FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2011-701
	:	LAKE 2011-881
v.	:	LAKE 2011-962
	:	LAKE 2012-58
THE AMERICAN COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Young, Cohen, and Althen, Commissioners

In these 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 Administrative Law Judge affirmed five citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The American Coal Company ("AmCoal"), including the significant and substantial ("S&S") designations for each violation, but with reductions in the penalties.[1] 35 FMSHRC 3077 (Sept. 2013) (ALJ).

On appeal, AmCoal challenges the civil penalties assessed by the Judge. It argues that those penalties were derived in part from MSHA's proposed penalties, which were specially assessed pursuant to MSHA's penalty regulations. It further maintains that those specially assessed proposed penalties are not supported in the record and therefore should not have been considered by the Judge.

For the reasons that follow, we remand for further proceedings consistent with this decision.

[1] 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."

I.

Facts and Proceedings Below

A. Factual Background

Between October 2010 and March 2011, MSHA inspectors issued ten citations to AmCoal for alleged safety violations at its New Era Mine in Saline County, Illinois. MSHA proposed penalties for the citations using its special assessment regulations set forth at 30 C.F.R. § 100.5. AmCoal contested the proposed civil penalties. The parties reached a partial settlement with regard to five of the citations. The remaining five citations—all specially assessed by MSHA—were the subject of a hearing before a Commission Administrative Law Judge in May 2013. The citations are summarized below.

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Citation No. 8428508 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a)[2] consisting of roof bolts that were not supporting the roof. The citation alleged that: (1) the violation was the result of AmCoal's high negligence; (2) an injury was reasonably likely to occur; (3) any such injury could reasonably be expected to be permanently disabling; and (4) one person would potentially be affected. MSHA proposed a special assessment of $40,300.

Docket No. LAKE 2012-58

Citation No. 8432118 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a) consisting of a rib that was cracked, broken, and leaning away from the pillar. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $9,100.

Citation No. 8432126 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a) consisting of damaged roof bolts in a crosscut. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $7,700.

Citation No. 8432129 alleged an S&S section 104(a) violation of 30 C.F.R. § 75.202(a) consisting of roof bolts that were too far from the pillar. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $7,700.

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[2] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Docket No. LAKE 2011-962

Citation No. 8432052 alleged a section 104(a) S&S violation of a safeguard that was previously issued to the mine pursuant to section 314(b) of the Mine Act and 30 C.F.R. § 75.1403,[3] involving a transformer parked less than 25 feet away from a curtain. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $4,800.

For each citation, AmCoal contested (1) whether a violation had occurred; (2) the Secretary's S&S designation; and (3) the appropriate civil penalty.

B. The Judge's Decision

The Judge affirmed all five violations and the associated S&S designations. 35 FMSHRC at 3099-122. For four of the five citations, the Judge reduced the level of negligence alleged by the Secretary. *Id.* at 3108-09, 3114-15, 3118-19, 3122. For one of the citations, the Judge reduced the level of gravity alleged by the Secretary of Labor. *Id.* at 3108. For all five of the citations, the Judge reduced the penalty amounts proposed by the Secretary. *Id.* at 3105, 3111, 3115, 3119, 3122. In total, the Judge assessed penalties of $43,200 for the five violations at issue, rather than the total of $69,600 proposed by MSHA by special assessment. *Id.* at 3123.

The Judge declined to address AmCoal's arguments about the validity of MSHA's special assessments process and the appropriate standard for reviewing the Secretary's proposed penalties. The Judge explained that AmCoal's challenges to the special assessment scheme failed to raise cognizable claims because the Commission alone is responsible for assessing final penalties. *Id.* at 3078 n.2, 3109-11. He concluded that whether the Secretary proposes a regular assessment or a special assessment is "not relevant" to the Commission's determination of a penalty amount. *Id.* at 3110 (citation omitted). The Judge explained that "[r]egardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used, — this Court is guided in its final determination by the polestar of 30 U.S.C. § 820(i) penalty considerations." *Id.*

[3] Both section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403 provide: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

II.

Disposition

AmCoal argues that MSHA's proposed penalties were arbitrary because the Secretary failed to meet a burden of proof of substantiating enhanced special assessments in these cases. According to AmCoal, the Secretary must prove by a preponderance of the evidence that specially assessed proposed penalties are warranted or appropriate under the circumstances in each case. AmCoal argues that the "practical result" when proposed penalties are specially assessed is that Judges rely on those elevated proposed penalties as a "baseline" for their assessments. PDR at 11. AmCoal also contends that Judges must utilize the penalty amounts that would have resulted from the regular assessment process as the baseline for determining penalty amounts and in explaining any substantial divergences under *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

As explained below, the Secretary is not required to prove by a preponderance of the evidence that it was appropriate to utilize the special assessment procedures to arrive at a proposed penalty amount rather than using the regular assessment formulas. In turn, however, Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a de novo assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment.

In these cases, the Judge did engage in a significant discussion of the evidence. However, his opinion could be read to indicate that he used the Secretary's special assessment as a starting point. In order to assure the independence of the assessment, we remand the cases to the Judge for reconsideration and further explanation.

A. The Secretary's Broad Discretion in Proposing Penalties Under the Mine Act

The Mine Act establishes a bifurcated scheme for the proposal and assessment of penalties for violations. The Mine Act requires the Secretary to propose a penalty initially. In doing so, the Act grants the Secretary latitude. Section 105(a) of the Mine Act states only that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). Moreover, section 110(i) provides that "[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and *shall not be required to make findings of fact* concerning the [six factors above]." 30 U.S.C. § 820(i) (emphasis added).

Although Congress did not require MSHA to issue regulations governing its proposal of penalties, MSHA has chosen to promulgate such regulations. The Secretary's Part 100 provides

for two types of proposed assessments: (1) regular formula assessments and (2) special assessments.

Regular formula assessments are made pursuant to 30 C.F.R. § 100.3. Under section 100.3, the Secretary proposes a penalty by applying specific penalty tables established by regulation to the allegations contained in the citation or order. A specific number of points are assigned to each penalty criterion and then a penalty amount is derived from Table XIV in 30 C.F.R. § 100.3(g). When MSHA proposes regular assessments, MSHA's Office of Assessments provides operators and, in turn, Judges with an "Exhibit A" that consists of a penalty report detailing the penalty points assessed under each statutory factor. This exhibit provides the operator and the Judge an explicit explanation of the bases for the proposed penalty.

Special assessments are governed by 30 C.F.R. § 100.5. Section 100.5(a) states that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." Section 100.5(b) states that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." The regulation does not state conditions warranting a special assessment. Therefore, the decision to issue a special assessment rather than a regular penalty is wholly within MSHA's discretion.

When MSHA elects to specially assess violations under section 100.5, its Office of Assessments sends operators a special assessment version of "Exhibit A" that includes Narrative Findings for a Special Assessment ("Narrative") purportedly to explain the agency's rationale for the proposed special assessment. *See* R. Exs. 4, 10, 18. It also sends a special assessment penalty report containing some factual allegations pertaining to the statutory penalty factors. *See* R. Exs. 3, 9, 17. In these cases, the Narrative Findings do not state specific reasons for the decision to issue a special assessment and provide little or no substantive information. For instance, the Narratives in these cases simply state that "MSHA has carefully evaluated the conditions cited and the inspector's relevant information and evaluation. The proposed penalty reflects the results of an objective and fair appraisal of all the facts presented." Then, the Narratives continue to provide a cursory and summary treatment of the penalty criteria for each violation.[4] R. Exs. 4, 10, 18.

MSHA has not promulgated a regulation explaining the calculation of special assessments. However, it has issued informal General Procedures explaining how the Assessment Office adds penalty points in specially assessing a penalty. Although there are exceptions, especially for flagrant violations, most commonly the Assessment Office adds points to the regular negligence and gravity points based upon the specific circumstances of the violation, such as the seriousness of any injury, unwarrantable failure, imminent danger, etc. *See*

[4] In response to an issue raised at oral argument before the Commission, the Secretary's counsel represented that MSHA is working on ways to make Narrative Findings more informative "by including a more detailed explanation of the rationale for its decision to specially assess a violation." Sec'y Suppl. Statement dated May 2, 2016, at 2; Oral Arg. Tr. 59-61.

MSHA General Procedures (Special Assessment), https://www.msha.gov/sites/default/files/Compliance_Enforcement/Special-Assessment-Table_Sept-2-2015.pdf) (outlining general procedure for calculating special assessments). This report prepared by MSHA provides information on the addition of penalty points but does not provide, at least in these cases, any explanation about the basis for the decision to specially assess the penalty.

In summary, the Mine Act does not require the Secretary to explain the basis for the proposed penalty, beyond its establishment of the penalty criteria. Otherwise, the Secretary has discretion to propose penalties that are now subject only to his own regulations. Those regulations, in turn, do not require the Secretary to explain the basis for the proposed penalty when he makes the discretionary decision to specially assess, beyond the requirements in 30 C.F.R. § 100.5(b) that MSHA base the penalty on the criteria set forth in section 100.3(a)[5] and that "[a]ll findings shall be in narrative form." If an operator ultimately disagrees with an assessment, the remedy is a hearing before the Commission.

B. The Commission's Independent Authority to Assess Penalties under the Act

Under the Mine Act's bifurcated penalty assessment scheme, the Commission possesses independent authority to assess all contested penalties de novo pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). When an operator contests the Secretary's proposed assessment pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), a Commission Administrative Law Judge "issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's . . . proposed penalty, or directing other appropriate relief." *Id.*

Section 110(i) of the Mine Act provides that the Commission is authorized to assess all penalties under the Act and that the 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). *See also* 30 U.S.C. § 815(b)(1)(B) (enumerating the same six factors that the Secretary "shall consider" when proposing penalties pursuant to section 110(b), 30 U.S.C. § 820(b)).

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[5] The criteria in section 100.3(a) are substantively identical to the six criteria in section 110(i) of the Act.

The Commission considers the same statutory penalty criteria as the Secretary in assessing penalties. In doing so, a Judge is bound neither by the Secretary's proposed penalty nor by the Part 100 regulations governing his penalty proposal process. *See Sellersburg Stone Co.*, 736 F.2d at 1151-52 ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties;" also, "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 v. Sec'y of Labor*, 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); *Walker Stone Co., Inc.*, 12 FMSHRC 256, 260 (Feb. 1990).

Congress has thus conferred broad discretion upon the Commission and its Judges in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Of course, such discretion is not unbounded. Penalty assessments must reflect proper consideration of the penalty criteria set forth in section 110(i). *Id.* (citing *Sellersburg*, 5 FMSHRC at 290-94). Under *Sellersburg* and the Commission's Procedural Rules, an Administrative Law Judge must make findings of fact under each of the statutory penalty factors. 5 FMSHRC at 292; 29 C.F.R. § 2700.30(a); *see also Cantera Green*, 22 FMSHRC 616, 621 (May 2000). The Judge then independently assesses a penalty. *See, e.g., Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012) ("[T]he penalty assessment for a particular violation is within the sound discretion of the administrative law judge.").

C. The Secretary's Evidentiary Burden for Proposed Penalties

AmCoal argues that when the Secretary chooses to use the special assessment process, he should be required to prove by a preponderance of the evidence that the violation warranted specially assessed penalties. AmCoal further contends that, if a Judge decides to use a baseline or starting point for his independent assessment, he should begin with a penalty calculated using the regular assessment formulas, not the special assessment regulations. It also argues that MSHA's special assessment narratives are deficient because they contain only "conclusory statements of a legal nature" without identifying the reasons justifying the special assessment, or the quantitative basis for the resulting proposed penalty.

The Secretary's authority to issue a special assessment is plenary. He is not required to explain the reasons for his decision to specially assess a violation to the Commission. The Secretary has authority to choose to propose a special assessment based on the alleged facts pertaining to the violation known to him at the time of the proposal.

The Secretary, however, does bear the "burden" before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed that obligation may be considerable. While the Secretary may provide a narrative that explains why a special assessment has been sought in a given case, no regulation or statutory provision provides criteria to guide that decision. Thus, Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge's findings and conclusions.

Hence, the decision to specially assess the penalty, and the rationale supporting that decision, may be relevant if the Judge appears to rely upon it, expressly or implicitly. This is true because the Commission Judge makes the final determination of the appropriate penalty based upon the evidence and arguments of the parties. In all civil penalty cases under the Act, the operator and the Secretary have the opportunity to persuade the Judge as to the amount constituting an appropriate penalty for a violation. The Secretary's proposed assessment is a proposal. Each party may and should present evidence on each penalty criteria in support of its positon.[6] After the hearing, as we have emphasized, it is the Judge's responsibility to assess the penalty independently.

There is one caveat—a caveat upon which resolution of these cases centers. While the Commission has emphasized the right of the Judge to impose the appropriate penalty based upon the Judge's application of the penalty criteria, the Commission has recognized that the Secretary plays an important role in the penalty process. Therefore, in an early case, the Commission held that Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. The rationale was plain and continues to be important. "If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293. The Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process. *See id.*; *Cantera Green*, 22 FMSHRC at 621.

Accordingly, the Secretary's decision to propose a penalty under his regular assessment formulas or under his special assessment regulations does not negate the Judge's duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria. In either instance, however, the Judge must also explain a substantial divergence from the proposed penalty amount.

It is relatively easy for the Judge to give such explanation when the Secretary uses the regular point system. Any modifications by the Judge to the Secretary's proposal with respect to penalty criteria, such as negligence or gravity, are likely to explain the divergence. The situation is somewhat more complicated with special assessments. Because the Secretary has proposed a penalty that may be substantially higher than would have been proposed under the regular system, the Secretary presumably will introduce evidence to support what is essentially an elevated assessment under the Secretary's regulations.[7] Evaluation of the evidence to support the

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[6] A lack of explanation or justification for the Secretary's special penalty proposal may fail to provide sufficient notice to the operator of the facts upon which the Secretary relied to specially assess the penalty to prepare its rebuttal. However, any notice issue that may exist from a special assessment narrative can be cured through discovery and/or a pretrial order by the Judge.

[7] Here, for example, had the Secretary used the regular point schedule, the total penalties proposed for the five violations at issue would have been $19,961. The Secretary's special

elevated assessment will certainly be central to any substantial deviation from the proposed penalty. Therefore, a full discussion of the evidence bearing upon the appropriate penalty must be the basis for any explanation of a substantial deviation.

For either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

D. The Judge's Findings in These Cases and Reason for Remand

In specifically challenging the Judge's penalty assessments in these cases, AmCoal argues that the Judge cited no aggravated circumstances—such as extraordinarily high negligence or gravity, an imminent danger, an accident, or conditions likely to lead to fatal injury—warranting elevated penalties for the violations. AmCoal contends that the only statutory criterion mentioned or relied upon by the Judge to warrant increasing penalties beyond the regular assessment mechanism is its history of previous violations, which he referenced in relation to the four section 75.202(a) violations.

In fact, the Judge did substantially consider the section 110(i) criteria with regard to the violations and explained his reduction of the penalties, at least in part. 35 FMSHRC at 3105, 3111, 3115, 3119, 3122. In particular, the Judge made explicit findings as to negligence and gravity for each violation. The parties stipulated to good faith abatement. *Id.* at 3079; Jt. Ex. 1. The operator does not contend that the penalties would affect its ability to remain in business. Although the Judge did not make an explicit finding in the record, there is undisputed evidence that this was a large mine. Tr. I 92; Ex. R-37.

For all but one citation the Judge did discuss the evidence as it applied to the penalty. Thus, the Judge considered the section 110(i) criteria and evidence supporting his penalty assessments. The exception is the history of violations criterion pertaining to the safeguard violation, Citation No. 8432052.[8]

On the other hand, however, the Judge also stated that he "reduced the [Secretary's proposed] penalty to [the Judge's assessment]," *see* 35 FMSHRC at 3105, 3111, 3115, 3119, 3122, thereby suggesting that he may have used the Secretary's specially assessed proposed

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assessment proposal was $69,600. As stated above, the Secretary need not explain his decision to specially assess, but must support the proposal he makes.

[8] As to Citation No. 8432052, which involved a safeguard violation for parking a transformer less than 25 feet from a curtain, the Judge did not make a finding with regard to the mine's violation history. The Secretary proposed a penalty of $4,800, which the Judge reduced to $3,800 despite affirming the Secretary's gravity and negligence findings. The evidence indicates that the operator has a history of 19 violations of the same standard. R. Ex. 9.

penalties as a benchmark for calculating his ultimate assessments. For most violations, he lowered the penalty by approximately 20% from the Secretary's special proposal.

As we have repeatedly held, Judges must make independent assessments of the final penalty. *Sellersburg*, 5 FMSHRC at 291; *Wade Sand and Gravel*, 37 FMSHRC 1874, 1876 (Sept. 2015). We are unable to discern with assurance whether the Judge did in fact rely on the Secretary's specially assessed proposed penalties or made an independent assessment. In order to assure the credibility of the administrative scheme, we require that Judges explain a substantial divergence from the penalty proposed by the Secretary. However, that requirement does not constrain the independence of the Judge to make a final penalty assessment with upwards or downward adjustments as the Judge determines circumstances warrant.

Here, MSHA issued a special assessment without explaining the basis in its Narrative Findings. At trial, AmCoal introduced the Secretary's "Special Assessment Narrative Form" ("SANF"), which assigns points for each of the section 110(i) criteria under both the regular and special assessment formulas and calculates a penalty amount based on those points. R. Ex. 5, 19. These exhibits do not conform with the Secretary's stated rationale provided at trial for the increased proposed assessments in these cases. While the Secretary's witnesses testified that the operator's excessive history of violations and repeated noncompliance with the roof standard justified MSHA's decision to specially propose penalties in these cases, the SANFs assign no extra points for the history criterion, but rather increase the points assigned for negligence and gravity.[9] R. Ex. 5. Thus, the points added to determine the proposed penalty bore no relationship to the asserted basis for the special assessment. They did nonetheless dramatically increase the proposed assessment.[10]

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[9] At the hearing, the operator's counsel did try to question the Secretary's witness about the fact that the form did not indicate a higher point value for history although the inspector testified that the operator's history was a basis for recommending these violations for special assessment. The Secretary's witness claimed he was not involved in calculating the assessment and did not know the answer. Tr. 325-28.

[10] The contrast between the proposed and final assessments in these cases provides an interesting perspective on the special assessment process. It is evident from the calculations provided by the Secretary in discovery that the calculation of specially assessed penalties is mechanically the same as regular assessments, including use of the same penalty points table. As an example, in Citation No. 8428508 (issued for roof bolts that failed to support the roof), the Secretary's special assessment procedures added 19 penalty points to the points that would have been assigned under the regular schedule for a total of 138 points, which converts to a $53,858 penalty. R. Ex. 5; *see* MSHA General Procedures (Special Assessment) at 3-8. As permitted in the special assessment procedures, MSHA then reduced that amount by 25% to $40,300. R. Ex. 5. After the hearing, the Judge reduced negligence from high to moderate and reduced severity from permanently disabling to lost work days/restricted duty. If the Secretary had used those findings with his special assessment procedures, the total points assessed would have been 113 for a penalty of $7,774. The Judge reduced the proposed penalty of $40,300 to $20,000. This means that, while the Judge substantially reduced the proposed penalty, his

The Judge's decision only summarily addressed the history of violations criterion in a general context as to the roof and rib violations and explicitly stated that he was reducing the penalties from the Secretary's proposed amounts to his ultimate assessments. In addition, the Judge failed to make any finding on the violations history relative to the safeguard violation. As a result, we are unable to determine exactly what the Judge did and whether he abused his discretion. *See Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011) (vacating and remanding the penalty assessment to the Judge to address each of the statutory criteria, especially the negligence criterion, where the Commission could not determine from the Judge's decision whether the reduction in penalty was supported by the application of the statutory criteria).

In order to assure fairness, therefore, it is important for us to know whether the Judge made an independent assessment or felt constrained to making his assessment as an adjustment to the Secretary's proposal. In this unique case, if the Judge did rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record.

Essentially, we are affirming the right and duty of Commission Judges to make assessments independently. Without undercutting the administrative credibility value of asking Judges to explain any substantial variance from MSHA's proposed penalty, we must be able to understand that the Judge made an independent final assessment. This does not impose a burden or any new obligations on the Judge; it merely conforms to our established law that the Judge must show he/she considered the six penalty criteria and assessed the penalty based upon his/her evaluation. We simply fulfill our obligation to know the Judge decided his/her penalty assessment based upon consideration of the penalty criteria.

Accordingly, we vacate the Judge's decision in part and remand the cases to him for further clarification of his penalty assessments. On remand, the Judge should explain whether he relied on the Secretary's specially assessed proposed penalties and provide an adequate explanation for the bases of his assessments, in light of the record evidence and his section 110(i) findings. If the Judge relied on the Secretary's proposed assessment as a starting point for his assessments, then he should specifically address the discrepancies noted in the record pertaining to the operator's history of violations, and explain how he considered this criterion in assessing the penalties. On remand, the Judge must also make a finding as to the history of violations pertaining to the safeguard violation, Docket No. LAKE 2011-962.

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penalty was more than double the penalty that would have resulted under the Secretary's special assessment procedures had the Judge's findings been used. In citing this example, we do not mean to undercut the Judge's assessment or require a change. We use it only to illustrate the need to consider whether the Judge independently assessed the penalty or used the Secretary's proposed special assessment as a benchmark.

III.

Conclusion

For the foregoing reasons, we vacate the Judge's decision in part and remand these cases for further proceedings consistent with this opinion.

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

Commissioner Nakamura, concurring and dissenting:

Although I agree with much of the majority's discussion of the governing principles underlying the assessment of penalties under the Mine Act, I disagree with the new requirement my colleagues impose on Judges, who must now provide an additional rationale for the penalties they assess in cases where they have taken the Secretary's special assessment into account.

All Commissioners agree on several central concepts underlying the penalty assessment process:

- Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a).

- There is no requirement in the Mine Act mandating that the Secretary explain the basis for this proposed penalty when he makes the discretionary decision to specially assess. 30 C.F.R. § 100.5.

- The operator has the right to challenge the Secretary's proposed penalty assessment. 30 U.S.C. § 815(a). This contest results in a penalty proceeding before the Commission.

- An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider the six penalty criteria listed in that provision and the deterrent purpose of the Mine Act.

- Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not binding in any way in Commission proceedings).

- The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983).

- 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) (citation omitted).

Applying these principles to the litigation of a penalty proposal at a hearing before a Commission Judge, it is clear that at trial the question of what penalty should be assessed unfolds on a level playing field. The Judge has broad discretion to assess a penalty *de novo*, *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986), and is in no way bound by the Secretary's penalty proposal.

When a penalty amount is in dispute, both parties should offer evidence and argument to support their positions; the Secretary must show that the amount he is requesting is warranted

under the facts of the case, and the operator must rebut these contentions. Specifically, each party must offer evidence and argument in support of how the Judge should apply the section 110(i) penalty criteria to the facts of the case at hand. The parties fail to do so at their peril.

Subsequently the Judge has the authority to assess a penalty de novo. As noted above, his or her discretion in setting the penalty amount is circumscribed by only two legal requirements: (1) he or she must make the appropriate findings consistent with section 110(i) of the Mine Act and (2) any substantial deviation from the Secretary's penalty proposal must be explained.

Historically, this is the sum total of what a judge must do when assessing a penalty. My colleagues, however, have now added an additional requirement, one supported neither by statute nor Commission precedent: notwithstanding their acknowledgement that the Secretary's proposal is not a baseline for the Judge, slip op. at 9, the Judge must be "attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision," if he or she relies on that special assessment. *Id.* at 7. But given that my colleagues recognize that "it is the Judge's responsibility to assess the penalty independently," *id.* at 8, I fail to understand why they believe that the Secretary's decision to issue a special assessment and the reasons supporting that decision are relevant if the Judge relies on that proposal. Either the Judge's penalty assessment is independent or it is not.

My colleagues remand these cases because, they say, they do not know whether the Judge relied on the specially assessed proposed penalties as a starting point. *Id.* at 10. If he did so rely, the Judge must address any inconsistencies in the record regarding the basis for the Secretary's proposed assessments and the Secretary's penalty criteria findings. *Id.* at 11. They impose this requirement despite their acknowledgement that "[t]he Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record." *Id.* at 9. In short, the majority demands that a Judge explicitly state whether he or she used the special assessment as a benchmark, while at the same time recognizing that the Secretary's proposal is not a baseline. And if the Judge confesses to having taken the special assessment into account, he or she will have a new burden: review the Secretary's rationale (as expressed in the special assessment narrative and at trial) and ensure that it is internally consistent. As we have not previously required a Judge to discuss or explain how the Secretary may have allocated points to arrive at her or his penalty proposal, we find our colleagues claim that their ruling "does not impose . . . any new obligations on the Judge" unconvincing. *Id.* at 11.

Under a statutory scheme where a Judge is free to disregard the Secretary's penalty proposal, and where a Judge need only explain how his or her penalty assessment conforms to the section 110(i) criteria and the appropriateness of any substantial deviation from the penalty proposal, he or she must now embark on an additional analysis to satisfy the majority's new inquiry. Little wonder that our Judges will be puzzled as to how they must meet this new requirement, and why they need to look behind the Secretary's special assessment and at times review the narrative form accompanying it.

In my view, the penalty analysis traditionally applied by our Judges (discussing the six section 110(i) criteria and explaining any substantial deviation from the Secretary's penalty proposal) provides sufficient information for the assessment and, if the penalty is appealed, permits the Commission to determine whether there has been an abuse of discretion. The extra layer of explanation now required by the majority (forcing the Judge to look behind the mechanics of the Secretary's special assessment process) adds nothing to our understanding of whether a Judge conformed to his or her duty to independently assess a penalty in accordance with the provisions of section 110(i) of the Mine Act.

I join my colleagues in the majority in vacating and remanding the penalty for the safeguard violation. That citation involved a safeguard violation for parking a transformer less than 25 feet from a curtain. The Secretary proposed a penalty of $4,800, which the Judge reduced to $3,800 despite affirming the Secretary's gravity and negligence findings. In his penalty assessment analysis, the Judge did not make a finding with regard to the mine's violation history, and thus failed to provide a complete explanation as to how his assessment comported with all of the section 110(i) criteria. As the majority correctly notes, this omission impedes our determination as to whether the Judge's reduction in penalty was supported by the application of the statutory criteria.

I depart from my colleagues, however, in their decision to remand the four penalties for the roof control violations.[1] I would affirm these penalties, finding that the Judge did not abuse his discretion in assessing these penalties.

The Judge explained how, applying the six penalty criteria in section 110(i), he arrived at his penalty determinations. He made explicit findings as to negligence and gravity for each violation (reducing the level of negligence for all four). The parties stipulated to good faith abatement. 35 FMSHRC at 3079; Jt. Ex. 1. The operator does not contend that the penalties would affect its ability to remain in business. Although the Judge did not make an explicit finding in the record, there is undisputed evidence that this was a large mine. Tr. I 92; Ex. R-37.

Thus, the history of violations is the only criterion really in dispute and it is on that issue that the majority remands the penalty determination to the Judge. However, the Judge made findings and addressed that criterion in his decision. Specifically, the Judge stated: "With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties." 35 FMSHRC at 3111 (footnote omitted); *see also id.* at 3115 ("in light of Respondent's previous violations history . . ."), 3119 (same), and 3122 (same)). The Judge explicitly adopted the Secretary's allegation that the operator had an excessive history. Thus, it appears that the Judge concluded that AmCoal

[1] The Secretary proposed a $40,300 penalty for Citation No. 8428508 and the Judge reduced it to $20,000. The Secretary proposed a penalty of $9,100 for Citation No. 8432118 and the Judge reduced it to $7,200. For Citations Nos. 8432126 and 8432129, The Secretary proposed penalties of $7,700 and the Judge reduced them to $6,100. 35 FMSHRC at 3111, 3115, 3119, 3122.

had a significant history of violations, particularly due to its history of repeat violations of section 75.202(a), and considered this to be aggravating. I believe that substantial evidence supports the Judge's findings.

The record contains evidence of the operator's repeated history of noncompliance. With respect to Citation No. 8432118, Inspector Edward Law "recommended the citation for special assessment because the operator had a 'lot of issues with ribs' and roofs and had been cited a 'pretty high' number of times for 202(a) violations." *Id.* at 3089. Citation No. 8428508 stated that "Standard 75.202(a) was cited 109 times in two years at mine." *Id.* at 3106. The inspectors acknowledged consideration of AmCoal's excessive history as influencing the decision to propose special assessments. "Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment." *Id.* at 3090. Regarding Citation Nos. 8432126 and 8432129, the inspector again testified that he recommended special assessments due to the operator's history violations. *Id.* at 3092 ("Law had again recommended a special assessment because . . . of Respondent's past violation history."); 3096 ("Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations that existed for the other citations testified to.").

As explained, the Judge must make findings on the penalty criteria, but has the discretion to assign varying weight to each criterion and need only explain any substantial deviation from the Secretary's proposed assessment, not from the assessment value the penalty would have been under the regular assessment formula, as the operator suggests. The Judge appropriately considered the evidence here in the context of the penalty criterion pertaining to the operator's history of violations.

The Judge's explanation merely must reflect proper consideration of the penalty criteria and the deterrent purpose of the Act. *Sellersburg*, 5 FMSHRC at 294. In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC 616, 621 (May 2000). *See also Lopke Quarries, Inc.*, 23 FMSHRC 705, 713-14 (July 2001) (holding that Judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Here, the Judge noted that the operator's violation history served as an aggravating circumstance in consideration of the penalty assessment. Addressing the operator's history of violations, the Judge agreed "with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties." 35 FMSHRC at 3111. His penalty reductions were undoubtedly due to the fact that he lowered the negligence level for all the roof control violations (and, in addition, reduced the gravity level for one of them).

In short, I conclude that the Judge adequately explained how he applied the section 110(i) history of violations criterion, as well as the other statutory penalty criteria, that he did not abuse his discretion in assessing the penalties, and that accordingly his penalty determinations should be affirmed.

Patrick K. Nakamura, Commissioner

Chairman Jordan, dissenting:

I join the opinion of Commissioner Nakamura regarding the extent of the penalty analysis a Judge must make when the Secretary has proposed a special assessment. I also join the section of his opinion affirming the penalties for the four roof control violations. I part ways only regarding the penalty for the safeguard violation, which I would affirm.

The Secretary proposed a $4,800 penalty for this violation, which involved parking a transformer less than 25 feet away from a ventilation curtain. The gravity was marked as serious, and the negligence as moderate. The Judge affirmed both of these findings and assessed a penalty of $3,800. Based on this record, I cannot conclude that in so doing he abused his discretion. *See Broken Hill Mining Co.*, 19 FMSHRC 673, 676-77 (Apr. 1997) (a Judge's assessment of a penalty constituting an abuse of discretion is not immune from reversal) (citation omitted).

In fact, the operator did not even argue as much. Placing all of its eggs in the regular assessment vs. special assessment basket, the operator argues that the Judge's five penalty assessments represent significant increases over what would have been proposed under a regular assessment formula and thus are not supported by substantial evidence. Nowhere in its submissions to us has it argued that the Judge abused his discretion by not making requisite findings on the six 110(i) penalty criteria.

My colleagues in the majority insist on vacating the penalty and remanding it to the Judge because, since he did not address the operator's history of violations for this penalty, they are "unable to determine exactly what the Judge did and whether he abused his discretion." Slip op. at 11.

I have no such problem. The Judge assessed a penalty of $3,800 against the operator of a large mine for a violation of moderate negligence and serious gravity for which the Secretary had proposed a $4,800 penalty. True, the Judge did not make a finding regarding the history of violations for this penalty (but the evidence indicates that the operator has a history of 19 violations for this standard, R. Ex. 9). Having reviewed the record and the Judge's other findings on the statutory penalty criteria, I am reluctant to hold that this single omission constitutes an abuse of discretion necessitating a remand of the penalty.[1]

[1] Although I am mindful that under *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984), a Judge should explain any substantial divergence between the Secretary's proposed penalty and the Judge's assessment, I do not find the penalty reduction here substantial enough to vacate the Judge's assessment on this basis.

In sum, I dissent from the majority's holding requiring an additional explanation from a Judge when it appears that the Judge might have relied on a proposed special assessment, and I also dissent from the majority's ruling to vacate and remand all five penalties at issue.

Mary Lu Jordan, Chairman

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