FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 16 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-120-M
v.	:	
WADE SAND & GRAVEL COMPANY	:	

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

DECISION

BY: Young, Cohen, and Althen, Commissioners

In this proceeding, 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 denied the motion for summary decision of Wade Sand & Gravel Company ("Wade") and granted the Secretary of Labor's cross-motion. 35 FMSHRC 817, 818 (Apr. 2013) (ALJ). At issue both before the Judge and on appeal is the appropriate penalty assessment for a single guarding violation. The issue presented by Wade is whether its history of violations was appropriately calculated by the Secretary in preparing a civil penalty. However, as described below, we need not reach that issue because we conclude that the Administrative Law Judge made an independent determination of the penalty which is supported by substantial evidence and was within her discretion.

For the reasons that follow, we affirm the Judge's decision.

I.

Facts and Proceedings Below

A. Factual Background

On September 24, 2012, Inspector Charles Gortney of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 8549940 to Wade for failure to guard moving machine parts on a welding machine in violation of 30 C.F.R. § 56.14107(a). On November 8, 2012, MSHA sent Wade a notice of a proposed penalty of $1,026.

MSHA's penalty proposal was made pursuant to its regular penalty assessment formula found in 30 C.F.R. Part 100. With respect to the "history of violations" criterion, MSHA calculated points using the charts contained in section 100.3(c) of his regulations.[1] It determined that Wade's history of violations per inspection day warranted 25 out of 25 possible points and that its history of repeat violations per inspection day warranted 17 out of 20 possible points. 30 C.F.R. § 100.3(c) (Tables VI and VIII). According to MSHA's Mine Data Retrieval System, Wade's history of violations included 67 prior violations over 23 inspection days for a total of 2.91 violations per inspection day and 9 violations of the same standard for a total of 0.39 repeat violations per inspection day. Accordingly, MSHA assigned Wade a total of 42 penalty points for this criterion and proposed a penalty of $1,026.

Having contested MSHA's penalty proposal, Wade moved for summary decision, contending that MSHA's application of section 100.3(c) pertaining to its history of violations was inappropriately applied and contravenes the regulation's plain language. According to Wade, 62 of the 67 violations and 8 of the 9 repeat violations should not have been included in its history because these violations occurred prior to the 15-month period identified in section 100.3(c). The Secretary responded by filing his cross-motion for summary decision.

Both before the Judge and currently on appeal, Wade does not contest the underlying violation, and the parties agree that there are no material facts in dispute as to the other penalty criteria or the evidence related to the history of violations criterion. The only issue raised by Wade is whether MSHA complied with section 100.3(c) of its penalty regulations in considering Wade's history and assigning points under his regulations for this criterion.

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[1] Section 100.3(c) provides:

> *History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

30 C.F.R. § 100.3(c).

Wade argues that the plain language of the Secretary's regulation mandates consideration of only those previous violations that were both cited and became final within 15 months of the date of the violation at issue. The Secretary argues that since the effective date of the 2007 rule, MSHA has used the final order date to calculate an operator's history of violations, regardless of when the violations were cited.

B. The Judge's Decision

At the outset of her decision, the Judge concluded that the Secretary's regulation was ambiguous and deferred to his interpretation, concluding that his consideration of the violations that had become final in the 15-month period prior to the violation at issue in this case was proper. The Judge noted that the language of section 100.3(c) could be subject to either party's interpretation, but held that the Secretary's interpretation was reasonable. 35 FMSHRC at 821-22.

Ultimately, however, the Judge stated that the Commission possessed the final authority to assess penalties. Exercising that authority, she considered the evidence pertaining to the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i),[2] and independently assessed the same penalty amount as was proposed by MSHA—$1,026—for the violation in this case. 35 FMSHRC at 822-24.

II.

Disposition

Whether the Judge's independent assessment of the civil penalty in this case was supported by substantial evidence.

Although Wade challenges the Secretary's proposed penalty assessment in this case, it is the Commission's final penalty assessment that ultimately governs this matter. The Commission possesses independent authority to assess penalties *de novo* pursuant to section 110(i) of the Mine

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[2] Section 110(i) provides 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.

30 U.S.C. § 820(i).

Act. 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). The Commission is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process.[3] *E.g.*, *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;" 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"); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014). Here, the Judge exercised independent judgment and authority in assessing the final penalty amount.

The Judge considered the record evidence on each of the six penalty criteria and independently determined that a penalty of $1,026 was appropriate under the circumstances. Specifically, the Judge noted that the parties represented that there were no material facts in dispute, Wade stipulated to the appropriateness of the penalty to the size of the business, the level of gravity and moderate negligence determined by the inspector, and that the penalty will not affect its ability to continue in business. The parties agreed that Wade demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The only issue in dispute was the evidence as to Wade's history of violations and the extent to which it should be considered when assessing the penalty. 35 FMSHRC at 823. In her decision, the Judge independently considered the evidence as to Wade's history, stating:

> In my review of the history, which has included an evaluation of the materials before me, as well as information regarding this mine available on MSHA's Mine Data Retrieval website, it is clear that this operator has reduced its number of violations over the past few years. However, I note that the "history of previous violations" is one of only six factors that must be considered. Moreover, *any apportionment of points in the Secretary's system to one factor over another is not binding, nor is it part of my analysis in this matter.*

Id. (emphasis added). Thus, the Judge acknowledged the evidence that Wade had improved its history and gave little weight to the Secretary's point allocation to this criterion. For this reason, we find that the Judge considered the record evidence on each of the six penalty criteria and independently determined that a penalty of $1,026 was appropriate under the circumstances.[4]

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[3] The Mine Act states 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 above factors." 30 U.S.C. § 820(i).

[4] The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, 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)).

Substantial evidence supports the Judge's findings on each of the penalty criteria, and her final assessment of a penalty was within her discretion as a Commission Judge. Based on the Commission's independent authority to assess penalties, we affirm the Judge's penalty assessment in this case.

Given our conclusion that the Judge determined the penalty pursuant to section 110(i) of the Mine Act independently of the Secretary's Part 100 regulations, we have no need to consider the validity of the Secretary's interpretation of the word "violations" in 30 C.F.R. § 100.3(c). Indeed, to do so would constitute an advisory opinion, a type of decision that the Commission, like the federal courts, does not issue. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Oak Grove Res.*, 36 FMSHRC 2411 (Sept. 2014). We recognize that operators such as Wade may be dissatisfied with the calculation of the points attributable to the history of violations reflected in the Secretary's proposed assessment of penalty. If so, they may contest the proposed penalty and be afforded an independent assessment by a Commission Administrative Law Judge based on section 110(i) of the Mine Act. [5]

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[5] Because we find the Judge conducted an appropriate and independent penalty analysis pursuant to section 110(i), we do not find it necessary to construe the Secretary's regulations in this case. Our concurring colleagues, however, would do so. They suggest that the Commission should defer to the Secretary's reasonable interpretation of his Part 100 regulations. In light of our colleagues' suggestion of deference to the Secretary's interpretation of *his* regulations, it is most important to state here, as we have in past cases, that Commission Judges need not defer to any element of the Part 100 regulations, including definition of terms. We must not compromise, through notions of deference or otherwise, our Congressional mandate to assess civil penalties independently after making findings of fact.

Therefore, for example, when Commission Judges consider "whether the operator was negligent" in assessing a civil penalty in accordance with section 110(i), they need not defer to the definitions of "negligence" established by the Secretary in his Part 100 regulations. *See Brody Mining, LLC*, 37 FMSHRC __, slip op. at 15-17, No. WEVA 2009-1000 (Aug. 25, 2015); *see also Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3105-09 (Dec. 2014) (Comm. Cohen concurring). While Commission Judges may certainly review MSHA assessed violation history reports to get a sense of an operator's violation history, as suggested by our colleagues, slip op. 7 n.1, our Judges are free to assess penalties without resort to the Secretary's penalty proposal regulations.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision assessing a penalty of $1,026.

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

Chairman Jordan and Commissioner Nakamura, concurring:

We agree with the majority that the Judge's assessment of the penalty is supported by substantial evidence and did not constitute an abuse of discretion. We write separately, however, because we also conclude that the Judge was correct in finding that the language of section 100.3(c) (setting forth the manner in which an operator's history of violations is computed) is ambiguous, and that it is appropriate to defer to the Secretary's reasonable interpretation of this regulation.

Our colleagues in the majority counsel against reaching this question, suggesting instead that operators who are not satisfied with the points attributed to their history of violations may simply contest the penalty assessment and have a judge assess the final penalty. Slip op. at 5. This is not a particularly practical approach. Instead of requiring each operator who believes the Secretary's interpretation of his penalty regulations is unreasonable to contest and litigate the penalty, we believe it preferable to provide the requested guidance now.

Rather than eschew this issue, which was briefed by the parties and fully analyzed and decided by the judge, we prefer to follow the example of the Commission in deciding *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673 (Apr. 1987). In that case, the Commission addressed the operator's argument that the Secretary failed to comply with Part 100 of his regulations by utilizing the special assessment formula instead of the regular or single assessment formulas under his then-existing penalty regulations. *Id.* at 678. The Commission emphasized that it had consistently rejected assertions that it was bound by the Secretary's penalty regulations, and acknowledged the Commission's independent penalty assessment authority under the Mine Act. *Id.* at 678-79. Nonetheless, it went on to issue a ruling that the Secretary, in proposing the special assessment under the penalty regulations, did not act arbitrarily. *Id.* at 680.[1]

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[1] We of course agree with our colleagues' statement that our judges must independently assess penalties. Slip op. at 5, n.5. However, it is true nevertheless that, although our judges independently assess a penalty *de novo*, many of them find MSHA's penalty regulations (and the manner in which the Secretary applies them in proposing a penalty) useful guidance. *See, e.g., Orica Nelson Quarry Serv.*, 35 FMSHRC 3004, 3014 (Sept. 2013) (ALJ); *Ligget Mining, LLC*, 33 FMSHRC 1702, 1717 (July 2011) (ALJ). It is also our understanding that often, in assessing a penalty, some judges will review an "assessed violation history report" produced by MSHA and made part of the case record. *See, e.g., Taft Production Co.*, 36 FMSHRC 522, 537-38 (Feb. 2014 (ALJ) (relying on a report from MSHA's database to determine operator's violation history); *TRC Mining Corp.*, 35 FMSHRC 590, 613 (Mar. 2013) (ALJ) (same).

When judges do turn to the Secretary's penalty regulations for guidance, they need to have a correct understanding of what they mean, and how to accurately interpret them. In providing such an interpretation (as the parties have requested us to do in this case), we apply traditional tools of regulatory interpretation, including principles of deference. This in no way

Section 100.3(c) provides in relevant part:

> *History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history.

30 C.F.R. § 100.3(c).

The Secretary interprets section 100.3(c)'s phrase "violations . . . in a preceding 15-month period" to include all violations that became final orders of the Commission within the preceding 15 months, *regardless of when the violation was initially cited.* Wade contends that the regulation permits MSHA to count only those violations that were both cited and became final orders of the Commission within the preceding 15 months.

Wade argues that the language of section 100.3(c) is plain and that "violations" refers to the event or occurrence giving rise to the violative condition, and not the citation or order issued by MSHA as a result of the violative conduct. Wade further maintains that if the Secretary had meant to include assessments that became final during the relevant time frame irrespective of when such violations occurred, he could have and should have drafted the regulation to explicitly indicate that.

As the Judge noted, and the Secretary concedes, Wade's interpretation is a permissible reading of the provision at issue. However, the Secretary's interpretation is likewise an acceptable one. Because the regulation is subject to competing interpretations, it is ambiguous, and deference must be accorded to the Secretary's reasonable interpretation. We believe that the Secretary's interpretation is reasonable, especially in light of the regulatory history, legislative intent, and the overall deterrent purpose of the Mine Act's penalty procedures.

The Commission has held that "the Secretary's interpretation of a regulation is reasonable where it is 'logically consistent with the language of the regulation and . . . serves a permissible regulatory function.'" *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted)); *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the

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subverts the longstanding principle that our judges must independently assess penalties pursuant to section 110(i) of the Mine Act.

regulation"' (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).

The Secretary amended his penalty regulations in 2007. The 2007 rule added the following pertinent language to the second sentence of section 100.3(c): "or have become final orders of the Commission,"[2] and changed the time period under consideration from 24 months to 15 months. 72 Fed. Reg. 13,592, 13,604 (Mar. 22, 2007). While MSHA narrowed the relevant time period to more accurately reflect the most recent history of the operator, it made clear that it would consider all violations that became final orders during that shorter time frame. As the preamble explained:

> MSHA included the insertion of the phrase "final orders of the Commission" to clarify the Agency's practice, in existence since 1982, to use only violations that have become final orders of the Commission in determining an operator's history of violations. This practice will continue to provide a measure of fairness by not including in an operator's history those violations that are in the adjudicatory process which may ultimately be dismissed or vacated. *As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final.*

Id. (emphasis added).

As the Judge noted, the preamble clearly expresses MSHA's intent to use the date on which a contested penalty "becomes final" when determining an operator's history of previous violations. The Judge explained:

> To find otherwise and accept Wade's interpretation of Section 100.3(c) would lead to an absurd result which would encourage mine operators to contest all citations and draw out the litigation in the hope that no final order of the Commission would be issued before the passage of 15 months. If such were allowed to occur the operator would be able to avoid all accountability for any history of violations it has developed. Certainly that cannot be the intention of either the Mine Act or the Secretary's regulations.

35 FMSHRC at 822.

We agree with the Judge's analysis. Exclusion of a large number of violations due to a

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[2] This additional language added "final orders" to the two categories that had previously been used to determine an operator's history of violations ("assessed violations that have been paid or finally adjudicated"). 72 Fed. Reg. 13,603.

long adjudicatory pendency period would not present an accurate and complete picture of an operator's history and thus would diminish the effect and purpose of this criterion. *See* S. Br. at 17 (stating that in 2009, 89 percent of contested citations would never have been counted in the operator's history of violations because they took more than 15 months to be resolved and become final Commission orders). In addition, an operator would also receive the benefit of the exclusion of these pending, non-final violations for purposes of calculating proposed penalty assessments on subsequently issued violations, thus resulting in lower proposed penalties in the future.[3]

The policy reasons in support of the Secretary's interpretation are further underscored by the deterrent purpose behind the Mine Act's penalty procedures. The D.C. Circuit's discussion of the legislative history behind this criterion in *Coal Employment Project v. Dole*, 889 F.2d 1127 (D.C. Cir. 1989), highlights this point. In that case, the court rejected a provision of the Secretary's penalty regulations excluding single penalty assessments from an operator's history of violations. *Id.* at 1136-39. The court stated that Congress "was intent on assuring that the civil penalties provide an effective deterrent against offenders with records of past violations" and concluded that the Mine Act and legislative history required MSHA to consider all violations under the history of violations criterion. *Id.* at 1133, 1138.

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[3] Wade contends that the Secretary's consideration of violations that occurred nearly three years prior to the penalty assessment at issue in this case is inconsistent with his stated explanation for shortening the time period for consideration of an operator's history from 24 to 15 months: focusing on the most recent history of the operator. It suggests that including in an operator's history only violations that were cited within the 15 month period helps MSHA to better assess whether the current behavior of operators is compliant with safety standards, pointing out that its own safety record had improved. However, as noted above, this method would remove many violations from consideration, because some citations issued within the 15 months would not yet be paid or otherwise become final. Also, although the history of violations regulation may not benefit an operator who demonstrates recent improvements in safety, at the same time it does not penalize an operator whose safety record has recently become worse (because some recent citations may not yet be final). Furthermore, even if MSHA's system does not take recent improvements into account, a judge may note an operator's recent reduction in violations. In fact, that is precisely what occurred in this case. 35 FMSHRC at 823.

Accordingly, we agree with the Judge's conclusion that the Secretary's interpretation of his history of violations penalty regulation is reasonable. For the foregoing reasons, we would affirm the Judge's decision assessing a penalty of $1,026.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

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