FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2009-401-M
v.	:	SE 2009-402-M
	:	SE 2009-553-M
MIZE GRANITE QUARRIES, INC.;	:	SE 2009-554-M
ROBERT W. MIZE III; and	:	SE 2010-849-M
CLAYBORN LEWIS	:	SE 2010-850-M
Both Employed by MIZE GRANITE QUARRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

This case comes to the Commission a third time for review under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary of Labor asserts that a supervisory miner was erroneously relieved of the burden of proving his inability to pay an individual penalty. We conclude that substantial evidence in the record supports the Judge's finding on inability to pay and the resultant penalty adjustment. Therefore, we affirm the decision.

I.

Factual and Procedural Background

In 2009, Mize Granite Quarries, Inc. ("MGQ"), a corporation, operated a stone quarry located in Elberton, Georgia. 33 FMSHRC 886, 888 (Apr. 2011) (ALJ). MGQ employed six regular employees and one foreman, Clayborn Lewis. Tr. 179. Lewis had worked at MGQ for 18 years. Tr. 161. After inspections on January 13 and March 11-12 of 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued eleven citations/orders against MGQ. MSHA also issued one citation and three orders against the owner of MGQ, Robert Mize and, separately, against Lewis. MSHA proposed individual penalties pursuant to section 110(c)

of the Mine Act[1] against both Mize and Lewis in the amounts of $3,600, $6,000, $4,000, and $4,000. After a hearing, the Judge dismissed one order but found violations with respect to the remaining citation and orders against Mize and Lewis. These three violations included total proposed penalties of $13,600 against Mize and Lewis individually.

After the parties filed post-hearing briefs, the Judge found that evidence of the personal income and financial responsibilities of Mize and Lewis was germane to the determination of appropriate penalties under section 110(c) of the Act. Therefore, she ordered Mize and Lewis to provide documentary evidence relative to their incomes and financial responsibilities. Unpublished Order Reopening for Submission of Evidence at 1-2 (Mar. 4, 2011). Mize responded by supplying financial information to the Judge. Lewis, whom Mize had represented at the hearing, did not respond to the Judge's order. Thereafter, the Judge assessed three penalties of $500 each against Mize totaling $1,500 and three penalties of $300 each against Lewis totaling $900. 33 FMSHRC at 917.

The Secretary petitioned the Commission for review and asserted with respect to both Mize and Lewis that the Judge had not adequately explained the basis for dismissing one order and for substantially reducing the penalties for the remaining citation and orders. Upon review, the Commission affirmed the dismissal of the order but remanded the case for a further determination of the appropriate penalties on the basis that the Judge erroneously had included the size of the mine and the penalties levied against the corporation in assessing the individual penalties. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760 (Aug. 2012). The Commission also noted that the March 4, 2011 Order requiring submission of evidence had not been sent to Lewis directly but had been addressed to him in care of Mize Quarries. Therefore, the Commission ordered that Lewis should be directly notified of penalties proposed by MSHA and should be given the opportunity to respond regarding his personal income and financial responsibilities. The notice was to include a statement that if Lewis failed to provide evidence of income, net worth, and financial obligations, the Judge could presume that the imposition of the assessed penalties would not adversely affect his ability to meet financial obligations. *Id.* at 1766.

On remand, the Judge reevaluated the individual penalties assessed against Mize and Lewis. *Mize Granite Quarries, Inc.*, 35 FMSHRC 414 (Feb. 2013) (ALJ). The Judge again assessed penalties against Mize and Lewis in the amounts of $500, $500, and $500 (totaling $1,500) and $300, 300, and $300 (totaling $900), respectively. The Judge based the continued reduction for Mize on her review of Mize's individual income tax return and personal financial responsibilities. The Judge stated specifically that she had taken the financial information provided by Mize into account in the reduction of the penalty.

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[1] Section 110(c) of the Act provides in relevant part that, whenever a corporate operator violates a mandatory safety standard, "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation" shall be subject to penalties as an individual. 30 U.S.C. § 820(c).

Despite the letter sent to Lewis as a result of the Commission's initial decision, Lewis did not submit any information to the Judge. However, the Judge found that, because Lewis was only a foreman at the operation owned by Mize, Lewis' ability to pay was no greater than Mize "and most likely sizably less." *Id.* at 417. Therefore, the Judge again assessed penalties totaling $900 against Lewis.

The Secretary again sought and obtained review by the Commission of the penalties assessed against both Mize and Lewis. The Commission upheld the Judge's analysis of the penalties to be assessed against Mize and Lewis. In doing so, the Commission applied the substantial evidence test to the Judge's factual findings. *Mize Granite Quarries, Inc.*, 36 FMSHRC 1813 (July 2014).

Regarding Lewis, the Commission found that documents in the record related to Mize also constituted sufficient evidence to support the Judge's evaluation of Lewis' ability to pay and the reduction in the penalty. More specifically, the Commission referenced the operator's tax return that was in the record and calculated that the average annual salary for MGQ employees was approximately $21,500. Based on this and other findings, the Commission affirmed the Judge's findings with regard to the effect of the proposed penalties on Mize's and Lewis' ability to meet financial obligations as based factually on substantial evidence and not an abuse of discretion.

The Commission, however, also found that the Judge's decision on remand misstated the negligence and gravity findings contained in her initial decision. Consequently, the Commission again remanded the case and ordered the Judge to consider the penalty assessments in light of the correct negligence and gravity findings. *Id.* at 1817.

Upon remand, the Judge reiterated the negligence and gravity findings from the initial decision. She further found that "in consideration of all section 110(i) factors, including the negligence and gravity of the violations as stated in my first decision, the amount of the penalties against both individuals is appropriate and I reiterate my decision." *Mize Granite Quarries, Inc.*, 36 FMSHRC 1912 (July 2014) (ALJ).

The Secretary filed and the Commission granted a third petition for discretionary review. The Secretary did not challenge the reduction in the individual penalty assessed against Mize, the owner and operator of MGQ, to $1,500. However, the Secretary continues to object to the Judge's decision to reduce Lewis' total penalty from $13,600 to $900.

II.

Legal Principles

Civil penalties under the Mine Act serve an important public purpose: motivation of conduct. To achieve this purpose, Congress enumerated six statutory criteria for assessment of

penalties against mine operators: the size of the operator's business, the operator's history of previous violations, the operator's ability to continue in business, the operator's negligence, the gravity of the violation, and good faith abatement efforts. 30 U.S.C. § 820(i).

As the Mine Act directs, and as the Commission has consistently held, the Commission makes independent penalty determinations based upon the statutory criteria in section 110(I) of the Mine Act. *See Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). The determination of the amount of the penalty for a particular violation is an exercise of discretion by the Administrative Law Judge but must reflect consideration of all six statutory criteria of the Act. *Id.* at 294. In turn, the Commission reviews a Judge's factual determinations under the substantial evidence standard. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984); *see also Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996).

In applying the criterion of inability to continue in business, the Commission has found that the burden rests upon the operator to introduce evidence demonstrating that a proposed penalty would adversely affect its ability to continue in business. *Broken Hill Mining*, 19 FMSHRC 673, 677-78 (Apr. 1997). Thus, the Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). To adjust a penalty based upon an operator's inability to pay, therefore, the Judge must have, and must point to, material in the record bearing upon the operator's ability to pay.

Congress did not create a set of statutory criteria for the assessment of penalties against individuals pursuant to section 110(c) of the Mine Act separate from the criteria applicable to operators under section 110(i). The Commission has held that in assessing penalties under section 110(c), "judges must make findings on each of the criteria as they apply to *individuals*." *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997) (emphasis in original). Application of the ability to continue in business criterion to an individual requires an inquiry into whether the penalty will affect the individual's ability to meet his financial obligations. *Id.*; *Steen, emp. by Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997). As a result, the present case rests upon a determination of whether the Judge abused her discretion in finding that the proposed penalty of $13,600 would adversely affect Lewis' ability to meet his financial needs and, consequently, reducing the penalty to $900.

III.

Disposition

The Secretary no longer seeks review of an assessed penalty of $1,500 against Mize, the owner/operator of MGQ, based upon the financial information provided by him, including the showing of the income he derives from his privately-owned, seven-employee quarry in rural Georgia. Nonetheless, the Secretary continues to seek a penalty of $13,600 against Lewis, who had been an employee at the quarry for 18 years at the time of the violation.

Such tenacity apparently results from concern that, because Lewis himself did not submit financial information, a reduction in the penalty assessed against him would undercut the burden of proof governing demonstration of an inability to pay. That is not correct. Neither the Judge nor the Commission made any finding that modifies or diminishes the burden of proving an inability to pay. The burden of proof is not at issue in this case.[2] The question in this case is whether substantial evidence in the record supports the Judge's factual determinations upon which she based her discretionary decision to reduce the penalty.[3]

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[2] Citing our decision in *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997), the Secretary argues "[t]he burden of proving inability to pay a penalty is on the operator making such a claim, and in the absence of such proof the ability to pay is presumed." PDR at 5. This argument mixes two separate principles to attempt to reach a third principle which goes beyond anything the Commission has stated. It is true that the operator has the burden of proving inability to pay a proposed penalty. It is also true that in *Broken Hill*, the Commission stated that in the absence of proof that the imposition of a proposed penalty would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur. In the situation of an operator claiming inability to pay, it makes sense to assume that such proof would be produced by the operator itself. But in the situation of an individual faced with a section 110(c) penalty, the proof need not be submitted by the individual himself. It is the existence of the proof in the record which matters rather than the identity of the party submitting the proof.

[3] The Commission ordered the Judge to inform Lewis that, if he failed to provide financial information, "the judge may presume that the imposition of the assessed penalties would not adversely affect his ability to meet financial obligations." 34 FMSHRC at 1766. The Judge, however, was not required to make such a presumption if evidence in the record submitted by another person supported a reasonable inference of adverse financial impact upon Lewis. *See supra*, n.2. Because the Judge may, indeed must, consider all the relevant evidence in the record, Lewis' personal failure to submit evidence of his financial status does not require imposition of the proposed penalty if evidence in the total record is sufficient to carry his burden on the inability to pay criterion.

The Judge's assessment in this case is based upon the total record before her. The Judge drew an inference regarding Lewis' ability to pay based upon that record.[4] Without doubt a Judge may draw such inferences, provided they are reasonable. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006). Such inferences are a fundamental principle of judicial decision making. For example, in *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1101 (D.C. Cir. 1998), the court held:

> This case turns not on the construction of regulations or on statutory interpretation, but on the weighing of evidence and reasonable inferences made therefrom. Thus, our deference runs not to the policymaking body, MSHA and the Secretary, but to the ALJ, the factfinder who oversees the adjudicatory proceedings.

See also Grundy Mining Co. v. Flynn, 353 F.3d 467, 484 (6th Cir. 2003) (quoting *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir.1985)).

The Judge had the authority to draw a reasonable inference from the record before her, and such a reasonable inference may be overturned only if absence of support in the record makes the inference unreasonable. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. . . . [T]he appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."); *Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007) ("*Lavender's* principles apply to our review of administrative findings of fact, just as they support and explain the "great deference" this Court accords to a district court's resolution of competing inferences after a civil bench trial."); *see also id.* at 169 ("So long as an inferential leap is tethered to the evidentiary record, we will accord deference to the finding.").

The question before the Commission in this case, therefore, is not the burden of proof in a claim of inability to pay. That law remains settled and undisturbed. The question in this case is whether the Judge's inference drawn from the record before her is reasonable. It is.

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[4] An "inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 897 (10th ed. 2014). The Judge may not have selected the ideal phrasing for the inference as she stated that she would "assume" Lewis was a man of modest means. Clearly, however, her finding was a conclusion reached by considering other facts and reaching a logical consequence from them.

The Judge's inference with respect to Lewis was reached in two steps. First, she reviewed the financial information provided by Mize with respect to Mize himself. She found:

> I have reviewed the tax returns for the business for years 2007 and 2009 and found the assessed penalties against the corporation to be disproportionate to its size and income. Likewise, having reviewed Mize's individual income tax returns and his personal financial responsibilities from the information provided, I find he does not have sizeable personal net worth and the amount of the penalties proposed is disproportionate to his income.

35 FMSHRC at 417. Consequently, the Judge assessed a total penalty of $1,500 rather than the $13,600 proposed by the Secretary.

As a second step, the Judge considered whether Mize's financial information could reasonably be used to draw an inference regarding Lewis' financial status. Based upon the facts of the case, she inferred that his financial well-being also would be adversely affected by the proposed penalty. As demonstrated in our second consideration of this matter, the records submitted by Mize show that MGQ paid average wages of approximately $13.34/hour equaling approximately $21,500 per year. 36 FMSHRC at 1816. Even considering Lewis was the foreman and presumably paid more than the other miners, twice that average would come to only $43,000 per year. Therefore, under any reasonable scenario, a penalty of $13,600 would be a very substantial portion of Lewis' entire yearly wages.[5] It was reasonable for the Judge to find that a penalty likely to consume so much of a miner's finances for an entire year provides a basis for finding a substantial detriment to Lewis' financial status.[6]

The body of evidence upon which the Judge found that the owner of MGQ carried the burden of proving inability to pay constitutes sufficient evidence to support the reasonable inference that the financial status of a long-term employee also would be adversely affected by

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[5] Of course, wages are not the only measure of a person's financial status or ability to pay. Here, the judge observed Lewis during his testimony, knew of his 18 years as an employee in a small quarry, and could determine the average income of quarry employees. In light of this evidence and the financial status of the owner of the quarry, the totality of the record supports a lesser penalty than the penalty proposed for Lewis.

[6] This case is a specific holding based upon exceptional circumstances unlikely to be replicated in future proceedings. It certainly is not a template for failing to submit financial information in a case involving an inability to pay issue. As we advised in a prior remand in this case, if a party fails or refuses to present financial information, a Judge may presume that the failure is an admission of ability to pay.

the penalty proposed by the Secretary. We find that the Judge made a reasonable inference based upon substantial evidence in the record and, therefore, did not abuse her discretion.[7]

IV.

Conclusion

For the foregoing reasons, the decision of the Judge is affirmed.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

[7] Any other inference would be highly improbable. It is not the common experience of our society that persons able to pay a $13,600 penalty without severe financial harm would work for 18 years doing exhausting and potentially hazardous work in a tiny quarry during the cold of the winter and the heat of a Georgia summer.

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