

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

September 25, 2014

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 2010-1130
v. :
SIGNAL PEAK ENERGY, LLC :

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

ORDER

BY THE COMMISSION:

This case involves review of an Administrative Law Judge’s decision affirming two citations issued to Signal Peak Energy in the wake of a roof cave-in which injured a miner. 34 FMSHRC 1346 (June 2012) (ALJ).

With regard to Citation No. 8463717, the Judge found that Signal Peak violated section 50.10(b) and/or 50.10(d) of the Secretary of Labor’s reporting requirements by failing to timely notify the Department of Labor’s Mine Safety and Health Administration (“MSHA”) of the injury and/or roof cave-in.¹ The Judge raised the \$51,400 special assessment proposed by the Secretary to \$74,250. 34 FMSHRC at 1346 n.1.

¹ Section 50.10 states that an “operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred” involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
- (d) Any other accident.

30 C.F.R. § 50.10.

Signal Peak contends and the Secretary agrees that the Judge erred by imposing a penalty in excess of the \$70,000 maximum for non-flagrant violations of mandatory standards provided by section 110(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“the Act”).² Sec’y Br. at 35; SP Br. at 27.

As explained below, the Commission requests additional briefing on the applicability of the \$65,000 maximum for immediate notification violations provided by section 110(a)(2).³

Section 50.10 requires an operator to contact MSHA within 15 minutes once it knows or should know that an accident, as defined in subsections (a) through (d), has occurred. *See* n.1. Subsections (a), (b) and (c) parallel section 103(j) of the Act, which states that an operator shall notify the Secretary “within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred.” 30 U.S.C. § 813(j). Pursuant to section 110(a)(2) of the Act (as adjusted for inflation), the failure to provide timely notification as required by section 103(j) shall be assessed a civil penalty by the Secretary of not less than \$5,000, and not more than \$65,000. *See* n.3. In contrast, section 110(a)(1) (as adjusted for inflation) provides that an operator shall be assessed a penalty by the Secretary of not more than \$70,000 for a non-flagrant violation of a mandatory standard or provision of the Act. *See* n.2.

Section 50.10 achieved its current form in 2009, when reference to “accidents” generally was replaced with subsections (a) through (d). The Secretary explained that the change would “make it readily apparent when the violation is subject to the higher penalty,” as subsections (a), (b) and (c) would automatically be subject to the Secretary’s corresponding penalty provision for section 103(j) violations,⁴ while subsection (d) would not. 74 Fed. Reg. 68918, 68918-19 (Dec.

² Section 110(a)(1) of the Act states that the “operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 for each such violation.” 30 U.S.C. § 820(a)(1). As discussed *infra*, the maximum has been adjusted to \$70,000 through rulemaking to account for inflation. *See* 30 C.F.R. § 100.3(a).

³ Section 110(a)(2) of the Act states that the “operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 103(j) of this [Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5,000 and not more than \$60,000.” 30 U.S.C. § 820(a)(2). Similar to section 110(a)(1), the maximum has been adjusted to \$65,000 to account for inflation. *See* 30 C.F.R. § 100.4(c).

⁴ The relevant regulatory provision is section 100.4(c), which, like section 110(a)(2) of the Act, states that “[t]he penalty for failure to provide timely notification to the Secretary under section 103(j) of the Mine Act will be not less than \$5,000 and not more than \$65,000 for the following accidents: (1) The death of an individual at the mine, or (2) An injury or entrapment of an individual at the mine, which has a reasonable potential to cause death.” 30 C.F.R. § 100.4(c).

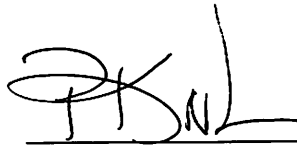
29, 2009). Also in 2009, the relevant penalty provision was moved from 30 C.F.R. § 100.5, which otherwise addresses special assessments, to section 100.4, which otherwise provides minimum proposed penalties for unwarrantable failure violations. The Secretary noted, however, that “MSHA [would] continue to review these violations for a special assessment when conditions warrant.” *Id.*

It is also notable that when section 110(a)(2) was enacted under the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”), sections 110(a)(1) and (a)(2) both provided a maximum assessable penalty of \$60,000. Pub. L. No. 109-236; 30 C.F.R. § 100.3 (2006). The legislative history of the MINER Act indicates that this correlation was intentional. S. Rep. No. 109-365, at 13 (2006) (“fix[ing] a minimum civil penalty of \$5,000, up to \$60,000 (which is the current maximum)”). The Secretary subsequently adjusted both for inflation via rulemaking, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, 110 Stat. 1321). The general maximum was increased to \$70,000 in 2008, and the maximum for section 103(j) violations was increased to \$65,000 in 2012. 73 Fed. Reg. 7206, 7207-08 (Feb. 7, 2008); 77 Fed. Reg. 76406, 76406-07 (Dec. 28, 2012). The Secretary has stated that the adjustments “are prescribed by the Inflation Adjustment Act and are not within MSHA’s discretion.” 77 Fed. Reg. at 76406-07. Both adjustments are reflected in the Secretary’s current regulations addressing proposed penalty assessments. 30 C.F.R. §§ 100.3(a), 100.4(c).

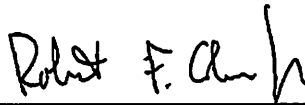
In light of this statutory framework, the Commission requests further briefing from the parties regarding the maximum assessable penalty for Citation No. 8463717 under each theory of liability. Specifically, the parties are requested to address the following questions:

- 1. Are violations of section 50.10(b) subject to a maximum penalty of \$65,000 under section 110(a)(2) of the Act, or \$70,000 under section 110(a)(1)?** The parties should address the relevance of the initial correlation between the maximum assessable penalties. The parties should also discuss the relevance (if any) of the distinction between section 110(a)(2), which provides both minimum *and* maximum penalty amounts for violations of section 103(j), and section 110(a)(3), which provides only a minimum penalty for unwarrantable failure violations issued under section 104(d).
- 2. Are violations of section 50.10(d) subject to a maximum penalty of \$65,000 under section 110(a)(2), or \$70,000 under section 110(a)(1)?** The parties should address whether it conflicts with congressional intent to allow a higher penalty to be assessed for failing to report a general accident under section 50.10(d), than for failing to report a death, or injury or entrapment with the potential to cause death, under sections 50.10(a), (b) or (c).

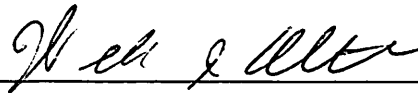
The parties are requested to file briefs, or alternatively, to notify the Commission that briefs will not be filed, within 30 days of the date of this order.



Patrick K. Nakamura, Acting Chairman



Robert F. Cohen, Jr., Commissioner



William I. Althen, Commissioner

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