

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

July 16, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2009-401-M
v.	:	SE 2009-402-M
	:	SE 2009-553-M
MIZE GRANITE QUARRIES, INC.;	:	SE 2009-554-M
ROBERT W. MIZE III; and	:	SE 2010-849-M
CLAYBORN LEWIS	:	SE 2010-850-M
Both Employed by MIZE GRANITE	:	
QUARRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The issues involve three penalties proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under section 110(c) of the Mine Act, 30 U.S.C. § 820(c),¹ against the mine’s owner, Robert W. Mize III (“Mize”), and, separately, against the mine’s foreman, Clayborn Lewis (“Lewis”).

¹ Section 110(c), 30 U.S.C. § 820(c), provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

For the following reasons, we remand this case to the Administrative Law Judge for further consideration of her negligence and gravity findings consistent with our decision.

I.

Factual and Procedural Background

Mize owns Mize Granite Quarries, Inc. (“MGQ”), a corporation that operates a stone quarry located in Elberton, Georgia. 33 FMSHRC 886, 888 (Apr. 2011) (ALJ). During inspections conducted in January and March 2009, MSHA inspectors issued a number of citations and orders to MGQ, including the citation and three orders involved in this proceeding. The Secretary subsequently conducted a special investigation which resulted in proposed individual penalties against Mize and Lewis under section 110(c) of the Act. *Id.*

Following a hearing, the Judge, among other things, dismissed the penalties against Mize and Lewis for Order No. 6505714. She also reduced the amounts of the remaining three penalties for both individuals. 33 FMSHRC at 914-18.²

The Commission granted the Secretary of Labor’s petition for discretionary review of the Judge’s decision. The Commission affirmed the Judge’s dismissal of the penalties proposed against Mize and Lewis associated with Order No. 6505714. 34 FMSHRC 1760, 1764 (Aug. 2012). We further concluded that the Judge had improperly based the amount of the individual penalties against Mize in part on the assumption that he would also be paying the penalties against MGQ as the corporate operator of the mine. Accordingly, we remanded the individual

² The proposed penalties, assessed penalties, and dispositions of these citations and orders are summarized below:

Citation or Order No.	Proposed Penalty	Assessed Penalty
1. Citation No. 6507102	Mize \$3,600 Lewis \$3,600	\$500 \$300
2. Order No. 6505709	Mize \$6,000 Lewis \$6,000	\$500 \$300
3. Order No. 6505714	Mize \$4,000 Lewis \$4,000	Dismissed Dismissed
4. Order No. 6505715	Mize \$4,000 Lewis \$4,000	\$500 \$300

33 FMSHRC at 916-18.

penalties against Mize so that the Judge could reconsider the penalties based solely on Mize's personal financial status, not the status of MGQ. *Id.* at 1765.

We also noted that the Judge had reduced the proposed penalties against Lewis although Lewis had not submitted any information concerning his personal income and financial responsibilities. We concluded that the Judge had not adequately explained the basis for the reductions and remanded the case for the Judge to reconsider the individual penalties assessed against Lewis, after offering him another opportunity to provide documentary evidence regarding his personal income and financial responsibilities. *Id.* at 1766.

On February 1, 2013, the Judge issued her Decision on Remand, which further explained her considerations in assessing the individual penalties against Mize and Lewis. After providing the explanation, the Judge assessed the same penalty amounts. 35 FMSHRC 414, 417-18 (Feb. 2013) (ALJ). The Commission again granted a petition for discretionary review filed by the Secretary of Labor.

II.

Disposition

A. Considerations Particular to Mize

On remand, the Judge reevaluated the individual penalties assessed against Mize, taking into consideration the section 110(i) criteria, as they apply to individuals.³ 35 FMSHRC at 416-17; *see Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 824 (May 1997) (explaining the application of the criteria in assessing section 110(c) penalties). Following the Commission's direction, the Judge took into account the fact that Mize had "no history of previous violations being assessed against him" and found that Mize "does not have sizeable personal net worth and the amount of the penalties proposed is disproportionate to his income." 35 FMSHRC at 417.

³ Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. It further directs that the Commission, in determining penalty amounts, 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.

It appears that the Judge may have once again taken into account the history of the corporation, stating that “the mine has not had any injuries or lost workdays and was the recipient of two safety awards.” *Id.* Although such considerations pertaining to the corporation should not play a role in the determination of personal liability, we find that the Judge’s mentioning of the mine’s enforcement history constituted harmless error, as substantial evidence supports the Judge’s determination of Mize’s section 110(c) liability based on his history of no personal violations.⁴ *See* 35 FMSHRC at 417; 33 FMSHRC at 917. Accordingly, we affirm the Judge’s findings with regard to Mize’s ability to meet his financial obligations and the appropriateness of the penalties in light of his income and net worth.⁵

B. Considerations Particular to Lewis

In accordance with our previous decision, the Judge issued an order on December 4, 2012, directing Lewis to provide his income information within 20 days of receipt of the order. 35 FMSHRC at 415. This order was mailed to Lewis’ personal address, Lewis’ work address, and to Mize as Lewis’ representative. Lewis did not respond to the order. *Id.* On remand, the Judge found that it is “safe to assume [Lewis’] income would be no greater than Mize’s and most likely sizably less and he is of modest means.” *Id.* at 417.

We find that documents already in the record support the Judge’s conclusions. The operator’s 2009 federal tax return reflects a total cost of labor of \$133,990 (a figure which presumably includes employer-provided payroll taxes and benefits). Resp. Ex. 1. The parties stipulated that the total 2009 production hours worked by the operator’s employees was 10,043. 33 FMSHRC at 888. MSHA’s 2009 printout of the operator’s Employment, Accident and Injury Data confirms this figure and also reflects that the average number of employees who worked for the operator over the four quarters of 2009 was 6.25. Resp. Ex. 5. From these figures one can derive an average hourly wage of \$13.34 and an average annual wage per employee of \$21,438.40 in 2009. While Lewis was presumably paid a premium over the average wage for his

⁴ When reviewing an administrative law Judge’s 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 *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁵ We reject the Secretary’s characterization of the Judge’s findings regarding Mize’s income and personal net worth as “hopelessly vague.” PDR at 7. In particular, the Secretary confuses the gross income of Mize Granite Sales with the company’s net income. The record discloses Mize’s earnings from this company and also from Apex-Mize Granite. The Judge’s findings that Mize’s personal net worth was not sizeable, and the proposed penalties are disproportionate to his income are supported by substantial evidence and within the Judge’s discretion.

duties as a foreman, we believe, based on these figures, that it was reasonable for the Judge to conclude that Lewis was of “modest means” and “most likely [made] sizably less” than Mize. We therefore affirm the Judge’s findings with regard to Lewis’ ability to meet his financial obligations and the appropriateness of the penalty.

C. Negligence and Gravity Findings

Although we uphold the Judge’s findings with regard to Mize and Lewis’ financial situations, we conclude that, in assessing the penalties in her second decision, the Judge has misstated the negligence and gravity findings contained in her first decision. With respect to Citation No. 6507102, the Judge found in her first decision that the “callous and reckless disregard for the safety of the miners is sufficient [] to determine that this violation was correctly and justifiably assessed as unwarrantable failure to comply with the standard.” 33 FMSHRC at 897. In regard to Order No. 6505709, the Judge found the violation to be an unwarrantable failure and described Mize and Lewis’ conduct as “shocking disregard for the safety of the miners,” and “both individually and in concert, as egregious.” *Id.* at 903. However, in her second decision, the Judge described Mize’s negligence with respect to this citation and order merely as “high” and the gravity involved only “to be serious.” 35 FMSHRC at 417.

Likewise, with respect to Order No. 6505715, in her first decision, the Judge found the violation to be significant and substantial (“S&S”) and an unwarrantable failure due to “Mize’s complete indifference and reckless disregard for the safety of [] miners.” 33 FMSHRC at 911-12. However, in her second decision, the Judge described Mize’s negligence associated with this Order as “moderate,” and the gravity of the violation as “moderate.” 35 FMSHRC at 417.

The Judge’s negligence and gravity findings from her first decision constitute the law of the case. *See Manalapan Mining Co.*, 36 FMSHRC 849, 852 (Apr. 2014); *Douglas R. Rushford Trucking*, 24 FMSHRC 648, 650 (July 2002). We hereby remand this case for the Judge’s explanation of whether exceptional circumstances within law of the case principles warrant changes in the negligence and gravity findings, or the characterizations on remand were simply inadvertent misstatements of her prior findings. Having explained and reconciled her negligence and gravity findings, the Judge should re-assess the penalties against Mize and Lewis with appropriate consideration of all the section 110(i) criteria as applied to individuals.

III.

Conclusion


For the foregoing reasons, we affirm the Judge's determinations regarding Mize and Lewis' individual abilities to meet their financial obligations and the appropriateness of the penalties in light of their income and net worth. However, we remand this matter to the Judge for reconsideration of her negligence and gravity findings and assessment of penalties in light of such reconsideration.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

Distribution:

Robert W. Mize III
President
Mize Granite Quarries, Inc.
P. O Box 299
Elberton, GA 30635

Clayborn Lewis
P. O. Box 881
Elberton, GA 30635

Clayborn Lewis
Mize Granite Quarries, Inc.
P. O. Box 299
Elberton, GA 30635
ccgc@elberton.net

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Administrative Law Judge Priscilla M. Rae
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004