finally occurred, it caused "a very big blast because all that air [had] to be displaced." Tr. 279. Prior to the MSHA investigation, Signal Peak had done nothing to prevent a similar blast from the initial cave in the next longwall panel to be mined. 34 FMSHRC at 1378-79; Tr. 300-04. Because of MSHA's intervention, the mine's roof control plan was modified to encourage earlier and smaller falls on future longwall panels. 34 FMSHRC at 1378; Tr. 298-99, 301, 309-13, 525.

B. The Judge's Decision

With respect to Citation No. 8463717, the Judge found that Signal Peak failed to notify MSHA within 15 minutes once it knew of "injuries . . . which have a reasonable potential to cause death" in violation of section 50.10(b). He found that any reasonable person should have known almost immediately that such a reasonable potential for death existed upon finding Stewart, based on the distance he was thrown, his difficulty moving, and his obvious back injury. 34 FMSHRC at 1368-69.

Alternatively, the Judge also found that Signal Peak failed to timely notify MSHA once it knew of "an unplanned roof [ ] fall in active workings that impairs ventilation," in violation of section 50.2(h)(8), as incorporated through section 50.10(d). He found that the roof fall clearly impaired ventilation by damaging 78 stoppings, was unplanned because it exceeded expectations, and was in active workings despite occurring in the gob because it affected ventilation in active workings. *Id.* at 1376-77, 1380-82.

The Judge affirmed the S&S designation for Citation No. 8463717. He found that the failure to report delayed MSHA involvement, thereby exposing miners to uncorrected conditions; that such exposure was likely to occur, noting that the necessary changes to the roof control plan would not have happened without MSHA intervention; and that a similar fall would likely result in similarly serious injuries as those sustained by Stewart. *Id.* at 1371-74.

In finding the violation attributable to reckless disregard, the Judge noted aggravating factors: Rice's unwillingness to provide details to Hamilton over the phone, and Signal Peak's general failure to take corrective action after the roof fall. The Judge rejected Signal Peak's contention that its determination not to report Stewart's injury was reasonable. *Id.* at 1374-75.

Having found that the roof fall and/or injury constituted a reportable accident, and finding it undisputed that Signal Peak had mined past the site where the event occurred, the Judge found that Signal Peak failed to preserve an accident site in violation of section 50.12. Accordingly, he affirmed Citation No. 8463718. *Id.* at 1375. The Judge also upheld the reckless disregard designation, noting that Signal Peak took no steps to notify MSHA before resuming mining in the area. *Id.* at 1376.

Based primarily on his determination that both violations constituted egregious failures and that the operator placed miners in danger by impairing MSHA's ability to investigate, the

Judge increased the penalty for Citation No. 8463717 from $49,500 to $74,250, and increased the penalty for Citation No. 8463718 from $1,900 to $9,500. *Id.* at 1346 n.1, 1382-83.

II.

Disposition

A. Citation No. 8463717

1. Violation

a. Section 50.10(b)

Section 50.10(b) requires an operator to "immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . an injury . . . which has a reasonable potential to cause death." 30 C.F.R. § 50.10(b). We affirm the Judge's finding that any reasonable person should have known immediately upon finding Stewart that his injuries had a reasonable potential to cause death.[7] 34 FMSHRC at 1368. The failure to notify MSHA of the injuries during the following five days clearly violated section 50.10(b).

As a preliminary matter, we note that the Judge defined a "reasonable potential" as a "not far-fetched" possibility, *id.*, while Signal Peak contends it is synonymous with "life-threatening." SP Br. at 11-12. As discussed below, we conclude that Stewart's injuries clearly fall within the realm of a "reasonable potential to cause death," without the need to further define the term reasonable potential to cause death.[8]

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[7] The Judge also delineated subsequent times at which it was clear that Stewart's injuries constituted a reportable accident. 34 FMSHRC at 1369. Although we agree that Signal Peak should have understood the need to report the accident to MSHA at each of these later moments, we need not discuss them in detail. The reporting period clearly commenced when Harcourt reached Stewart after the blast which threw him 50 to 80 feet.

[8] Commissioner Cohen disagrees with his colleagues that the Commission should not take this opportunity to define the phrase "reasonable potential to cause death" contained in 30 C.F.R. § 50.10(b). The Judge rejected Signal Peak's argument that a miner must sustain an injury that qualifies as "life-threatening" to trigger the reporting requirements of section 50.10(b). 34 FMSHRC at 1369. The Judge concluded that Signal Peak's position was contradicted by the plain language of the standard which requires only "a reasonable *potential* to cause death." The term "potential" is commonly understood to mean "something [that is] 'capable of being,' or something which presents a 'possibility,' albeit not yet in existence." *Id.* at 1368.

Commissioner Cohen agrees with the distinction identified by the Judge -- a "reasonable potential to cause death" is not synonymous with "life threatening." The Judge correctly discerned that the reporting requirement in section 50.10(b) contemplates a subjective immediate evaluation governed by the concern for the "possible," not an objective clinical examination as suggested by Signal Peak. *See* SP Br. at 12-14. The Judge's analysis is

Substantial evidence amply supports the Judge's finding that Stewart's condition evinced a reasonable potential to cause death.[9] Stewart had been thrown a great distance,[10] and had a significant back protrusion. 34 FMSHRC at 1368-69. In addition, in finding that these signs indicated a reasonable potential for death, the Judge relied on Stewart's own testimony that he told nearby miners he was not okay, was in great pain, and had trouble moving. *Id.* at 1357-58.[11] He also credited EMT Halverson's testimony that the blast and impact could easily have caused internal injury and raised concerns that Stewart had suffered spinal damage. *Id.* at 1357. The Judge also based his findings on miner Brandon Mobley's testimony that, in view of Stewart's pain, back injury, difficulty moving and trouble breathing, Mobley believed Stewart was "really hurt." *Id.* at 1356; Tr. 156-63.

Notably, the preamble to the final rule for section 50.10 includes major upper body blunt force trauma in a list of types of injuries which pose a reasonable potential for death. 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006). In addition, Stewart's obvious back injury, pain, difficulty moving, and difficulty breathing increased the possibility that his injuries could be fatal. Stewart's initial condition presented a sufficient possibility of internal injury and spinal damage that a reasonable person should have recognized that an injury with a reasonable potential to cause death had occurred.

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consistent with the Commission's decision in *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003), in which we stated that "the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident." *See also* 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006).

Commissioner Cohen suggests that the Commission adopt the following definition of "reasonable potential to cause death": The reporting requirement of section 50.10(b) is triggered when a miner is injured in a manner that would cause a reasonably prudent mine operator to consider the possibility that the injured miner's life may be in jeopardy. Obviously, because the extent of an injury is not always immediately apparent, the totality of the circumstances, including how the injury occurred, should be considered by the mine operator.

[9] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[10] The Judge credited Inspector Johnson's testimony that both mine and hospital personnel informed him that the blast had thrown Stewart 50-80 feet. 34 FMSHRC at 1352. Even the 40 foot estimate provided by Rice is a significant distance. Tr. 459.

[11] According to Inspector Johnson, Harcourt told him that Stewart "was in excruciating pain, ten plus on a pain scale, pretty critical." Tr. 70.

Signal Peak argues that the Judge erred in giving more weight to external indicators of injury than to Harcourt's evaluation of the actual injuries, which Signal Peak claims established that Stewart's life was not in danger. However, the evaluation did not establish that Stewart's injuries posed no reasonable potential for death. While Harcourt did find that Stewart had some stable vital signs and no obvious signs of concussion or internal injury, Tr. 370-74, the evaluation was neither conclusive nor exhaustive. Harcourt testified that he did not take all of Stewart's vital signs and therefore could not get an accurate assessment, and that he "absolutely" did not know what was wrong with Stewart. Tr. 391-92, 396. Clearly, Stewart was severely injured and the fortunate fact that he did not die from the injuries does not detract from a finding that the readily observable nature of his injuries presented a reasonable potential to cause death.

Section 50.10 requires operators to notify MSHA "immediately . . . at once without delay and within 15 minutes." 30 C.F.R. § 50.10. Prompt reporting is clearly essential to the standard, and requires a prompt determination as to whether an accident has occurred. *See Consolidation Coal Co.,* 11 FMSHRC 1935, 1938 (Oct. 1989) (finding that section 50.10 "accords operators a reasonable opportunity for investigation," but that the investigation "must be carried out . . . in good faith without delay and in light of the regulation's command of prompt, vigorous action"); *see also* 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (noting that "[t]aking too much time to determine whether . . . an accident occurred" is a common reason for violations of section 50.10).

Given the need for a prompt determination inherent in section 50.10, the Commission has found that readily available information such as the nature of the accident is highly relevant in determining whether an injury is reportable, while permitting operators to wait for a medical or clinical opinion would "frustrate the immediate reporting of near fatal accidents." *Cougar Coal Co.*, 25 FMSHRC 513, 520-21 (Sept. 2003) (holding that an electric shock, 18-foot fall, and head injury had a "per se" reasonable potential for death); *see also Mainline Rock & Ballast, Inc.*, 693 F.3d 1181, 1188-89 (10th Cir. 2012) (holding that an operator should have been alerted to the potential for death by the fact that the miner was pulled through a roller). Here, the Judge properly considered the nature of the accident, i.e., being propelled a great distance, as well as readily observable indicators of trauma such as Stewart's severely injured back, difficulty moving, and great pain.

Although the testimony and the parties' arguments primarily focused on Safety Manager Rice's actions, Harcourt testified that he had the authority to notify MSHA in the event of an accident resulting in a reasonable potential to cause death, Tr. 389, and he failed to do so. His failure to call, or to have a call made, was sufficient to constitute a violation. In this respect, an operator may not designate one specific person, such as a safety manager, to place the immediate call to MSHA. Once a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of whether the injury presents a reasonable potential to cause death and a determination of whether a call is required.

We emphasize that an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification. As stated in the preamble to the final rule addressing 30 C.F.R. § 50.10 in 2006:

> In emergencies, where delay in responding can mean the difference between life and death, immediate notification leads to the

> mobilization of an effective mine emergency response. Immediate notification activates MSHA emergency response efforts, which can be critical in saving lives, stabilizing the situation, and preserving the accident scene. Immediate notification also promotes Agency assistance of the mine's first responder efforts. In other situations, it allows for a range of appropriate Agency responses depending on the circumstances. It alerts MSHA to trends or warning signals that can trigger a special inspection, an investigation, or targeted enforcement. This communication also encourages operators and miners to work with MSHA to develop procedures that prevent incidents from resulting in more hazardous situations, ultimately leading to disasters.

71 Fed. Reg. at 71,431. Although notification of MSHA may result in delays in production, Congress declared in section 2(a) of the Mine Act that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a).

In addition, as the Commission stated in *Cougar Coal*, "[i]n the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes." 25 FMSHRC at 521. Yet, before speaking with Harcourt and deciding not to report the injury, Rice spent 30 minutes in his car waiting for the ambulance. During that time, he called the mine to find out whether the ambulance had left, but did not gather any substantive information from on-site personnel regarding the roof fall or Stewart's injuries. Tr. 453, 501. Rice's testimony indicates that he waited for a medical opinion because he was hoping for a level of certainty with respect to Stewart's prognosis. Tr. 472-74, 479. By waiting for a medical opinion at the hospital rather than spending that time gathering readily available information, information which in this case would have been sufficient to trigger the notification requirement, Rice failed to conduct a sufficiently prompt investigation. *See, e.g., Consolidation Coal*, 11 FMSHRC at 1936-38 (finding that a supervisor's 45-minute investigation was not sufficiently prompt, because he could have ascertained the necessary facts to determine that an accident occurred during the initial call informing him of the incident).

Given the mechanism of Stewart's injuries – being propelled 50-80 feet – and the apparent severity of his injuries, whether the incident was immediately reportable was not a close call. The Judge properly found on the basis of substantial evidence that a reasonable person would have concluded that Stewart's injuries posed a reasonable potential for death based on the available information.

b. Section 50.10(d)

Section 50.10(d) states generally that "any other accident" is also immediately reportable. 30 C.F.R. § 50.10(d). For the purposes of the Part 50 reporting requirements, the definition of "accident" includes "an unplanned roof or rib fall *in active workings* that impairs ventilation or impedes passage." 30 C.F.R. § 50.2(h)(8) (emphasis added). It is undisputed that the roof fall

at issue occurred in the longwall gob, which is not an active working.[12] 34 FMSHRC at 1377 n.54. The Judge nevertheless accepted the Secretary's alternate theory of liability, finding that the roof fall was an accident as defined in section 50.2(h)(8) because it affected ventilation in active workings. *Id.* at 1381-82. We find that the regulatory language plainly requires that the fall occur in active workings; therefore the roof fall here was not an accident as defined in section 50.2(h)(8), and the failure to report it was not a violation of section 50.10(d).

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted)). The language of section 50.2(h)(8) is clear. The regulation addresses roof falls *in* active workings; use of the word "in" precludes a finding of an accident where the fall occurred outside of active workings.

We note that the Secretary's litigating position in this matter, i.e., that roof falls in the gob are immediately reportable if they impair ventilation in nearby active workings, is not reflected in MSHA's Program Policy Letter regarding the "Reporting of Unplanned Roof Falls in Accordance with 30 C.F.R. § 50.10." PPL No. P12-V-03 (May 11, 2012). The Letter repeatedly uses the phrase "in active workings" when enumerating the types of falls that must be reported, and states that "[a]n active working does not include worked out areas or areas adjacent to active workings." *Id.* This exclusion of nearby areas suggests that MSHA has traditionally interpreted the "in active workings" requirement for unplanned roof falls more narrowly.[13]

Only a fall which occurs in active workings may be an "accident" as defined in section 50.2(h)(8), and the fall here occurred outside of active workings in the longwall gob.[14] Signal Peak's failure to report the roof fall did not constitute a failure to report an accident in violation

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[12] "Active workings" are defined as "any place in a coal mine where miners are normally required to work or travel." 30 U.S.C. § 878(g)(4).

[13] While the Secretary's Program Policy Letters cannot prescribe binding rules of law, *see The American Coal Co.*, 34 FMSHRC 1963, 1970-71 (Aug. 2012), they can be instructive. The Secretary's Program Policy Manual can clarify or explain a regulation's language and therefore provide instruction to mine operators. *See Tilden Mining Co.*, 36 FMSHRC 1965, 1969-70 (Aug. 2014). MSHA considers Program Policy Letters "an integral part of the Program Policy Manual." MSHA, *Program Policy Manual*, www.msha.gov/REGS/COMPLIAN/PPM/PMMA INTC.HTM (last visited Feb. 25, 2015).

[14] Although the roof fall caused an air blast which damaged stoppings in active workings, and thus impaired ventilation, Del Duca testified that the stoppings were not hit with anything from the roof fall other than the air blast. Tr. 331; 34 FMSHRC at 1381 n.57. We do not address the question of whether a roof fall outside of active workings which expels physical debris or other material into active workings could be considered an "accident" within the meaning of 30 C.F.R. § 50.2(h)(8).

of section 50.10(d).[15] However, because Stewart's injuries constituted an "accident" pursuant to section 50.10(b), the Judge's finding of a violation is affirmed.

2. S&S

As a threshold matter, only violations of mandatory standards may be designated as S&S. *See supra* n.3. We find that the Judge properly rejected Signal Peak's claim that section 50.10 is not a mandatory standard. 34 FMSHRC at 1348. Section 50.10 was initially issued as a regulation. *Cyprus Emerald Res. Corp.*, 195 F.3d 42, 44 (D.C. Cir. 1999). However, in 2006, a revised section 50.10 was published as an Emergency Temporary Standard ("ETS"), then adopted as a permanent standard in a Final Rule, in accordance with section 101 of the Act.[16] 71 Fed. Reg. 12,252 (Mar. 9, 2006); 71 Fed. Reg. 71,430 (Dec. 8, 2006); *see Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 651 n.4 (Aug. 2008).

Signal Peak claims that the final rule merely revised a regulation and showed no intent to create a mandatory standard. These arguments were addressed in *Pine Ridge Coal Co.*, 33 FMSHRC 987 (Apr. 2011) (ALJ). The Judge in that case held that section 50.10 was properly promulgated according to procedures outlined in section 101, and that publishing the ETS and Notice of Formal Rule Making in the Federal Register provided notice to operators of the Secretary's intent to enforce section 50.10 as a mandatory standard. *Id.* 1003-10. We agree.

Having determined that Citation No. 8463717 *may* be designated as S&S, we also conclude that the Judge properly affirmed the S&S designation. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary

[15] We can understand that from a policy standpoint, it might be useful to consider an unplanned roof fall in the gob which impairs ventilation or impedes passage in active areas as a reportable accident under 30 C.F.R. § 50.10(d). If Mike Stewart had not been injured in this accident, under our holding today the roof fall would not have been an occurrence which needed to be reported to MSHA. If that had been the case, the resulting changes to Signal Peak's roof control plan, which encouraged earlier and smaller caves on future longwall panels, 34 FMSHRC at 1378-79, would not have been made. However, we are constrained by the language of the regulation to rule as we have.

[16] Section 101(b) states that the Secretary shall provide an Emergency Temporary Standard if he determines that miners are exposed to a grave danger. The provision outlines the process for transforming the temporary standard into a mandatory standard through notice-and-comment rulemaking, as described in section 101(a). 30 U.S.C. § 811(b).

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

Accord Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Signal Peak contends that the failure to timely report the accident to MSHA did not contribute to a hazard, because MSHA's involvement was not necessary to remedy Stewart's injuries. This interpretation unduly narrows the purpose of section 50.10. While immediate rescue efforts are a significant concern, section 50.10 is also intended to facilitate MSHA's ability to investigate and remedy the cause of the accident. The preamble to the final rule states:

> Not only can [timely reporting] be vital to the saving of lives, but it can be instrumental to having expert Agency personnel at the scene with authority to assure that the accident site remains undisturbed and preserved for investigation into causes.
>
> . . . roof falls . . . for example, may necessitate critical, pro-active corrective actions and the need for emergency response assistance.

71 Fed. Reg. at 71,435. This is properly reflected in the Judge's determination that Signal Peak's failure to immediately report the accident created a hazard by interfering with MSHA's ability to investigate the cause of the accident, thereby exposing miners to the danger resulting from roof conditions resulting in an unexpectedly massive initial roof fall.[17] 34 FMSHRC at 1371-73.

Signal Peak also contends that the hazard was unlikely to result in a serious injury in the context of continuing mining operations. Specifically, Signal Peak states that a similarly dangerous roof fall was unlikely to recur, noting that subsequent falls on the cited panel would have been smaller than the initial fall which injured Stewart, and that MSHA permitted mining to resume on the cited panel without requiring modifications to the roof control plan. However, these factors at most establish that a similar fall was unlikely on the *cited* longwall panel.[18]

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[17] Although the accident at issue is Stewart's injury rather than the roof fall, an investigation into the cause of the accident necessarily would, and ultimately did, lead MSHA to discover the roof conditions that caused the unexpectedly massive initial fall and to suggest means (hydrofracking) to prevent such an event on future panels. Tr. 310.

[18] MSHA's inspector and roof specialist conceded that the initial fall on a longwall panel is generally the largest. Tr. 93-94, 282-83. However, the record does not indicate whether subsequent falls would still have been large enough to cause serious injury. It is also true that

We conclude that substantial evidence supports the Judge's finding that the hazard contributed to the reasonable likelihood of a similarly dangerous cave when Signal Peak began its *subsequent* longwall panel. 34 FMSHRC at 1373. Signal Peak's chief engineer agreed with the inspector that MSHA's recommended changes to the roof control plan were necessary and effective in preventing a similarly large blast on the next longwall panel. Tr. 298-99, 523-25. These changes did not originate with Signal Peak. Following the roof fall and ensuing blast of air on December 23, the operator simply fixed the ventilation damage and resumed mining. 34 FMSHRC at 1371. In light of Signal Peak's failure to initiate contact with MSHA or preserve the accident site, the investigation and modification of the roof control plan prior to beginning the next panel would not have occurred without MSHA's intervention.

Signal Peak does not dispute that any injury that occurred from a blast resulting from a roof fall in the gob of the size that occurred on December 23, 2009, would be of a reasonably serious nature. Accordingly, we affirm the Judge's finding that the violation was significant and substantial.

3. Reckless Disregard

The Judge based his determination of reckless disregard on findings regarding several elements of Signal Peak's conduct, all of which are supported by the record. First, the Judge found evidence, based on Rice's evasiveness during his phone conversation with MSHA Supervisor Hamilton, that Signal Peak knew it had a duty to report immediately but failed to do so. 34 FMSHRC at 1374. He relied on Hamilton's testimony, which he deemed "highly credible," that he had to pry every bit of information from Rice. *Id.* at 1354; Tr. 212-15. A Judge's credibility determination is entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Second, the Judge found that Signal Peak failed to take any steps to ensure that the roof fall was investigated, thereby placing miners at future risk. 34 FMSHRC at 1374. It is uncontested that Signal Peak did not initiate contact with MSHA after the accident, and Signal Peak presented no evidence of an independent investigation. As discussed above, without an investigation, necessary changes to the roof control plan would not have been made, and miners would have been at risk on subsequent panels. We conclude that substantial evidence supports the Judge's finding of reckless disregard.

The Judge considered and rejected Signal Peak's argument that its determination that the injuries were not immediately reportable was reasonable. Instead, he found that Signal Peak missed several discrete points at which it was clear from Stewart's condition that Signal Peak had an obligation to report immediately. In short, the duty to report was obvious at multiple points in time. 34 FMSHRC at 1374. As discussed above, *see supra* p. 6, substantial evidence supports the Judge's determination that the operator should have known that Stewart's injuries

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MSHA allowed mining to resume on the cited panel without requiring modifications to the roof control plan. Tr. 302-03. But this happened only after additional safety precautions were put in place at MSHA's instigation. Tr. 304-06.

were immediately reportable, i.e., that it was unreasonable to conclude that the injuries were not immediately reportable.

To summarize the Judge's findings, all of which are supported by substantial evidence: (a) a roof fall in the longwall gob occurred with such force that it damaged 78 stoppings; (b) the blast picked up miner Mike Stewart and threw him 50 to 80 feet; (c) Stewart suffered severe and obvious injuries, had trouble moving and trouble breathing, and was in "excruciating" pain; (d) it took one-and-a-half hours to bring Stewart out of the mine, during which time it was impossible to fully take his vital signs; (e) Stewart was taken by ambulance to a hospital and then by life flight to another hospital; (f) the doctor at the first hospital believed "absolutely" that Stewart's injuries were life-threatening; (g) Signal Peak never contacted MSHA about the accident; (h) rather, as the Judge noted, 34 FMSHRC at 1359, Signal Peak's concern was to resume production, which it did three days later, after fixing the ventilation damage; (i) in resuming mining, Signal Peak changed conditions at the accident scene, thereby impeding any investigation by MSHA; (j) Signal Peak did nothing to investigate causes of the enormous roof fall and resulting blast or to prevent recurrences in future longwall panels; (k) MSHA found out about the accident from a newspaper reporter, five days after it occurred; (l) when contacted by MSHA, Signal Peak's Safety Director was "anything but forthcoming" in answering questions; and (m) Signal Peak filed the Form 7000-1 accident report one-and-a-half hours after the Safety Director first spoke with MSHA. This pattern of behavior fully supports the Judge's conclusion that Signal Peak acted with reckless disregard in failing to report Stewart's injury to MSHA.

B. Citation No. 8463718

Section 50.12 prohibits operators from altering an "accident site" before investigations are completed. 30 C.F.R. § 50.12. Signal Peak does not deny that it resumed mining at the site of Stewart's injury before MSHA was able to investigate, but contends that it did not fail to preserve an accident site in violation of section 50.12 "[f]or the same reasons" that it did not fail to report an accident in violation section 50.10, i.e., the injury was not an accident. SP Br. at 27. Having already found that the Judge properly identified Stewart's injury as a reportable accident, *see supra* pp. 6-8, we affirm the Judge's finding that Signal Peak failed to preserve the accident site in violation of section 50.12.[19]

C. Penalties

In assessing penalties, the Judge raised the amount for Citation No. 8463717 from $49,500 as proposed by the Secretary to $74,250, and similarly raised the penalty for Citation No. 8463718 from $1,900 to $9,500. 34 FMSHRC at 1346 n.1.

First, Signal Peak contends, and the Secretary agrees, that the Judge erred by imposing a penalty for Citation No. 8463717 in excess of the $70,000 maximum for general non-flagrant

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[19] Signal Peak does not explicitly challenge the Judge's finding of reckless disregard for Citation No. 8463718. However, if Signal Peak intended to also challenge the reckless disregard finding "for the same reasons" as for Citation No. 8463717, i.e., that it reasonably believed the injuries were not immediately reportable, that argument is again rejected. *See supra* p. 12.

violations of mandatory standards provided by section 110(a)(1) of the Act.[20] We find that the Judge did improperly exceed the relevant statutory maximum. However, as provided in section 110(a)(2) of the Act, the relevant maximum assessable penalty for failing to immediately report an injury with a reasonable potential to cause death is $60,000.

Section 110(a)(2) states that an operator "who fails to provide timely notification to the Secretary as required under section 103(j) of this [Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000."[21] 30 U.S.C. § 820(a)(2). Section 103(j) requires an operator to notify the Secretary "within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred." 30 U.S.C. § 813(j). This is the same conduct required by sections 50.10(a), (b), and (c) of the Secretary's regulations. Accordingly, the assessment of a penalty for a non-flagrant violation of section 50.10(b) is governed by section 110(a)(2) of the Act.[22] The Judge erred by assessing a penalty in excess of $60,000 for Citation No. 8463717.

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[20] Section 110(a)(1) of the Act states that the "operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation." 30 U.S.C. § 820(a)(1). In 2008, the maximum was adjusted to $70,000 through rulemaking to account for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, Nov. 10, 1998, 112 Stat 3280). *See* 30 C.F.R. § 100.3(a); 73 Fed. Reg. 7206, 7207-08 (Feb. 7, 2008).

[21] In 2012, the $60,000 maximum was raised to $65,000 to account for inflation. *See supra* n.20; 30 C.F.R. § 100.4(c); 77 Fed. Reg. 76,406, 76,406-07 (Dec. 28, 2012). However, adjustments for inflation "shall apply only to violations which occur after the date the increase takes effect." Sec. 6, Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, § 31001(s)(2), Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, §§ 1301(a)(1), 1301(a)(2), Nov. 10, 1998, 112 Stat 3280). These violations occurred in 2009; therefore the pre-adjustment maximum of $60,000 applies.

[22] Penalties for non-flagrant violations of section 50.10(d) (for failure to report "any other accident") are governed by section 110(a)(1) of the Act rather than section 110(a)(2), as these violations have no counterpart in section 103(j). Here, however, there was no violation of section 50.10(d) because the roof fall was not, in and of itself, a reportable accident. *See supra* p. 9. Citation No. 8463717 involves a non-flagrant violation of section 50.10(b) only. Therefore the maximum assessable penalty is governed by section 110(a)(2) of the Act. The lower penalty for an accident involving death or a reasonable potential to cause death is an anomalous result given Congress' concern in enacting section 103(j). Nevertheless, it is compelled by a fair reading of the various Acts and regulations involved.

Additionally, Signal Peak alleges that the Judge did not provide adequate justification to account for the difference between the Secretary's proposed penalties and the penalties which the Judge independently assessed. Although Commission Judges are accorded broad discretion in assessing civil penalties, such discretion is not unbounded, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act.[23] *See, e.g.*, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In this regard, the Commission has recognized that substantial deviations from the Secretary's proposed assessment must be adequately explained. *Id.* at 621. However, the Judge's findings need not be exhaustive; rather, they must be sufficient to provide the Commission with a basis for determining whether the Judge complied with the requirement to consider the section 110(i) criteria. *Id.*

The Judge addressed all six section 110(i) criteria, particularly noting the impact of his gravity and negligence findings on the assessed penalties. 34 FMSHRC at 1382-83. With regard to gravity, the Judge emphasized that both violations placed miners in danger by interfering with MSHA's ability to investigate. *Id.* at 1383. With regard to negligence, the Judge considered both violations "egregious failures," noting that the "decision not to call MSHA, in violation of . . . [section] 50.10, was in no way a borderline call for which reasonable minds could differ," and noted that the Secretary described Signal Peak's failure to inform MSHA of the accident before resuming mining as a "blatant disregard of [section 50.12]."[24] *Id.* at 1383, 1375. Given the broad discretion accorded to Commission Judges within the confines of the section 110(i) framework, the Judge's findings of particularly high gravity and negligence adequately explain the deviation between the proposed and assessed penalties.[25]

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[23] Section 110(i) states in relevant part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[24] The Judge also found that Signal Peak did not show good faith, as that term is employed under 30 U.S.C. § 820(i). 34 FMSHRC at 1383.

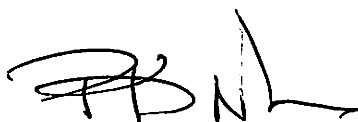
[25] Relying on our decision in *Hidden Splendor Resources, Inc.*, 36 FMSHRC ___ (Dec. 2014), Commissioner Althen would vacate and remand this decision, instructing the Judge to explain why he substantially diverged from the Secretary's penalty proposal. Slip op. at 17. However, the two cases are readily distinguishable. In *Hidden Splendor*, the Judge explained why the penalty would not affect the operator's ability to pay, but as for the other factors, simply stated: "I have reviewed the Assessed Violation History Report, which is not disputed. At all pertinent times, Hidden Splendor Resources, Inc. was medium in size. The violations were abated in good

We therefore conclude that, except to the extent that the penalty for Citation No. 8463717 exceeds the statutory maximum, the Judge did not abuse his discretion in raising the penalty amounts.

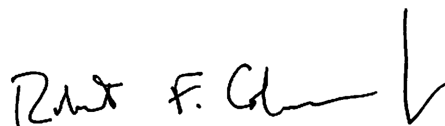
III.

Conclusion

For the foregoing reasons, we vacate the $74,250 penalty imposed by the Judge for Order No. 8463717 and impose a penalty of $60,000. The Judge's findings with respect to Citation Nos. 8463717 and 8463718 are otherwise affirmed.



Patrick K. Nakamura, Acting Chairman



Robert F. Cohen, Jr., Commissioner

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faith. The gravity and negligence findings are set forth above." 34 FMSHRC 3310, 3380-81 (Dec. 2012) (ALJ). In other words, the Judge did not specify how his findings on gravity, negligence, or any other factor (apart from the operator's ability to pay) impacted his penalty assessment. In contrast, in this case the Judge's penalty analysis details the gravity and negligence associated with the citations. In addition to the negligence findings cited above, the Judge specified that "regarding the violation of 30 CFR § 50.12, the failure of Signal Peak to preserve the evidence, that can be viewed as more serious because it eliminated MSHA's ability to assess the accident site." 34 FMSHRC at 1383-84. In other words, unlike in *Hidden Splendor*, the Judge here specified which factors he weighed more heavily and why. We note that the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001); *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Commissioner Althen also states that the Judge erred in assessing the size of the operation, by rejecting the tonnage in Exhibit A in favor of testimony regarding shipping goals. However, it is only 30 C.F.R. Part 100, governing the Secretary's proposed penalties, that refers to tonnage. *See* 30 C.F.R. § 100.3(b). Section 110(i), governing a Judge's assessment of penalties, only requires that a Judge consider whether the penalty is appropriate to the size of the business. Considering testimony regarding numbers of employees and shipping goals seems to fit within that description.

Commissioner Althen, concurring in part, dissenting in part:

I concur with the Majority on all issues except the decision to assess a maximum penalty for Citation No. 8463717 and to affirm the $9,500 assessment for Citation No. 8463178.[1] I would find the Judge abused his discretion by increasing by fifty percent (50%) and five hundred percent (500%), respectively, penalties already specially assessed by the Secretary without acknowledging that the increases are substantial or explaining the basis for such substantial increases and by erroneously applying certain statutory penalty criteria.

Background

A. Penalty Assessments

The Commission has held that if a Judge's penalty assessment differs substantially from the Secretary's proposal, the Judge must explain the variance in the assessed penalty from the proposed penalty. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (1983), *aff'd,* 736 F.2d 1147 (D.C. Cir. 1986); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). The Judge need not make exhaustive findings and may assign different weights to different criteria, but must provide an adequate explanation of why the penalty assessment diverges from the penalty proposal. *Cantera Green*, 22 FMSHRC at 622.

In the recent decision in *Hidden Splendor Resources, Inc.*, 36 FMSHRC __ (Dec. 2014), the Commission vacated and remanded a reduction of a penalty from a proposed $6,459 to an assessed $5,000 – a relatively paltry reduction of $1,459 and 23% respectively. Our basis was that, even though the Judge considered and made findings on all six penalty criteria, he "did not offer any explanation for the divergence." *Id.*, slip op. at 6. Having so recently found an explanation necessary for very small dollar and percentage changes, it seems clear that an explanation is even more important for changes in the tens of thousands of dollars and of 50% and 500% – decreases and increases from penalty proposals should be subject to the same standard. Only if a proper explanation is provided for the assessment and if the penalty criteria are properly applied is the final assessment not arbitrary. *Id.*; *Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998) (quoting *Sellersburg Stone*, 5 FMSHRC at 293); *Cantera Green*, 22 FMSHRC at 621-23; *Virginia Slate*, 23 FMSHRC 482, 493 (May 2001); *Rushford Trucking*, 22 FMSHRC 598, 602 (May 2000); *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).[2]

[1] The Secretary proposed penalties of $49,500 and $1,900 for Citation No. 8463717 and Citation No. 8463178, respectively. The Judge increased the penalties to $74,250 and $9,500, respectively. 34 FMSHRC at 1346 n.1. The Commission's reduction of the penalty for Citation No. 8463717 to the maximum allowed by law does not obviate the abuse of discretion in failing to explain the substantial change from the penalty assessed by MSHA. Further, the maximum penalty of $60,000 and the unchanged penalty of $9,500 continue to constitute substantial changes from the assessed penalties. Although the Commission has not defined the term "substantial" or reduced the term to a percentage variance, all must agree that changes of 50% from $49,500 to $74,250 ($24,750) and of 500% from $1,900 to $9,500 ($7,600) are substantial.

[2] I do "rely[ ] on" *Hidden Splendor* for the accepted proposition that Judges must explain substantial divergences from the Secretary's penalty proposal. *See* slip op. at 15-16 n.25.

B. Special Assessments

The regular penalty point schedule set out in 30 C.F.R. § 100.3 provides a basis for dispassionate and uniform penalty proposals. In this case, however, MSHA exercised its unbridled discretion to propose a penalty as a "special assessment" summarily provided for at 30 C.F.R. § 100.5. Special assessments are made on the basis of narrative findings rather than the uniform tables for regular assessments. 30 C.F.R. § 100.5(b). Although the regulations do not explain how specially assessed penalties are calculated, the Secretary has posted information styled as "guidelines" on the MSHA website.[3] Under the guidelines, except perhaps in very rare instances, specially assessed penalty proposals are based upon finding a heightened degree of negligence and/or gravity – that is, negligence or gravity apparently beyond the contemplation of the regular point system.[4]

The subjective nature of special assessments does not render MSHA's role in the assessment process irrelevant to a Judge's assessment. However, it is important that the Judge recognize the specially assessed nature of the proposed penalty in explaining why his/her

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Hidden Splendor is most notable here, however, as a case in which the Judge's findings on each of the penalty criteria were essentially parallel to the Secretary. We remanded the case for an explanation of a penalty reduction of less than $1,500 as compared to the nearly $25,000 increase in this case. The sauce for the goose must be the sauce for the gander. In that vein, one may wonder if the majority would accept a fifty percent penalty reduction partially based upon a finding that the operator apparently planned to reduce production in coming years. *See infra* p. 20.

[3] *Available at* www.msha.gov/PROGRAMS/ASSESS1.htm (follow "Special Assessment Guidelines" hyperlink) (last visited February 26, 2015). As it behooves Commission Judges to explain substantial divergence from the proposed penalty, it would seem to behoove the Secretary to explain substantial divergence from the regular penalty criteria. However, the Mine Act permits the Secretary to propose penalties on the basis of narrative findings. It is up to the Commission to guard against overly lenient or punitive penalty proposals by the Secretary.

[4] The primacy of negligence and gravity is shown by MSHA's explanation that the assessments are made on the basis of five of the six criteria (omitting the effect on the operator's ability to continue in business) and the description of special assessment penalty point assignments for the other three penalty criteria:
(1) For size of business, the guidelines state "[f]or most special assessments, MSHA assigns the regular assessment penalty points for size derived from § 100.3(b), Tables I through V;"
(2) For violation history, "MSHA assigns the regular assessment penalty points for <u>Violation History</u> from Tables VI and VII [of § 100.3(c)]. For special assessments MSHA assigns the regular assessment penalty points for <u>Repeat Violation History</u> from Tables VIII and IX [of § 100.3(c)], except for flagrant violations;" and,
(3) For abatement and good faith, the guidelines state "[i]n general, if an operator abates a citation within a reasonable period of time, as prescribed by the citation, the total number of special assessment penalty points is reduced by 2 points." The guidelines also permit special assessment penalty points for an unwarrantable failure, imminent danger order, and for defiance of a withdrawal order.

findings warrant a substantial increase or decrease from the penalty proposal. Otherwise, the Commission cannot know whether the Judge took into account, or even realized, that MSHA made a special penalty proposal on the basis of heightened negligence and/or gravity without the uniformity and predictability provided by the regular point system.

C. The Judge's penalty decision

Regarding Citation No. 8463717, the Secretary specially assessed the penalty at $49,500. As in *Hidden Splendor*, the Judge essentially agreed with the findings of MSHA with respect to the six penalty criteria, except for a lesser degree of injury to the one affected miner and incorrect application of the size of business criterion. He then assessed a penalty of $74,250. 34 FMSHRC at 1384.

Regarding Citation No. 8463718, MSHA proposed a specially assessed penalty of $1,900. The Judge agreed with MSHA's finding except he found the hazard to have occurred, thereby warranting a five-fold increase from the penalty proposed by MSHA from $1,900 to $9,500. *Id.*[5]

Errors Warranting Remand

The Judge's decision is a well-written expository opinion. However, the Judge made a number of errors and/or oversights affecting his penalty assessment that jeopardize the credibility of the penalty assessment process and fail to explain sufficiently the very substantial modifications to the specially assessed penalties proposed by the Secretary.

First, with respect to Citation No. 8463717, the Judge assessed a penalty of $74,250, an amount that is exactly 150% of the proposed penalty of $49,500 but that clearly exceeded the statutory maximum penalty. It is taken as a given that every Judge knows the maximum penalties under the Mine Act. It is also a given that a Judge would not intentionally violate the Mine Act by assessing a penalty not permitted by law. We may only speculate on the reason for this error – simple oversight, error by an assistant, commitment to a 150% penalty, etc. The over-assessment standing alone might not warrant reassessment of the penalty except to comply with the Mine Act's maximum. However, here, it is a template for a host of other errors casting doubt on whether the penalty adjustment was a well-reasoned, properly-supported change from

[5] Although explanations are best made explicitly, an explanation sometimes may be implicit. For example, the Judge's finding that the hazard occurred might explain implicitly a substantial increase in the penalty for violation of 30 C.F.R. § 50.12. We note that, while the violation occurred, MSHA was able to examine the site and make suggestions to prevent recurrence. Slip op. at 3. The Judge's finding that the hazard occurred, therefore, most likely reflects a finding that the hazard would have occurred if a reporter had not made an inquiry regarding the incident. Even that finding might have constituted an implicit explanation had the Judge not committed other errors indicating more may have been at work in the increased penalty than a different gravity finding.

the proposed penalty or an arbitrary decision to punish the operator to the limit of the law and beyond.

Second, MSHA's penalty petition, which the Judge accepted, states mine and mine controller production of 275,220 tons (Exhibit A). Nonetheless, the Judge's assessment refers only to speculative future production. In assessing the penalty, the Judge does not refer to the actual production but instead opines: "[b]y any measure Signal Peak is a large mine, presently employing about 240 people and *with a goal of shipping a million tons of coal per year*." *Id.* at 1382 (emphasis added). While the Judge does not state explicitly that he considered this goal in increasing the penalty, such consideration is the only reasonable reason for the discussion of the operator's future production plans in the penalty assessment portion of his opinion, especially as he does not there identify the actual, relevant production. Thus, with respect to the penalty criterion of size of the business of the operator, the Judge identifies not the actual size of the mine and mine controller – the penalty criterion – but instead long term plans for future years. The Mine Act does not permit assessments based upon a Judge's speculation about an operator or controlling entity's future size – an entirely speculative future in the mining industries.

Third, in assessing the penalty, the Judge states: "[t]he Secretary seeks a *minimum* penalty of $51,400.00 for the two violations." *Id.* (emphasis in original). Thus, he asserts MSHA's proposed penalty was a "minimum" – even emphasizing the term "minimum." This is the only place in the opinion where the Judge identifies MSHA's penalty proposal. Even then he aggregates the penalties for two violations and describes the total proposed penalty as a minimum. Indeed, he repeatedly expressed a finding that MSHA's proposed penalty was a minimum. *Id.* at 1384 n.60.

The Secretary did not propose a modified assessment during the hearing. The proposed specially assessed penalty in this case was not a product of the point system but instead resulted from an individualized review by MSHA's special assessment office – a higher than regular penalty assessment. It was a deliberately arrived at penalty proposal. It was neither minimum nor maximum. An assertion that the Secretary's proposed penalty is a "minimum" does not "explain" a substantial increase in the proposed penalty. Of course, it is most unlikely the Secretary would ever state that his proposed penalty was a "maximum" but certainly the Commission would not accept a substantial downward adjustment based upon a claim that the Secretary's proposal was a "maximum."[6]

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[6] It is also noteworthy that the Judge created out of whole cloth a heretofore unknown interpretation of "reasonable potential to cause death" by defining this phrase to mean that the possibility of death is "not far-fetched." 34 FMSHRC at 1368. In creating his far-fetched definition, the Judge summarily rejects: (1) the inspector equated "reasonable potential to cause death" with "life threatening," Tr. 189; (2) the preamble to the Emergency Mine Evacuation regulation equates "reasonable potential to cause death" with "life threatening," 71 Fed. Reg. 71,430, 71,433-34 (Dec. 8, 2006); (3) numerous Commission Judges have used "life threatening" in construing "reasonable potential to cause death," *Vulcan Construction Materials, L.P.*, 35 FMSHRC 2868, 2879 (Aug. 2013) (Judge Gill); *Cemex, Inc.* 35 FMSHRC 1355, 1365 (May 2013) (Judge Miller); *Walker Stone Co.*, 23 FMSHRC 180, 183 (Feb. 2001) (Judge Feldman); *Consolidation Coal Co.*, 9 FMSHRC 1950 (Nov. 1987) (Judge Broderick); *Climax Molybdenum Co.*, 2 FMSHRC 1967, 1970-1971 (July 1980) (Judge Morris); and (4) the Secretary's reliance in

Fourth, the Judge's penalty discussion does not even acknowledge that increases of 50% and 500% respectively constituted substantial variances from the proposed penalty requiring explanation. The Judge makes no effort to explain the reasons for his changes. He identifies the Commission's authority to assess penalties but fails to discuss the obligation to explain (meaning give good, substantial reasons) for substantially changing a penalty proposal by the Secretary.

The Judge does find negligence and gravity were "egregious." However, just as he does not discuss the Secretary's assessment or reason for his changes, he does not take into account that MSHA had already assessed maximum penalty points for negligence and gravity and then gone further and substantially increased the regular assessment proposal on the basis of a special assessment turning on egregious negligence and gravity. It is impossible to reconcile acceptance of such erroneous failure to explain his increase, especially when coupled with other clear errors, with the Commission's decision in *Hidden Splendor, supra.*

Fifth, the Judge either did not understand or did not think it important to note that the proposed assessment was a special assessment in which the penalty proposal was already increased above the regular point system on the basis of heightened negligence and/or gravity. Without that understanding, the increase is a substantial increase on top of a substantial increase above the otherwise predictable penalty without an explanation by MSHA for its increase or by the Judge for his overlapping substantial increases.

By not explaining the very substantial modifications as compared to the proposed penalties, the Judge creates the danger of the appearance of arbitrariness against which *Sellersburg Stone Co.* and its progeny are designed to protect. The Judge increased an already increased penalty to – in fact beyond – the maximum without substantial explanation. The penalty assessment appears, therefore, to be a reflexive rather than reflective action apparently flowing from intent to inflict maximum financial pain.

Conclusion

Penalties should reflect as objective as possible application of the penalty criteria. Based upon the decision in this case, I find no assurance of such a process.

The Judge assessed a penalty above the statutory maximum; he erred in his application of the appropriate size of business factor; he erred by categorizing the specially assessed proposed penalty as a minimum; he gave no consideration to findings by MSHA and other Commission Judges that "reasonable potential to cause death" equates with "life threatening;" he did not recognize his assessments were substantial changes from the already specially assessed proposed penalties; he did not recognize he had a duty to explain the change, and did not do so.

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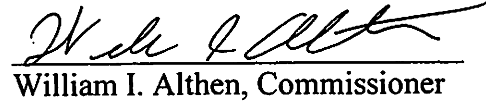
his post-hearing brief upon the interpretation of the standard as meaning a "life threatening" condition. S. Post-Hearing Brief, p. 10. An interpretation as abstruse as "not far-fetched" sheds no light on the nature of an event having a "reasonable potential to cause death." The Mine Act is a mature statute. There is no reason to invent new and even more ambiguous interpretations of its terms.

These errors constitute an abuse of discretion. As in *Hidden Splendor*, I would remand the penalties associated with the violations to the Judge for further explanation consistent with the requirements for explanation of substantial divergences and for proper application of the penalty criteria.



William I. Althen, Commissioner

Distribution:

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004