

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 16, 2021

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. LAKE 2017-0099  
 :  
SOLAR SOURCES MINING, LLC :

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

**DECISION**

BY: Althen and Rajkovich, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act” or “Act”), on appeal from the Administrative Law Judge’s decision on remand. It is the second time that the Commission is considering the penalty assessment for a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Solar Sources Mining, LLC (“Solar Sources”) for failure to provide berms of substantial construction at a dumpsite.

As instructed by the Commission’s prior decision, 42 FMSHRC 181 (Mar. 2020) (“*Solar Sources I*”), the Judge reassessed the penalty and made additional findings on the section 110(i), 30 U.S.C. § 820(i), penalty criteria to more fully explain the bases for his assessment. 42 FMSHRC 329 (May 2020) (ALJ) (“*ALJ Rem. Dec.*”). Solar Sources appealed the Judge’s remand decision, alleging that the Judge erred in assessing a \$69,000 penalty and that substantial evidence does not support his penalty assessment.

Having reviewed the Judge’s remand decision, we conclude that the Judge erred again in his consideration of the section 110(i) penalty criteria. For the reasons provided herein, we vacate the Judge’s penalty assessment. In the interest of judicial economy, we assess a new penalty here. As set forth in our analysis below, we conclude that the evidence concerning the penalty criteria warrants a penalty of \$40,000.

**I.**

**Factual and Procedural Background**

This proceeding arises from an accident at the Shamrock Mine, an Indiana surface coal mine operated by Solar Sources. The facts of the violation are fully set forth in the Judge’s and

the Commission’s initial decisions. 40 FMSHRC 462, 463-87 (Mar. 2018) (ALJ) (“*ALJ Dec.*”); *Solar Sources I*, 42 FMSHRC at 182. Briefly, on June 27, 2016, miner Shawn Standish backed his haul truck carrying slurry to the edge of the dump pit. The truck’s rear tires began to sink. Standish attempted to accelerate away from the edge but decided to abandon the truck as it continued to sink. He climbed from its cab and jumped, landing on the ground and breaking both heels and an ankle. The truck fell over the edge and landed upside-down in the pit 47 feet below.

MSHA issued Citation No. 9102704, pursuant to section 104(d)(1), 30 U.S.C. § 814(d)(1), to Solar Sources for violating 30 C.F.R. § 77.1605(l), which provides: “Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.” Ex. P-3. MSHA designated the citation as significant and substantial (“S&S”)<sup>1</sup> and concluded that the operator exhibited an unwarrantable failure<sup>2</sup> to comply with the standard.

Solar Sources contested the citation. After a hearing, the Judge affirmed the Secretary’s gravity (*i.e.*, highly likely to be fatal) and high negligence findings and affirmed the S&S and unwarrantable failure designations. The Judge found that a significant penalty was appropriate “based on the high negligence, the serious gravity, and the fact [that] Respondent knew or should have known the berm construction was inadequate, yet it made no efforts to correct the hazardous condition . . . .” *ALJ Dec.*, 40 FMSHRC at 495. In a footnote, the Judge summarily stated that he had considered the other penalty criteria and assessed a penalty of \$68,300—the same amount proposed by MSHA. *Id.* at 495-96 & n.15.

Solar Sources appealed the Judge’s decision, arguing that the Judge failed to assess a civil penalty in accordance with the Mine Act and the Commission’s guidance in *The American Coal Co.*, 38 FMSHRC 1987 (Aug. 2016), and, as a result, abused his discretion. Solar Sources did not seek review of any other issues in the case.

On appeal, the Commission vacated the Judge’s decision and remanded the case to him to reassess the penalty after making the requisite findings and adequately considering all section 110(i) penalty criteria. *Solar Sources I*, 42 FMSHRC at 181. In particular, the Commission noted that the Judge based his penalty determination on only two criteria—negligence and gravity—and failed to make findings on and meaningfully consider the remaining criteria. Specifically, the Judge failed to make findings on the operator’s violation history and good faith abatement. The Commission directed the Judge to consider the evidence pertaining to these criteria and make findings and explain the impact of these criteria, along with the other penalty criteria, on his penalty determination.

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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.”

<sup>2</sup> An “unwarrantable failure” represents aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

On remand, the Judge issued a lengthy opinion. As an initial determination, the Judge concluded that “this violation was ‘especially egregious.’” *ALJ Rem. Dec.*, 42 FMSHRC at 336. Concerning Solar Sources’ history of violations, the Judge found that two previous berm violations six and eight years before the current violation were recent enough to be relevant and that Solar Sources knew berms required “constant attention.” *Id.* at 365. He also found that serious gravity and high negligence outweighed any amelioratory effect that its history might have warranted. Addressing good faith, the Judge gave no credit to the operator’s actions to assure future compliance because MSHA required changes to Solar Sources’ berm procedures. As to the remaining penalty criteria, the Judge found that the operator was large and that the penalties would not affect its ability to continue in business.

In sum, the Judge stated that he “applied greater weight to the negligence and gravity penalty factors and determined that the modest violation history over the past two years should not operate to bring about a net negative reduction in the penalty assessed, especially when considered with the other statutory penalty factors.” *Id.* at 358, 360. Based on his findings, the Judge increased the penalty to \$69,000.<sup>3</sup>

## II.

### Disposition

Section 110(i) of the Mine Act provides that the Commission is authorized to assess all penalties under the Mine Act and that such penalties must reflect consideration of six statutory factors:

[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.

30 U.S.C. § 820(i).

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<sup>3</sup> In imposing a \$69,000 penalty, the Judge exceeded the maximum penalty for the violation. At the time the violation was issued (June 2016), the statutory maximum penalty was \$70,000. However, on July 1, 2016, in accord with the Inflation Adjustment Improvements Act of 2015, MSHA issued an interim change that decreased the maximum penalty for violations during the relevant period from \$70,000 to \$68,300. 81 Fed. Reg. 43430, 43443-44 (July 1, 2016). In November 2016, MSHA assessed the penalty at the maximum amount of \$68,300. In January 2017, MSHA issued a final rule raising the maximum penalty to \$69,417 but stating that violations which occurred after November 2015 with proposed penalties assessed between August 2016 and January 2017 (as with the citation at issue) would be subject to penalties at August 2016 levels. 82 Fed. Reg. 5373, 5374 (table) (Jan. 18, 2017). Accordingly, the maximum penalty for the subject citation was \$68,300.

In drafting section 110(i), Congress' primary purpose was to encourage mine operator compliance under the Act. The legislative history of the Act's civil penalty provision states:

The purpose of . . . civil penalties, of course, is not to raise revenues for the federal treasury . . . . [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. No. 95-181, at 40-41 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978). *See also* *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (Sept. 1996) (recognizing importance of the deterrent function of civil penalties). The legislative history of section 110(i) makes clear that civil penalties are remedial, not punitive, and are assessed to induce "effective and meaningful" compliance with safety and health standards. *Contractors Sand & Gravel Inc.*, 23 FMSHRC 570, 580 (Jun. 2001).

The Commission possesses independent authority to assess all penalties *de novo* pursuant to section 110(i) of the Mine Act. While the Commission considers the same criteria as the Secretary in assessing such penalties, it is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties;" and "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"); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) ("[U]nder both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.") (citations omitted). It is important to keep that line of separation between the Commission and the Secretary to maintain the review process's integrity. Otherwise, operators may believe that the Commission is merely a rubber stamp of the Secretary's assessment proposals.

The Commission has granted Judges broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). This "wide discretion" is necessary "if, as Congress intended, civil penalties assessed under the Act are effectively to encourage operator compliance with the Act and its standards and to protect the public interest." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1148, 1150 (May 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)).

Under *Sellersburg* and the Commission's Procedural Rules, an Administrative Law Judge must make:

[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the

Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.

*Sellersburg*, 5 FMSHRC at 292-93; 29 C.F.R. § 2700.30(a). 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).

In its initial decision in this proceeding, the Commission directed the Judge on remand:

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

*Solar Sources I*, 42 FMSHRC at 188. At issue is whether the Judge erred in reassessing and increasing the penalty to \$69,000 after reviewing the operator’s history of violations and whether there was good faith in addressing the violation. *Solar Sources* raises several arguments challenging the Judge’s decision—primarily that the Judge erred in his consideration of its history of violations, good faith abatement, and negligence—and thus, he erred in his penalty reassessment.

In its first decision, the Commission noted extensive case law remanding cases to Administrative Law Judges for failure to make adequate findings on the section 110(i) penalty criteria and so that Judges may provide sufficient explanation for the bases of their penalty determinations. *Id.* at 185–86. We highlighted that a Judge’s penalty determination must “meet the requirements of due process and fair and informed review.” *Id.* at 186. “Despite the Commission’s clear mandate in *Sellersburg* and related cases, and in its Procedural Rules, we have repeatedly found it necessary to remand cases for penalty assessments because judges have failed to enter the requisite findings.” *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000).<sup>4</sup>

Here, the Judge failed to follow the Commission’s remand instructions properly and ignored the law of the case. As discussed below, the Judge erred in his treatment of the history of violations and good faith abatement criteria and did not appropriately credit the operator for its low violation history and good faith abatement when assessing the penalty. In addition, the Judge effectively increased his negligence finding on remand to justify an increased penalty. Although the evidence supported the position that several of the criteria did not suggest a statutory maximum penalty, the Judge refused to credit the operator. Instead, he increased the

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<sup>4</sup> Commission Procedural Rule 30(a) instructs Judges that their decisions “shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.” 29 C.F.R. § 2700.30(a).

penalty beyond the maximum amount permitted under the Mine Act.<sup>5</sup> Thus, the Judge committed several errors in his treatment of the penalty criteria, each of which infected his penalty assessment. Accordingly, we vacate the Judge's penalty assessment. *U.S. Steel*, 6 FMSHRC at 1432 (assessments "infected by plain error . . . are not immune from reversal.").

This is the second time this case is before the Commission. As such, we do not find it judicially efficient to remand it to the Judge yet again solely for another reassessment. Given that the Judge has made all the necessary findings of fact on section 110(i), we will apply the criteria here and assess an appropriate penalty.<sup>6</sup>

### **1. Solar Sources' History of Violations**

In our prior decision, the Commission noted that "[t]he record contains highly relevant evidence regarding the operator's violation history. Yet, the Judge did not engage in any analysis and did not make any findings on the possible significance of such evidence. The Judge merely references Government Exhibit P-2." *Solar Sources I*, 42 FMSHRC at 187. The Commission, however, found that the Secretary's "exhibit reveals a positive compliance record in that the operator had not had a berm violation in six years and only two such violations in its entire history. It did not have any unwarrantable failures in the 15 months preceding the citation. In fact, the operator had received only 19 citations under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for which it was penalized a total of \$13,276." *Id.* at 187 n.8.

The Judge acknowledged that there was no evidence of any berm violation in this operator's recent history but declined to give any measurable weight to such evidence, in part because the operator had two berm violations, some six to eight years prior, in 2008 and 2010/11. *ALJ Rem. Dec.*, 42 FMSHRC at 353-54. He reasoned that "[b]y having any berm violations in its history, and noting that those violations were not ancient by any means, the Respondent should not be awarded with a penalty reduction on that account." *Id.* at 352.

The Judge erred by giving greater weight to the two old berm violations than the operator's favorable recent 15-month record. The operator had not had a berm violation in six years and only two such violations in its history.

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<sup>5</sup> See n.3, *supra*.

<sup>6</sup> The Commission typically leaves such determinations in the hands of our Judges, but where a Judge has failed to follow the law of the case, it has previously assessed a penalty where such action was deemed necessary and prudent. See, e.g., *Douglas R. Rushford Trucking*, 24 FMSHRC 648, 653 (Jul. 2002) (Judge failed to adhere to remand instructions so Commission vacated the Judge's penalty and assessed \$15,000 penalty); *Steen employed by Ambrosia Coal & Constr. Co.*, 20 FMSHRC 381, 386 (Apr. 1998) (holding that, in the interest of a speedier resolution to litigation, the Commission may assess a penalty rather than remand to the Judge for assessment); *Westmoreland Coal Co.*, 8 FMSHRC at 492 ("determination of an appropriate penalty to be assessed necessarily should have been affected by [the Commission's determination] of a lesser degree of negligence.").

While there is no prohibition against the Judge's consideration of older violations per se, the record as a whole does not support his characterization of the operator's overall violation history. First, the older berm violations were six and eight years old. The Secretary did not present any record evidence on the details of those violations. The scant mention of prior violations was by Solar Sources' Safety Director Steven Troy Fields. Fields merely noted that the operator had no berm violations in its recent past and he stated his belief, without detail, that the operator had only two berm violations in its history—one in 2008 and a second in 2010 or 2011.<sup>7</sup> Inspector Jason Noel testified that he did not find any prior berm violations in the operator's mine files. Tr. 272.

Without any record evidence about the older berm violations, the Judge could not rationally evaluate and compare or contrast the circumstances of those violations with the current violation. *See Sec'y of Labor on behalf of McClain v. Misty Mountain Mining, Inc.*, 28 FMSHRC 303, 307 n.9 (Jun. 2006) ("Because this evidence is not part of the record on review, it cannot be considered by the Commission."); *see also* 30 U.S.C. § 823(d)(2)(A)(iii) ("no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.").

In the absence of any meaningful evidence, the existence of two old violations should bear little to no weight considering the operator's overall violation history, especially given their age compared to the operator's relevant violation history. Thus, the Judge erred by assigning them greater weight than the operator's recent compliance history without any basis in the record.

Second, the Commission has held that an operator's general violation history, not just its history of similar violations, is relevant in considering this penalty criterion. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 995 (Dec. 2006) ("The Commission has previously held that the reference in section 110(i) to an 'operator's history of previous violations' refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment."). The Judge should have considered the record evidence of the operator's general violation history, including non-berm violations. That evidence demonstrates this operator had a low violation history.

Significantly, in the Commission's initial decision remanding the issue to the Judge to reconsider the evidence, the Commission noted the operator's "positive compliance record." 42 FMSHRC at 187 n.8. The evidence indicates that in the preceding 15-month violation history, Solar Sources had received only 19 citations for which the penalties totaled \$13,276. All the violations were assessed under MSHA's regular assessment process—six of which were assessed at the statutory minimum of \$100, nine were under \$200, and all but three were less than \$1,000, with the highest at \$4,099. None involved the standard at issue in this case, and none were

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<sup>7</sup> The entirety of the testimony about the two old berm violations accorded great weight by the Judge occurred when Fields was asked if he was aware of the last berm violation. His response was, "I would have to look back. Excuse me, my voice is going, but I think we had previously had two berm violations. One was 2008 and possibly, like, 2010 or '11." Tr. 498. Thus, Fields did not testify with certainty to prior violations and did not provide any evidence, if they occurred, regarding their location, facts, or seriousness.

designated unwarrantable failures. Only nine of the sixteen were designated S&S. Ex. P-2. The evidence supports that for a large mine, producing approximately 1.2 million tons of coal annually, this is a low history of violations. *ALJ Rem. Dec.*, 42 FMSHRC at 355; Gov't Ex. A. The Judge failed to address this evidence. Instead, he focused on the two older berm violations, despite the absence of evidence on those particular violations.

Not only did the Judge fail to make a quantitative analysis, but also he failed to make a *qualitative* evaluation of the operator's violation history. In *Cantera Green*, the Commission held that in addressing the history of violations criterion, a Judge should evaluate whether that history was high, moderate, or low. 22 FMSHRC 616, 623 (May 2000). In his analysis, the Judge did not meaningfully examine the entire violation history presented by the Secretary. As noted, the overwhelming evidence of the operator's recent history compels the conclusion that it had a low history of violations. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

Despite this evidence, the Judge summarily concluded that "only a small downward penalty adjustment is due . . . . [T]hat is more than offset by consideration of the other five penalty factors, each of which points in the opposite direction." *ALJ Rem. Dec.*, 42 FMSHRC at 360. We disagree. The operator's low violation history does not support a maximum penalty. Thus, by not giving the operator any appreciable credit for its low violation history, the Judge erred in making his penalty assessment.

## **2. Solar Sources' Good Faith Attempt to Achieve Rapid Compliance After Notification of the Violation**

In its initial decision, the Commission noted that the Judge failed to address the good faith abatement criterion in his decision, relegating the criterion to brief mention in a footnote and an erroneous statement that the parties had entered a stipulation as to this criterion. *Solar Sources I*, 42 FMSHRC at 187-88 (citing *ALJ Dec.*, 40 FMSHRC at 495 & n.15). The parties continued to dispute whether the operator engaged in good faith in abating the violation. *Solar Sources I*, 42 FMSHRC at 188 (citing Oral Arg. Tr. 37-38, 57).

On remand, the Judge concluded that the operator displayed "zero good faith" and was "entitled to *no reduction* in the penalty imposed because, to put it simply, there was no good faith in attempting to achieve rapid compliance under this penalty criterion. After all, the berm vanished upon its collapse, taking the huge truck along with it. No rapid compliance was thereafter available." *ALJ Rem. Dec.*, 42 FMSHRC at 348, 361 (emphasis added). The Judge opined that the operator's admission that MSHA made it take certain measures post-accident to abate the violation belied the fact that it attempted to achieve rapid compliance after being notified of the violation. *Id.*

Again, the Judge mischaracterized the operator's efforts to achieve compliance with 30 C.F.R. § 77.1605(l) and should have credited the operator for its good faith. In rejecting the notion that the operator exhibited good faith, the Judge erroneously focused on the futility of actions to repair the original berm, which the accident destroyed. The Judge completely ignored



the operator's *efforts post-accident* to ensure a safe means of dumping, which ultimately resulted in it re-designing the berm and dumping procedures.

Solar Sources' Vice President of Mining Matthew Atkinson testified that the operator redesigned how it dumped gob and slurry into the pit and submitted a modified ground control plan after the accident. The operator explained that the new process included a chute and a berm with a secondary area below it which is also bermed off. Once material accumulates, a dozer pushes the material into the pit, keeping the truck operator behind two berms, approximately 20 feet away from the embankment edge. Tr. 344-47; *see also* Ex. R-22 (modified Ground Control Plan).

The destruction of the original berm does not negate a subsequent showing of good faith. Obviously, the operator had to restore the worksite to resume operations at this location. However, the operator took significant new actions to prevent the occurrence of a similar accident.

Thus, the operator acted promptly to rectify the violative condition and to redesign procedures to prevent future accidents. Solar Sources complied with MSHA's directive to implement a new ground control system. Tr. 347-48, 516-17. The fact that MSHA was involved in new procedures does not invalidate the operator's work to abate the violation in good faith and to achieve regulatory compliance. Rather, it shows that the operator cooperated and complied with MSHA's directives.

The Judge also erroneously discredited the steps taken by Solar Sources by pointing to Safety Director Fields' testimony that "MSHA made us submit a ground control plan or revised ground control plan . . . that's what we had to do. We had to revise that so it basically put[] at least 20-foot or minimum 20-foot between the berm and then another berm and then the spoil bank." *ALJ Rem. Dec.*, 42 FMSHRC at 348; Tr. 516-17. The Judge mischaracterized this testimony as an admission or demonstration of a lack of good faith. No evidence supports such an inference. *See Bussen Quarries, Inc. v. Acosta*, 895 F.3d 1039, 1046-47 (8th Cir. 2018) (concluding that the Judge's inference was unreasonable because it was based on nothing more than suspicion). Cooperating with MSHA and willingly complying with its directions are good faith actions. Hence, the Judge's characterization of Solar's post-accident actions is misplaced.

Moreover, the Mine Act's mandate that an operator abate a violation prior to adjudication promotes consideration of an operator's efforts to abate the violation. The Mine Act identifies the penalty factor as "good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). Therefore, the Mine Act *explicitly contemplates* the actions by an operator after a violation. This factor encourages and credits an operator's good faith in cooperation with MSHA to rectify dangerous or violative conditions. To hold otherwise would discourage an operator's compliance efforts, which would be antithetical to the Mine Act's safety-promoting purpose. The operator's cooperation or compliance with MSHA's requirement to modify its ground control plan and implement a new method for dumping, instead of arguing that it should merely rebuild the berm, demonstrates good faith in achieving compliance and safe operating conditions.

The Commission has recognized that good faith is a matter of degree, similar to negligence. *Coal River Mining, LLC*, 32 FMSHRC 82, 97 (Feb. 2010) (“The term ‘demonstrated’ makes the question of the operator’s ‘good faith’ one that can be answered in degree.”). Ironically, in his initial decision, the Judge found that Solar’s “post-incident action was laudable, and reflective of the serious attitude [it] takes towards safety.” *ALJ Dec.*, 40 FMSHRC at 489. In this regard, the Judge noted that Solar Sources modified the ground control plan for the dumpsite and redesigned the slurry dumping process.

Simply stated, substantial evidence does not support a finding that the operator failed to act in good faith in attempting to achieve rapid compliance after notification of the violation.<sup>8</sup> Consequently, the Judge erred in declining to credit Solar Sources for its good faith abatement. This error undermines the Judge’s assessment.

### **3. Negligence**

The operator argues that the Judge erred in determining that its negligence was of the “highest order” in assessing a penalty in this case. PDR at 31-32. The operator characterizes the Judge’s statement as a new, enhanced finding on negligence akin to reckless disregard. We agree and find that he erroneously relied on this new finding in assessing a higher than maximum penalty.<sup>9</sup>

In explaining his consideration of the penalty factors, the Judge stated that “[f]inding the negligence to have constituted an unwarrantable failure, the negligence associated with this violation was of the *highest order* for this penalty factor and thus points to the *highest penalty* the Court may impose.” *ALJ Rem. Dec.*, 42 FMSHRC at 358 (emphasis added).

In his initial decision, the Judge concluded that the operator was highly negligent and that this criterion weighed heavily in his penalty assessment. *ALJ Dec.*, 40 FMSHRC at 488, 495. Neither party appealed the Judge’s negligence finding nor challenged his consideration of the evidence pertaining to this criterion to the Commission after his initial decision. Thus, this

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<sup>8</sup> When reviewing administrative law judges’ 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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

<sup>9</sup> We reject the Secretary’s contention that Solar Sources is barred from raising this argument on appeal. It did raise this argument in its petition for discretionary review, which relates to a modified finding made by the Judge for the first time in his remand decision. *See* 30 U.S.C. § 823(d)(2)(A)(iii) (“Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.”).

finding was not before the Commission in *Solar Sources I* and was not remanded to the Judge for reconsideration. It is the law of the case. See *Manalapan Mining Co.*, 36 FMSHRC 849, 850 (Apr. 2014) (in the second appeal after Judge’s decision on remand, the Commission “conclude[d] that by reversing his initial finding of a violation, the Judge violated the ‘law of the case’ doctrine”); *Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (holding that Judge’s original findings of gross negligence and unwarrantable failure were not appealed, were not subsequently remanded, and thus became the law of the case).

The law of the case doctrine provides that when a decision is made at one stage of litigation and not challenged on appeal, it continues to govern. See *Concrete Works of Colorado, Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 992 (10th Cir. 2003); *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993); see also *Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) (stating that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.”). Here, the law of the case doctrine governs issues related to negligence.

The Commission has held that “the Judge should take into account the degree of operator negligence, which would be on a scale between low negligence and reckless disregard, in assessing an appropriate penalty.” *The American Coal Co.*, 38 FMSHRC 2062, 2084 n. 32 (Aug. 2016). Thus, there is a recognition of degrees of negligence ranging from low through reckless disregard or gross neglect, and the Commission explicitly drew such distinction in *Lehigh Anthracite Coal LLC*, 40 FMSHRC 273 (Apr. 2018). There, it found that the Judge erred in finding high negligence rather than reckless disregard. *Id.* at 279-83.

In this case, the Judge changed his negligence determination in the opposite direction. Upon remand, the Judge found negligence was of the “highest order,” by implication raising the negligence level to reckless disregard. We understand the Judge’s desire to reaffirm his initial assessment, but he may not increase his negligence finding to do so. The Judge’s prior negligence finding was before him in the limited capacity to consider and weigh all the penalty criteria in reassessing the penalty. Hence, the Judge’s original finding of high negligence is the law of the case and may not be disturbed on remand by choosing to reclassify it as the “highest level” of negligence.

Because the Judge inappropriately inflated the operator’s negligence to the highest level, he erred by relying on his new finding to reassess the penalty. Thus, his consideration of negligence on remand constituted another error that further infects his penalty assessment.

#### **4. Remaining Penalty Criteria**

The Commission also instructed the Judge to make necessary findings on the remaining penalty criteria—the operator’s size and its ability to continue in business—and to “consider his penalty criteria findings along with the record evidence, reassess a civil penalty, and explain his rationale in an independent and reasoned manner.” *Solar Sources I*, 42 FMSHRC at 188.

As to the operator’s size, the Judge found that the evidence supported that the Shamrock Mine was a large mine. *ALJ Rem. Dec.*, 42 FMSHRC at 353. He found that the operator did not

raise the argument that the penalty would affect its ability to continue in business. *Id.* at 353-54. Solar Sources did not appeal the findings regarding size or ability to stay in business.<sup>10</sup> The Judge concluded that the two remaining criteria—violation history and efforts to achieve compliance—did not warrant lowering his original penalty assessment. *Id.* at 343, 348, 352.

## **5. The Judge's Reassessment**

After addressing the four criteria he previously failed to consider, the Judge increased the penalty from \$68,300 to \$69,000. *Id.* at 364. The Judge somewhat inflated his prior finding of negligence to a finding upon remand that negligence was of “the highest order,” justifying the highest penalty that could be imposed. *Id.* at 358.

The Commission has held that a Judge may assign different weights to the section 110(i) penalty criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373-74 (Sep. 2016) (“We have recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria.”); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (“Judges have discretion to assign different weight to the various factors, according to the circumstances of the case. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).”). Moreover, Judges are “not required to weigh the criteria in assessing the penalty in the same manner that the criteria are weighed in the proposal of a penalty.” *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014). Ultimately, the Judge’s penalty assessment must not be “inconsistent with the statutory criteria and the deterrent purpose behind the Act’s provision for penalties.” *Sellersburg*, 5 FMSHRC at 295.

The Judge’s numerous errors in considering the penalty criteria taint his penalty assessment in this case. Not only did the Judge make errors in findings of fact on several of the criteria, as noted above, but he erred in his analysis of the impact of the criteria on the penalty determination here. In assessing the penalty below, the Judge relied heavily on MSHA’s rationale that the violation deserved a special penalty due to the nature of the violation. Finding the violation to be “especially egregious,” the Judge accepted that view based on negligence and gravity, which he determined to be very serious on both accounts. *ALJ Rem. Dec.*, 42 FMSHRC at 336. Despite this, he did not find the highest levels of negligence and gravity. The Judge did not conclude that the evidence supported a finding of reckless disregard. Rather, he found that the operator exhibited only high negligence. Nevertheless, he concluded that the conduct of the operator warranted the highest penalty for this berm violation. Based on these factors and with little to no regard for the other penalty factors, the Judge imposed a penalty beyond the maximum and higher than the penalty proposed by MSHA.

Accordingly, we vacate the Judge’s penalty assessment. Under the circumstances of this case, we conclude that remand is not necessary. The findings on the section 110(i) penalty criteria are not in dispute. Rather, it is the appropriate application and consideration of those factors that are disputed. In this instance, in the interest of judicial economy, we will consider and impose an appropriate penalty rather than remand the case to the Judge to reassess the penalty yet again.

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<sup>10</sup> Likewise, the parties did not appeal the findings on gravity. *ALJ Rem. Dec.*, 42 FMSHRC at 364.

The penalty will not affect the operator's ability to stay in business. Considering the other penalty criteria in a holistic and integrated manner, we recognize that the violation's gravity and negligence factors play important roles in evaluating the violation to determine a penalty. We also must factor in the operator's size, history of violations and attempt to achieve rapid compliance after notification of the violation. We are mindful, as set forth above, that the purpose of the penalty is to deter rather than to punish. Here, the Judge exceeded the maximum permissible penalty.

First, the inspector cited gravity as highly likely to be fatal to one person. Without doubt, a violation highly likely to cause a fatality is serious and militates toward a significant penalty. Fortunately, a fatality did not occur.

Second, the Judge found "high negligence," not reckless disregard, which is a higher level of negligence under MSHA's penalty system and in the Commission's case law. Again, high negligence is serious and leads toward a significant penalty. As noted above, however, in *Lehigh Anthracite Coal, supra*, the Commission reversed a Judge's finding of high negligence and substituted reckless disregard. In doing so, the Commission remanded the case for a redetermination of the penalty. On remand, the Judge increased the penalty. In *Lehigh Anthracite*, the Commission recognized that high negligence did not manifest a maximum degree of negligence. 40 FMSHRC at 283.

Third, regarding size, the parties stipulated that the operator produced approximately 1.2 million tons of coal per year. That is a very substantial amount of coal, and as the Judge found, the operator is large. At the same time, it does not place it within the top 50 coal mines in the nation and, therefore, is not near the maximum in the size category.

Therefore, in terms of negligence, gravity, and size, it is reasonable to look toward the high end of the penalty spectrum. In turning to other penalty factors, we must consider the favorable history of violations and a good faith abatement effort. We do so cognizant that the purpose of the penalty is to deter future violations. From the foregoing, it is apparent that the Judge's analysis erred in the factoring of the history of violations and good faith attempt to achieve rapid compliance. Those factors demonstrate good faith efforts to comply in the past and good faith efforts to do even more in the future to prevent violations. They cut against a need for a maximum penalty to deter future violations. Efforts, monetary and otherwise, incurred in implementing a rigorous system for preparing structurally sound berms are not part, per se, of the civil penalty, but they are efforts intended to prevent/deter violations. Thus, these measures support efforts to achieve compliance moving the penalty away from the highest end of the penalty spectrum.

i. History of Violations

As demonstrated above, Solar Sources had a good record of compliance in the months and years before this aberrational event. In the prior 15 months, despite its size and regular inspections, it had been cited only 19 times for violations with total penalties of less than \$14,000.<sup>11</sup>

Continuing further, MSHA also examines an operator's history of repeat violations. In this regard, Solar Sources did not have any recent history of repeat violations. Its history illustrates that this criterion should lean toward a minimal penalty due to its good record of compliance.

We have already explained the weakness of the Judge's reliance on the scant testimony of two prior berm violations six and eight years earlier with respect to which no citation or other verifiable evidence was introduced. Thus, the operator's history of violations does not demonstrate the need for a maximum penalty to deter future violations.

ii. Good Faith in Attempting to Achieve Rapid Compliance After Notification of a Violation

While MSHA's penalty assessment proposal criteria do not bind us, we note that the criteria allow up to 10% - reduction for good faith abatement. *See* 30 C.F.R. § 100.3(f). The Mine Act, however, speaks more broadly than abatement. Using the terminology "achieve rapid compliance," 30 U.S.C. § 820(i), the statute speaks to all activities an operator undertakes to assure compliance with the regulation—that is, to use berms that prevent over-travel and overturning at dumping locations as required by 30 C.F.R. § 77.1605(l).

Solar Sources instituted a new and extensive system of berm workings to prevent future events. The Judge refused to give these actions any credit regarding the civil penalty because MSHA required this new system. The fact is that the operator undertook extensive, entirely new procedures to prevent—that is, deter—any future over-travel of berms. Following Congressional intent toward the purpose of deterrence, Solar Sources' institution of a new and extensive system of berm workings to prevent future events must be considered.

The Judge should have credited the operator for its low history of violations and good faith abatement and assessed a lower, not higher, penalty. The Judge erred in his findings related to these criteria and in his consideration of the interplay of the criteria. Having concluded that the evidence compels the conclusion that the operator had a favorable violation history and demonstrated good faith in achieving rapid compliance, a penalty less than maximum is warranted to accomplish the deterrent purposes of a civil penalty. We accord significance to these factors. In summary, the Judge's finding of negligence and gravity support a high albeit less than maximum penalty. On the other hand, the operator's history and good faith action to

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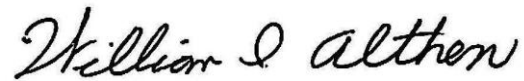
<sup>11</sup> While the ideal would be a history with no violations or penalties, this is not a significant history, especially for a moderately large operator under current inspection and enforcement.

achieve compliance with the standard offset the need for a maximum penalty to achieve deterrence. Balancing all factors, we find the appropriate penalty is \$40,000.

**III.**

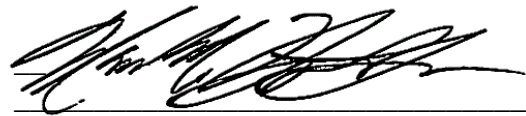
**Conclusion**

Accordingly, we vacate the Judge's decision and assess a penalty of \$40,000 for Citation No. 9102704.



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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner

**Chair Traynor, dissenting:**

In our first decision in this matter, *Solar Sources Mining, LLC*, 42 FMSHRC 181, 203 (Mar. 2020) (*Solar I*), I concurred, in part, with my colleagues' decision to vacate and remand the Judge's penalty assessment (\$68,300) because he failed to first consider each of the statute's six penalty criteria, 30 U.S.C. § 820(i). Regretfully, I was not able to join their decision in full because the majority also appended a separate advisory opinion on an issue that was not actually before the Commission on review. *Solar I* at 203-204.

Once again, I am unfortunately unable to join my colleagues' decision – this time, because they usurp the discretionary role of our Judges in the assessment process, arrogating to themselves the power to set a penalty.

On remand, following our first decision in this case, the Judge fully considered the six penalty criteria at section 110(i) when making his discretionary decision to assess a \$69,000 penalty. This is fully consistent with section 110(i), 30 U.S.C. 820(i), of the Mine Act, which states, in pertinent part:

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.

The Judge explained that the \$69,000 penalty assessment was due to the operator's high negligence, history of berm violations, and the extreme gravity of the accident.<sup>1</sup> He found that the other penalty factors did not militate against imposing a high penalty.<sup>2</sup> Specifically, although the Judge concluded that the operator's general history of violations of all safety standards was "modest" he found its history of berm violations was aggravating. Furthermore, the Judge found

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<sup>1</sup> The Judge found that the violation of the safety standard at 30 C.F.R. § 77.1605(l) – which requires berms or other means to prevent overtravel at dumping locations – was significant and substantial and the result of an unwarrantable failure to comply. 42 FMSHRC 329, 358 (May 2020) (ALJ).

Here, due to the deficiency in the berm, the dump truck's back wheel over-traveled the ledge of the dump site, fell and flipped upside down into the slurry pit approximately 48 feet below. The driver escaped almost certain death by leaping from the truck's cab before it descended over the ledge. The jump and fall resulted in a broken foot that required multiple surgeries to reconstruct using donated bone, steel and screws.

<sup>2</sup> The majority incorrectly asserts that the Judge's \$69,000 penalty exceeded the maximum penalty available for an unwarrantable failure violation. Slip op. 3 n.3. The Judge issued his independent penalty reassessment in May 2020, at which time the maximum penalty assessment available was \$69,417. 82 Fed. Reg. 5373, 5384 (Jan. 18, 2017). Thus, the Judge did not err.



that the operator was large, producing over one million tons of coal a year. The Judge recognized that Solar Sources did not contend that the proposed penalty would affect its ability to stay in business. Finally, the Judge found that Solar Sources did not demonstrate a good faith attempt to achieve rapid compliance.

Solar Sources again petitioned the Commission for review of the Judge's assessment, and the Commission granted review.

Until this decision, we have regularly preserved our Judges' wide discretion to apply the section 110(i) penalty criteria in support of a penalty assessment. Our precedents recognize that application of the six criteria and our Judges' ability to assign different weights to each can (and should) result in a wide range of permissible assessments, with no single "correct" or "best" assessment decision in any particular case. To that end, we have consistently applied an intentionally limited appellate review to our Judges' penalty assessment decisions that has taken the form of a two-step process. The Commission:

[R]eview[s] the findings of fact on each of the section 110(i) criteria under the substantial evidence standard, looking for '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). Then, [ ] review[s] the Judge's assessment decision for abuse of discretion, which must be 'bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.' *Sellersburg*, 5 FMSHRC at 294.

*Solar I*, 42 FMSHRC at 208.

My colleagues ignore this well-settled standard of review. Instead, they make penalty criteria findings *de novo* and then assess a new penalty (\$40,000). Specifically, the majority makes the following *de novo* findings: the violation history was low,<sup>3</sup> slip op. at 8, Solar Sources demonstrated good faith in abating the violation, slip op. at 10, and the mine was is not in "the top 50 coal mines in the nation and, therefore, is not near the maximum [ ] size," slip op. at 13. The majority weighs their new findings against the Judge's negligence<sup>4</sup> and gravity findings and

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<sup>3</sup> The majority states that the Judge failed to make a qualitative evaluation of for the operator's history of violations. Slip op. at 8. This is false. In fact, the Judge states "in the past two years Solar Sources has had a *modest number* of violations . . . the violation history does not especially aid the Respondent . . . [as] it has had prior berm violations." 42 FMSRHC at 360 (emphasis added). The majority contends that the Judge erred in relying on testimony regarding the prior berm violations because the Secretary did not also enter the citations as exhibits. The majority cites no authority for their novel proposition that the uncontroverted testimony of an operator's witness is not part of the record and cannot be relied upon by the Judge.

<sup>4</sup> The majority mischaracterizes the decision below, claiming that on remand the Judge increased his negligence determination. This too is demonstrably false. In fact, on remand the Judge explicitly reaffirmed his March 2018 negligence determination. 42 FMSHRC at 337 ("the Commission did not disturb . . . this Court's determinations that the violation was . . . the result

independently concludes that their own penalty criteria findings preclude imposition of a maximum penalty. The majority concludes that \$40,000 is an appropriate penalty for the violation.

There are multiple problems with the majority's decision. First, the majority errs by reweighing the evidence to reach different penalty criteria findings. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached."); *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("[i]t would be inappropriate for the Commission to reweigh the evidence . . . or to enter *de novo* findings based on an independent evaluation of the record.").

Second, the majority's re-balancing of their criteria findings to reassess the penalty ignores the discretion the Commission has historically accorded to Judges to assign weight to the criteria when assessing penalties. *See Knight Hawk*, 38 FMSHRC at 2373-74 ("We have recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria."); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (Jul. 2001) ("[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Thunder Basin Coal, Co.*, 19 FMSHRC 1495, 1503 (Sep. 1997)."); *see also American Coal Co., v. FMSHRC*, 933 F.3d 723, 726 (D.C. Cir. 2019), *aff'g* 40 FMSHRC 1011 (Aug. 2018) ("we review the ALJ's penalty calculation for an abuse of discretion.").

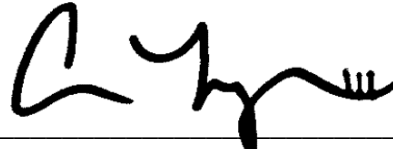
In particular, the Commission has held that it is *not* an abuse of discretion for a Judge to weigh negligence and gravity more heavily than the other criteria. *Knight Hawk*, 38 FMSHRC at 2373-74; *Spartan Mining, Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (holding that a judge may increase penalties significantly based on findings of extreme gravity and unwarrantable failure); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979-80 (Aug. 2014) (holding that weighing one factor more heavily was not an abuse of discretion); *Thunder Basin*, 19 FMSHRC at 1503 ("there is no requirement that equal weight must be assigned to each of the penalty assessment criteria").

My colleagues have improperly commandeered the Judge's role to reduce his penalty assessment. The majority's decision marks a sharp and consequential departure from well-settled precedent providing that we do not overturn the Judge's penalty assessment absent an abuse of discretion. In fact, my colleagues' momentary reflection that their decision is irregular, slip op. 6 at n.6, is a tacit acknowledgment of this departure. Of course, this decision in which a Commission majority claims for itself the power to *lower* a penalty (without finding a true abuse of discretion and instead of remanding to the Judge) is now precedential authority a future Commission may use to *increase* a penalty.

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of *high negligence.*") (emphasis added), *id.* at 358 (the "March 2018 decision detailed [my] findings regarding Solar Sources negligence. Those findings . . . are reaffirmed here.").

The result of my colleagues' decision is to strip a layer of political insulation from the penalty assessment process — taking the penalty assessment out of the hands of life-tenured Judges and centralizing it in a Commission comprised of political appointees serving six-year terms. I would not be surprised if my colleagues re-think the wisdom of their position when the Secretary cites their decision in a petition seeking review of a Judge's otherwise sound discretionary decision to impose a minimal penalty on a mine operator.

A handwritten signature in black ink, appearing to read 'A. Traynor, III', written in a cursive style. The signature is positioned above a horizontal line.

Arthur R. Traynor, III, Chair

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