FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 2 3 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2009-208
	:	WEST 2009-209
	:	WEST 2009-210
	:	WEST 2009-342
v.	:	WEST 2009-591
	:	WEST 2009-916
HIDDEN SPLENDOR RESOURCES, INC.	:	WEST 2009-1072
	:	WEST 2009-1162
	:	WEST 2009-1451

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

DECISION

BY: Nakamura, Acting Chairman, and Althen, Commissioner

In these civil penalty proceedings, arising 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 seeks review of three civil penalties assessed by a Commission Administrative Law Judge for violations of mandatory safety standards by Hidden Splendor Resources, Incorporated. 34 FMSHRC 3310 (Dec. 2012) (ALJ). The Secretary argues that the Judge erred by relying on mitigating circumstances that were irreconcilable with other penalty-related findings, by assessing a penalty less than the statutory minimum penalty amount, and by failing to adequately explain an assessment's substantial divergence from a penalty proposed by the Department of Labor's Mine Safety and Health Administration ("MSHA").

For the reasons that follow, we conclude that the Judge did not err by relying upon the mitigating circumstances and affirm that penalty. However, we conclude that the Judge erred with respect to the other two penalty assessments at issue.

I.

Order No. 8460169

A. **Factual and Procedural Background**

On April 10, 2009, MSHA Inspector Richard Boyle issued Order No. 8460169 to Hidden Splendor, alleging a training violation of 30 C.F.R. § 48.5(a). The order further alleged that the violation was significant and substantial ("S&S") and had been caused by the operator's unwarrantable failure to comply with the standard[1] and by high negligence. The inspector issued the order because he discovered that two new miners had worked underground without receiving required training. 34 FMSHRC at 3323. The inspector stated that management had told him that they thought it "would be okay" to have the untrained miners work underground if they were accompanied by experienced miners. *Id.*; Tr. 660-61. When the shift foreman discovered that the new miners had not been trained, he removed the entire crew from the mine as quickly as possible. 34 FMSHRC at 3324; Tr. 683-85, 687.

The Secretary proposed a penalty of $5,645 for the violation. The operator conceded that it had violated the training regulation but disputed the special findings and the designation of high negligence. 34 FMSHRC at 3323-24.

The Judge concluded that the violation was S&S and had been caused by unwarrantable failure and high negligence. Regarding S&S, he concluded that it was reasonably likely that the untrained miners could cause a serious injury to themselves or other miners underground. The Judge further concluded that the violation was unwarrantable because the violation was obvious and posed a high degree of danger, and Hidden Splendor's belief that it could send the untrained miners underground defied common sense and demonstrated a serious lack of reasonable care. He based his high negligence finding on evidence that mine management knew that the miners had not completed training. The Judge acknowledged, however, that the foreman immediately pulled the miners from the mine when he discovered that they had not completed their training and, "[f]or that reason," reduced the penalty to $4,000. *Id.* at 3325-26.

The Secretary argues that the Judge's decision to reduce the penalty on the basis of the foreman's withdrawal of the untrained miners cannot be reconciled with his high negligence and unwarrantable failure findings. He notes that "high negligence" is defined in 30 C.F.R.

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

§ 100.3(d)[2] as occurring when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." PDR at 17-18 (citations omitted).[3] In addition, the Secretary asserts that the foreman's action in withdrawing the miners does not diminish the culpability of Hidden Splendor's management in deciding to send the miners underground to work without training. *Id.*

B. **Disposition**

The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). An abuse of discretion may be defined to include errors of law. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991).

The Mine Act sets forth a bifurcated penalty scheme under which 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 [the] penalty." *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). The Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent "authority to assess all civil penalties provided [under the Act]" by applying the six criteria set forth in section 110(i).[4] 30 U.S.C. § 820(i); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either

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[2] Section 100.3(d) defines negligence in part as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). Section 100.3(d) sets forth five categories of negligence ranging from "no negligence" to "reckless disregard." Each category defines the level of negligence and number of penalty points assigned for that level.

[3] The Secretary has previously taken a contrary position, asserting that a Commission Judge acted within his discretion in assessing a penalty because Part 100 is binding only on the Secretary and not on Commission Judges. *See Hubb Corp.*, 22 FMSHRC 606, 608 (May 2000).

[4] Section 110(i) provides in pertinent 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).

the ALJ nor the Commission is bound by the Secretary's proposed penalties. . . . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see also W.S. Frey Co. v. Sec'y of Labor*, 57 F.3d 1068, *5 (4th Cir. 1995) (unpublished) (citing *Sellersburg*, 736 F.2d at 1152) (holding that a Judge is authorized to determine a penalty amount *de novo* based on statutory criteria).

We conclude that the Judge did not abuse his discretion in assessing a $4,000 penalty rather than the penalty of $5,645 proposed by the Secretary. As already discussed, the Judge was not bound by the Secretary's penalty proposal. In addition, the Commission's Procedural Rules specifically state that, "In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary. . . ." 29 C.F.R. § 2700.30(b). Nor was the Judge bound by the Secretary's definition of "high negligence" set forth in section 100.3(d). *See, e.g., Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("We reject the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering whether [the operator] was negligent."); *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994).

Moreover, we see no inherent inconsistency between the Judge's findings of high negligence and unwarrantable failure and his assessment of a penalty lower than that proposed by the Secretary. Although the operator's conduct in permitting the untrained miners to go underground was intentional, the operator's conduct was offset by evidence that the foreman withdrew the miners from the mine as soon as he realized the miners were untrained rather than waiting until the end of the shift. 34 FMSHRC at 3324, 3325-26; Tr. 685. The foreman's conduct, which is imputable to the operator for civil penalty and unwarrantable failure purposes, promoted miner safety and is to be encouraged. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (stating that the conduct of an operator's agents may be imputed to the operator for civil penalty and unwarrantable failure purposes). Accordingly, we affirm the $4,000 penalty related to Order No. 8460169.

II.

Order No. 8457347

A. Factual and Procedural Background

On July 29, 2009, MSHA Inspector DeVere Smith observed accumulations of float coal dust and coal fines on and around the No. 1 surface belt tailpiece. 34 FMSHRC at 3357. The inspector considered the condition to be obvious and extensive, and noted that a supervisor had recently traveled through the area. Tr. 511-12. The inspector issued Order No. 8457347 to Hidden Splendor, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). The order alleged an S&S and unwarrantable accumulations violation of 30 C.F.R. § 77.1104, which had been caused by high negligence. Hidden Splendor stipulated that it had violated the standard. 34 FMSHRC at 3357, 3359.

Following a hearing on the matter, the Judge found that the violation was unwarrantable and had been caused by high negligence. However, the Judge concluded that the violation was not S&S. *Id.* at 3359-60. Accordingly, the Judge assessed a penalty of $500 rather than the penalty of $4,000 proposed by the Secretary. *Id.* at 3357, 3360.

On review, the Secretary argues that the Judge erred by assessing a penalty below the statutory minimum required by section 110(a)(3)(B) of the Mine Act.[5] The Secretary does not challenge the Judge's determination that the violation was not S&S.

B. Disposition

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties under the Act in accordance with the six criteria listed. 30 U.S.C. § 820(i). Section 110(a)(3) of the Mine Act sets forth minimum penalty assessment provisions for citations and orders issued under section 104(d) of the Act. More specifically, section 110(a)(3)(B) sets forth a minimum penalty of $4,000 for any order issued under section 104(d)(2).

The statutory minimum provisions set forth in section 110(a)(3) are binding upon the Commission and its Judges. *Stansley Mineral Res., Inc.*, 35 FMSHRC 1177, 1180 (May 2013). The Commission has explained that sections 110(i) and 110(a)(3) "confer broad discretionary authority upon the Commission and its Judges to apply the criteria in section 110(i), but require that no penalty for a section 104(d) citation or order may be assessed at less than the statutory minimums in section 110(a)(3)." *Id.*

Here, the Judge sustained the allegations of unwarrantable failure underlying the section 104(d)(2) order. In addition, he adequately addressed each of the six factors required for consideration under section 110(i). However, the Judge erred by assessing a penalty of less than $4,000 for a section 104(d)(2) order. Finding no fault otherwise in the reasoning underlying his assessment, we vacate the penalty assessed by the Judge and impose the $4,000 minimum penalty required by the Mine Act.

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[5] Section 110(a)(3)(B) of the Mine Act provides, "The minimum penalty for any order issued under section 104(d)(2) shall be $4,000." 30 U.S.C. § 820(a)(3)(B).

III.

Citation No. 6685833

A. Factual and Procedural Background

On August 11, 2008, MSHA Inspector Russell Bloomer issued Citation No. 6685833 to Hidden Splendor, alleging that an S&S roof control violation of 30 C.F.R. § 75.202(a) was caused by high negligence. The citation alleged bad roof conditions in the mine, including areas where material had fallen and had exposed roof bolts. The inspector testified that the Horizon Mine had a history of repeated roof control violations. The Secretary proposed a penalty of $6,458 for the violation. 34 FMSHRC at 3378.

The Judge found that the operator violated the standard and that the violation was S&S and caused by high negligence. With respect to S&S, the Judge credited the inspector's testimony regarding the roof conditions and the mine's history of roof falls. Regarding negligence, the Judge found that the conditions were obvious, extensive, and had existed for "quite some time." *Id.* at 3379-80. He further stated that a roof fall had potentially fatal consequences to miners, and that the operator had made no effort to correct the conditions. After finding high negligence, the Judge stated that, "[a] penalty of $5,000 is appropriate for this violation." *Id.* at 3380.

The Secretary argues that the Judge erred by substantially deviating from MSHA's proposed penalty for the citation without any explanation. The Secretary explains that the Judge's assessment of a penalty 23% lower than the proposed penalty requires more explanation than that the assessed penalty is "appropriate."

B. Disposition

In a contested case, the amount of the penalty to be assessed by the Commission and its Judges is a *de novo* determination based on the criteria set forth in section 110(i), 30 U.S.C. § 820(i). *Sellersburg Stone*, 5 FMSHRC at 293. Penalties assessed by Commission Judges can be greater than, less than, or the same as those proposed by the Secretary. *Id.* However, when it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed. *Id.*; *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Here, the Judge considered and made findings on all six section 110(i) factors and assessed a penalty that was 23% below that proposed by the Secretary. 34 FMSHRC at 3380-81. However, the Judge did not offer any explanation for the divergence, for instance, by explaining whether he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission. *See Cantera Green*, 22 FMSHRC at 622-23, 626 (vacating assessed penalties that ranged from 20% to 70% of the proposed penalties because Judge failed to explain divergence although he made findings on penalty criteria).

Accordingly, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

IV.

Conclusion

For the reasons discussed above, with respect to Order No. 8460169, we affirm the Judge's assessment of a penalty in the amount of $4,000. With respect to Order No. 8457347, we vacate the penalty of $500 assessed by the Judge and hereby assess a penalty in the amount of $4,000. Finally, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

Patrick K. Nakamura, Acting Chairman

William I. Althen, Commissioner

Commissioner Cohen, concurring:

Commissioner Cohen joins the majority with respect to their decision regarding Order No. 8457347 and Citation No. 6685833, and concurs with their decision regarding Order No. 8460169.

Order No. 8460169

The Secretary contends that after finding high negligence and unwarrantable failure, the Judge erred in reducing MSHA's proposed penalty. According to the Secretary, the Judge relied on "a reason that should not have been considered after he found that the violation was the result of mine management's high negligence." PDR at 2. I concur with my colleagues' conclusion that the Judge did not err when he reduced the civil penalty for Order No. 8460169. Rather, the Judge's analysis reflects a thoughtful balancing of the statutory penalty criteria he is required to consider when exercising his authority to assess civil penalties. I write separately in order to more fully discuss why the Judge's Decision fully reflects the principles contained in the Mine Act.

The Secretary's argument is predicated on the definition of "high negligence" found in 30 C.F.R. § 100.3(d) (Table X): "The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." Essentially, the Secretary's argument is that: (1) the Commission and its Judges are bound by the definitions of negligence contained in section 100.3(d); (2) the Judge's finding of "high negligence" meant that he was precluded from finding any mitigating circumstances; (3) the fact relied on by the Judge in reducing the penalty -- the section foreman stopped production and pulled all the miners from the section as soon as he discovered that management had sent two untrained miners to work there -- was not a mitigating circumstance; and (4) because the Judge relied on a mitigating circumstance, his assessment was inconsistent with his finding of high negligence.

The Secretary's argument does not reflect a correct understanding of the penalty provisions of the Mine Act. As my colleagues have noted, slip op. at 3-4, the Mine Act establishes a bifurcated mechanism for the proposal and assessment of civil penalties. The Secretary initially proposes a civil penalty for a citation or order under section 105(a), and – if the operator contests the proposed penalty – the Commission holds a hearing and assesses the final penalty pursuant to section 110(i). 30 U.S.C. §§ 815(a), 820(i).[1] *Sellersburg Stone Co.,* 5 FMSHRC 287, 291 (Mar. 1983), *aff'd,* 736 F.2d 1147, 1151-52 (7th Cir. 1984).

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

To assist in his responsibility to propose civil penalties, the Secretary promulgated regulations at 30 C.F.R. § 100. *See* 30 C.F.R. § 100.1 ("This part provides the criteria and procedures for proposing civil penalties under sections 105 and 110 of the [Mine Act].") The Part 100 regulations assign "points" that correlate generally with the six statutory criteria. *See* 30 C.F.R. § 100.3 (Tables I-XIII). MSHA's proposed penalty is then calculated based on the number of points.

The Secretary proposed a penalty of $5,645 for the order at issue. The amount of the proposed penalty was based, in part, on the Secretary's allegation that the violation was the result of "high negligence" on the part of the operator.[2] Gov. Ex. 38.

After a hearing on the merits, the Judge concluded that the failure to train the miners in accordance with 30 C.F.R. § 48.5 was a very dangerous practice, reasonably likely to result in serious injury. The Judge found that the violation was indeed the result of a high degree of negligence because the management at Hidden Splendor knew that two miners had not finished their training, but nevertheless sent the miners underground to work. 34 FMSHRC at 3325.

The Judge then noted that when section foreman Carl Martinez discovered that the miners had not completed their training, he immediately withdrew the entire crew from the mine. *Id.* at 3324, 3325-26; Tr. 683-85, 687. In consideration of the prompt remedial actions of the section foreman, the Judge lowered the civil penalty to $4,000.

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[2] Mine inspectors issue citations on MSHA Form 7000-3. The form includes five options for negligence: no negligence, low negligence, moderate negligence, high negligence, and reckless disregard. When issuing the citation, the inspector must check a box designating an assignment of negligence which he believes most closely resembles the culpability of the operator for the violative condition at issue. Mine inspectors are directed to consider the surrounding circumstances in accordance with the definitions of the categories of negligence that are provided in the Part 100 regulations.

The associated definitions are as follows: <u>No negligence</u> - the operator exercised diligence and could not have known of the violative condition or practice; <u>Low negligence</u> – the operator knew of or should have known of the violative condition or practice, but there are considerable mitigating circumstances; <u>Moderate negligence</u> – the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances; <u>High negligence</u> – the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; <u>Reckless disregard</u> – the operator displayed conduct which exhibits the absence of the slightest degree of care. 30 C.F.R. § 100.3(d) (Table X) (emphasis added).

The greater the degree of negligence designated by the inspector, the more "penalty points" are assigned during the penalty proposal process, and the higher the penalty. *Id.*

Contrary to the Secretary's assertion, there is no inherent contradiction between the Judge's finding of high negligence and his reduction of the penalty because of the section foreman's safety-conscious action.

The Commission and its Judges are not bound by the definitions in Part 100, but instead assess penalties in accordance with the six statutory criteria set forth in section 110(i) of the Act "and the information relevant thereto developed in the course of the adjudicative proceeding." *Sellersburg Stone*, 5 FMSHRC at 292; *see also Black Diamond Coal Mining Co.*, 7 FMSHRC 117, 1122 (Aug. 1985) ("The separate procedures by which penalty assessments are proposed by the Secretary ... are not material to a penalty assessment by the Commission."). Indeed, the Commission has recently specifically rejected the Secretary's argument that the Commission must apply the standard of care set forth in section 100.3(d) in considering an operator's negligence. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted).

The Seventh Circuit has directly considered the application of the Secretary's penalty proposal regulations to the Commission and concluded that there was "no basis upon which to conclude that these MSHA regulations also govern the Commission." *Sellersburg Stone Co. v. FMSHRC, supra,* 736 F.2d at 1152. The Court further stated:

> It cannot be disputed that the Commission and its ALJs constitute an adjudicative body that is independent of the MSHA. Sen. Rep. No. 461, 95th Cong. 1st Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary. 29 C.F.R. § 2700.29(b) (1983). Furthermore, neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations.

Id.[3]

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[3] I recognize that some courts have applied the Secretary's Part 100 regulations when considering a Judge's negligence finding and assessment of a penalty. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012) (defining "high negligence" in accordance with section 100.3(d)); *see also Allied Products Co. v. FMSHRC*, 666 F.2d 890, 895-96 (5th Cir. 1982) (applying Part 100 regulations in determining whether the Judge abused his discretion in assessing a penalty). In addition, in an unpublished decision, the D.C. Circuit stated that the penalty regulations required the Judge to adjust the negligence finding to "moderate negligence" because he found a mitigating circumstance. *Excel Mining, LLC v. Dep't of Labor*, 497 Fed.Appx. 78, 80; 2013 WL 1155362 (D.C. Cir. Mar. 15, 2013). However, these cases are distinguishable because the issue of whether the Secretary's Part 100 regulations are binding on the Commission was not directly before the courts in these proceedings. Thus, the statements

The definitions in 30 C.F.R. § 100.3(d) make sense in light of the purpose for which they were created. As described *supra* in footnote 2, the categories of low negligence, moderate negligence and high negligence are all characterized by the finding that the operator "knew or should have known of the violative condition or practice. What distinguishes the three categories are the existence and amount of "mitigating circumstances" -- if no mitigating circumstances, the negligence is "high"; if considerable" mitigating circumstances, the negligence is "low"; and if there simply "are" mitigating circumstances, the negligence is "moderate". This sets up a system which is easily applicable by MSHA inspectors at mine sites. They deal with thousands of violations where the amount of negligence has to be rated. With this system, they can do it efficiently and quickly (as they must) – if no mitigating circumstances, check "high"; if considerable mitigating circumstances, check "low"; if somewhere in between, "moderate".

In contrast, Commission Judges can evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence. Thus, there is a very different process for the Judge to evaluate negligence compared with the inspector at the mine site. The criteria of 30 C.F.R. § 100.3(d) make sense for inspectors at the mine site, but are too mechanical for Commission Judges.

The Commission has not promulgated a definition of "high negligence". But the Commission has stated that high negligence "suggests an aggravated lack of care that is more than ordinary negligence" and "an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). In *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994), despite the claim of mitigating circumstances, the Commission upheld an ALJ's conclusion of high negligence based on findings "that Deshetty had actual knowledge of the accumulations along the No. 1 belt and that he failed to remedy the conditions."

Although *Topper Coal* and *Deshetty* provide examples and useful statements about high negligence, they do not completely define its parameters. Nevertheless, it is clear that a single mitigating circumstance does not preclude the finding of high negligence. I would suggest that the application of the Secretary's definition of high negligence goes beyond the *Sellersburg Stone – Jim Walters Resources* proposition that Commission Judges are not bound by the Secretary's definition. Rather, I conclude that the 30 C.F.R. § 100.3(d) definition of high negligence is too restrictive, and should not be used by Commission Judges.

In the present case, the Judge found a high degree of negligence because management sent two new miners into the mine, knowing that they had not completed their training: "The fact that Joe Fielder thought it would be permissible to send the new miners into the mine supports the fact that management knew that these miners had not completed training." 34 FMSHRC at

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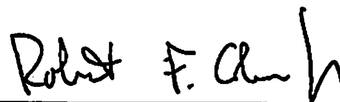
regarding the applicability of Part 100 are dicta. In contrast, in *Sellersburg Stone,* the issue of whether the Judge was required to apply section 100.3 in his assessment of penalties was directly at issue.

3325. The violation, together with its high negligence, was complete when the two untrained miners entered the mine.

What section foreman Martinez did was in the nature of abatement – "as soon as Martinez discovered that the miners had not completed their training, he immediately pulled them out of the mine." *Id.* at 3325-26. One of the factors to be considered in setting a penalty pursuant to section 110(i) of the Mine Act is "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). Here, in ordering the miners out of the mine, section foreman Martinez did not wait for "notification of a violation". He took action immediately. Since a Judge is statutorily required to consider the mine's promptness in abating a violation after notification by MSHA, it is certainly appropriate for the Judge to consider a section foreman's prompt action in averting a hazard before an MSHA inspector appeared on the scene.

In *Spartan Mining Co.,* 30 FMSHRC 699, 710, 722-26 (Aug. 2008), the Commission affirmed a Judge's decision to substantially increase penalties because of extreme negligence on the part of a section foreman. Conversely, it is appropriate for a Judge to reduce a penalty where a section foreman takes decisive action to enhance miners' safety even when his superiors created the hazard by flouting the law. When assessing a civil penalty a Commission Judge may consider the deterrent purposes of a civil penalty within his analysis of the statutory criteria. *Black Beauty Coal Co.,* 34 FMSHRC 1856, 1866-67 (Aug. 2012). Lowering a civil penalty, after crediting a foreman's proactive behavior in abating a violative condition before it was cited, is consistent with the deterrent purposes of a civil penalty. Stated another way, lowering a penalty based on abatement prior to the issuance of a citation encourages vigilance and works to deter the existence of violative and unsafe conditions.

I find no inconsistency in the Judge's application of the six penalty criteria. I conclude that the Judge's analysis is well reasoned and does not reflect an abuse of discretion. Rather, the Judge's analysis reflects an appropriate exercise of the discretion that was afforded to the Commission by Congress to assess civil penalties. Thus, I join my colleagues in affirming the $4,000 penalty for Order No. 8460169.



Robert F. Cohen, Jr., Commissioner

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