FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 23 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2008-1059
SEQUOIA ENERGY, LLC	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

At issue in this case is whether a Commission Administrative Law Judge erred in his assessment of civil penalties for four citations issued to Sequoia Energy, LLC, relating to mobile equipment defects. 32 FMSHRC 1361 (Sept. 2010) (ALJ). The case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). We conclude that the Judge erred in his assessment of the four penalties by reducing those penalties based upon his consideration of prior penalties that were proposed pursuant to a different penalty regulation. Accordingly, we vacate those penalties and remand them to the Judge for reassessment. On remand, the Judge is also instructed to reconcile seemingly unsupported or inconsistent findings with respect to the four penalties.

I.

Factual and Procedural Background

On February 8, 2008, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), Argus Brock, inspected Sequoia's coal preparation plant in Harlan, Kentucky. 32 FMSHRC at 1362. As a result of the inspection, Inspector Brock issued various citations, including the four at issue in this proceeding. All four citations related to defects on trucks that hauled rock material from refuse bins at the plant to a refuse pile near the plant. *Id.* at 1362, 1363.

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A. The Judge's consideration of prior penalties

With respect to all four penalties, the Judge "note[d] parenthetically" that previous penalties concerning Sequoia's failure to correct defects on mobile equipment had ranged from $60 to $400 compared to the range of $3,996 to $5,503 currently proposed for the four citations. *Id.* at 1372. The Judge recognized the Secretary's concern that Sequoia needs to display greater efforts in maintaining its equipment but stated that his assessments, which were "significantly greater" than previous assessments, adequately addressed the Secretary's concern. *Id.*

B. Citation No. 7496260: Exhaust pipe and headlights

MSHA Inspector Brock issued Citation No. 7496260, which alleged a significant and substantial ("S&S")[1] violation of section 77.404(a),[2] because he observed that a refuse truck's exhaust pipe had a leak that permitted carbon monoxide to enter the driver's compartment. *Id.* at 1365-66. The citation was modified to incorporate allegations from a separate citation (which was then vacated) that the high and low beam headlights on the right side of the truck were also inoperative. *Id.* at 1365 & n.2. The inspector indicated in the citation that the operator's degree of negligence was moderate. Gov't Ex. 4.

The Judge affirmed the allegations of violation, S&S, and moderate negligence alleged by the inspector on the citation. 32 FMSHRC at 1366-67. However, the Judge assessed a civil penalty of $1,400, rather than the penalty of $4,689 proposed by the Secretary of Labor because he reasoned that there were several mitigating factors relating to the degree of gravity that warranted the reduction. *Id.* The Judge found that the hazard caused by the truck's inoperative right headlights was mitigated by supplemental lighting at the refuse bins and at the refuse pile and on the truck. *Id.* at 1367. Regarding the defective exhaust pipe, he stated that the inspector did not contend that the condition was noted by pre-shift examiners, and that there was no visible hole that made the condition visibly "readily apparent." *Id.*

C. Citation No. 7496262: Mirrors and headlights

Inspector Brock issued Citation No. 7496262, which alleged an S&S violation of section 77.404(a), because he observed that a refuse truck had a broken upper left side view mirror and a missing lower left side view mirror. *Id.* at 1368. The citation was modified to incorporate allegations from a separate citation (which was then vacated) that the high and low beam

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[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."

[2] 30 C.F.R. § 77.404(a) provides, "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

headlights on the right side of the truck were also inoperative. *Id.* & n.3. The inspector indicated in the citation that the operator's degree of negligence was moderate. Gov't Ex. 7.

The Judge affirmed the allegations of violation, S&S, and moderate negligence alleged in the citation. 32 FMSHRC at 1369. However, the Judge assessed a penalty of $1,200, rather than the proposed penalty of $4,689 because, similar to Citation No. 7496260, he found that there were significant mitigating factors relating to gravity. *Id.* at 1368, 1369. The Judge stated that the same mitigating factors regarding headlights with respect to Citation No. 7496260 were applicable to Citation No. 7496262. *Id.* at 1369. He further noted evidence that the upper mirror was still functional, although it was cracked. *Id.* The Judge also determined that the lower mirror was used to look at the rear tires, and that the missing lower mirror would not normally be relied upon because the truck did not dump in the vicinity of an elevated area. *Id.*

D. Citation No. 7496263: Accumulation of oil on hood

Inspector Brock issued Citation No. 7496263, alleging an S&S violation of 30 C.F.R. § 77.1104[3] because he observed combustible material, in the form of hydraulic oil, accumulated on the hood of the refuse truck that was also the subject of Citation No. 7496262. *Id.* at 1370. The inspector indicated in the citation that the operator's degree of negligence was moderate. Gov't Ex. 10.

The Judge affirmed the violation and that the violation was S&S. 32 FMSHRC at 1370-71, 1374. He determined that the leaking combustible hydraulic oil in proximity to very hot engine components constituted a hazardous condition, and that the degree of hazard was accentuated by the unpredictability of the directional flow of the oil. *Id.* at 1371. The Judge also recognized that the Secretary alleged that the condition had existed for several shifts and had been noted in the pre-shift examination book. *Id.* He further found that the condition was obvious in that it was readily observable on the hood of the truck. *Id.* The Judge concluded that the evidence reflects "at least a moderately high degree of negligence." *Id.* He then assessed a penalty of $3,500 rather than the penalty of $5,503 proposed by the Secretary. *Id.* at 1370, 1371.

E. Citation No. 7496266: Inoperative backup alarm

Inspector Brock issued Citation No. 7496266, alleging a violation of 30 C.F.R. § 77.410(c)[4] because the back-up alarm on a refuse truck was not maintained in a functioning condition. *Id.* at 1371. The backup alarm had been noted as non-functional for several months. *Id.*; Tr. 291-92, 309-10. Sequoia's mechanic testified that the alarm was covered in mud, which

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[3] 30 C.F.R. § 77.1104 provides, "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

[4] 30 C.F.R. § 77.410(c) provides, "Warning devices shall be maintained in functional condition."

muted its sound. Tr. 130-31, 317. He stated that it was a recurring problem and that he periodically cleaned the alarms, although he did not indicate that he did so in the pre-shift reports. Tr. 319-20. The mechanic stated that, after the citation had been issued, he repositioned the alarm so that it would not be filled with mud. Tr. 319-20, 322-23. The inspector indicated in the citation that the operator's degree of negligence was high. Gov't Ex. 11.

The Judge affirmed the allegations of violation and S&S. 32 FMSHRC at 1371-72, 1374. However, he reduced the degree of negligence associated with the violation from high to moderate. *Id.* at 1372. The Judge reasoned that the alarm was exposed to mud, which prevented it from working, and that it was cleaned from time to time, although Sequoia's mechanic did not report the cleaning. *Id.* Concluding that the muddy conditions were a mitigating factor, he assessed a penalty of $2,200, rather than the penalty of $3,996 proposed by the Secretary. *Id.* at 1371, 1372.

The Secretary filed a petition for discretionary review challenging the Judge's reduction of the four penalties. The Commission granted the petition.

II.

Disposition

A. Consideration of past penalty amounts

Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i), 30 U.S.C. § 820(i), and the deterrent purposes of the Act. *Id.*

In his penalty assessment, the Judge considered MSHA's standard Assessed Violation History Report, which covered penalties assessed to Sequoia from February 8, 2006, through February 7, 2008. Gov't Ex. 12. The information contained in the report is limited to the standard violated, the date of the occurrence, whether the violation was S&S, the type of enforcement action, the proposed penalty amount, and the amount paid. The Judge referred to the report in order to compare past penalty amounts with the amount of subject penalties proposed by the Secretary, in order to arrive at the appropriate amount of penalty that he should assess for the subject violations. 32 FMSHRC at 1372; Tr. 350-51.

We conclude that the Judge abused his discretion in assessing the four penalties.[5] The Judge failed to recognize in his decision that the four proposed penalties were significantly impacted by the Secretary's amendments to 30 C.F.R. Part 100, which sets forth the Secretary's criteria and procedures for proposing civil penalties.[6] In March 2007, the Secretary amended Part 100 to bring about "an across-the-board increase in penalties." 72 Fed. Reg. 13592 (Mar. 22, 2007). The higher penalties under the amended scheme became effective on April 23, 2007.

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[5] Our colleagues assert that we should have addressed the "real issue in dispute" – the Secretary's argument that the Judge acted improperly by considering past penalty amounts assessed against Sequoia. Slip op. at 11, 13. However, we need not reach that issue because we find error in the narrower issue of the manner in which the Judge considered the past penalty assessments.

[6] Our colleagues suggest that when we hold in our opinion that the Judge "failed to recognize" the impact of the Secretary's amendments to the Part 100 regulations, we are saying that the Judge failed to discuss or think about those amendments. Slip op. at 11-12, 16 n.10. However, the Judge's error was not in the nature of a failure to think about the Part 100 amendments. Rather, the Judge failed to recognize that those amendments, which significantly raised Mine Act penalties, rendered previous penalties essentially irrelevant for purposes of comparison to present penalties.

The Judge's failure to recognize that the four proposed penalties were impacted by the amendments to Part 100 is evident from the Judge's treatment of the prior penalties in assessing the four penalties at issue. At the conclusion of the hearing, the Judge described his assessment of the penalties:

> And what I'm trying to do here is somehow come to a resolution that is – each side gets sort of half a loaf or whatever. Because if you look at the history of violations, these were a lot of similar violations that are at issue in this case and the proposed penalties . . . that were paid were somewhere between $60 and 2 or $300. So occasionally there was a $400 penalty, but nothing of the magnitude of the total 40,000 penalty and $4,600 for each citation, 4,689. So in reaching this conclusion, for example, of the 1,400 and 1,200 . . . I want to note that I'm doing it in the context of, I'm significantly raising the previous penalties, but I'm not raising them as much as the . . . Mine Safety and Health Administration has raised them.

Tr. 350-51. Thus, it is clear that the Judge used the irrelevant past penalties as a baseline for his present assessments. This is exemplified in Citation No. 7496263, where the Judge raised the negligence finding from "moderate" to "at least moderately high" but lowered the penalty from $5,503 to $3,500.

Thus, a lower penalty scheme was in effect for many of the prior penalties relied upon by the Judge, but the four proposals at issue were all subject to a higher penalty scheme. Indeed, some of the prior penalties relied on by the Judge in the Assessed Violation History Report (Gov't Ex. 12) were "single assessments" of $60, which are not used under the amended system.[7]

The four proposed penalties in this case precisely reflect amended Part 100, specifically the tables contained in 30 C.F.R. § 100.3.[8] Obviously, a Commission Judge is not bound by MSHA's proposed assessments of penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, the fact that MSHA's proposed assessments in this case were derived from its Part 100 standards shows that the proposed penalties were determined in a manner consistent with the regulations, given MSHA's factual findings as to Sequoia's size, history of previous violations, negligence, the gravity of the violations, and the operator's good faith in achieving compliance.

Moreover, as argued by the Secretary, the Assessed Violation History Report relied upon by the Judge (Gov't Ex. 12) does not contain sufficient information to have permitted a meaningful comparison between the violations described in the document and the violations in this case, for purposes of comparing prior penalties. The Assessed Violation History Report does not indicate the precise levels of negligence and gravity, which were the factors upon which the Judge based his penalty reductions in this case. Thus, the report is only useful as an overview of an operator's history of previous violations.[9]

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[7] We note for illustrative purposes that if, for instance, the former penalty scheme had been used to calculate a proposed penalty for the violation set forth in Citation No. 7496263, the proposed penalty would have been $629 rather than the proposed penalty of $5,503 under the amended scheme.

[8] The proposed penalties of $4,689 in Citation Nos. 74966260 and 7496262 are based on a total of 108 penalty points under Table XIV (which converts to $5,211) with a 10% reduction for good faith in abating the violation. The proposed penalty of $5,503 in Citation No. 7496263 is based on a total of 110 penalty points (which converts to $6,115) with a 10% reduction for good faith in abating the violation. The proposed penalty of $3,996 in Citation No. 7496266 is based on a total of 106 penalty points (which converts to $4,440) with a 10% reduction for good faith in abating the violation.

[9] Our colleagues suggest that we are impugning the use of MSHA Assessed Violation History Reports by Commission Judges in assessing penalties. Slip op. at 12-13. Their characterization of our views is incorrect. These Reports are routinely used by Judges in determining an operator's history of previous violations for purposes of section 110(i) of the Act. Their use is proper in that the Reports provide information about the dates of violations, the standards violated and whether the violation was S&S. *See Cantera Green*, 22 FMSHRC 616, 623-24 (May 2000). All we are saying here is that the information about an operator's *previous penalties* contained in the Assessed History Violation Report is not particularly useful because of

For these reasons, we conclude that the Judge abused his discretion in assessing the four penalties at issue. Accordingly, we vacate the penalties and remand for reassessment.

In addition to his use of past assessments, the Judge's analysis of the four citations raises other issues which we instruct the Judge to address on remand. Those issues are described in the sections that follow.

B. Citation No. 7496260: Exhaust pipe and headlights

With respect to Citation No. 7496260, the Judge concluded that there were "significant mitigating circumstances related to the degree of gravity" that warranted a reduction in the civil penalty proposed by the Secretary. 32 FMSHRC at 1367. We conclude that there is considerable evidence in the record that appears to contradict the Judge's findings that mitigating circumstances existed with respect to the defective exhaust pipe. In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence that "fairly detracts" from the finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Judge's discussion of mitigating circumstances for this violation is confusing. Under the heading "Degree of Negligence," he stated that the inspector found a moderate degree of negligence. 32 FMSHRC at 1367. He set forth factors relevant to the operator's knowledge that a defect existed (which is pertinent to whether the operator failed to meet the appropriate standard of care to avoid a violation). But contrary to the Judge's finding that the defective exhaust pipe had not been noted by preshift examiners, Inspector Brock testified that the condition of the exhaust pipe had been noted in pre-operation checklists. Tr. 74, 83. The inspector also testified that the foreman had written in a notebook that he carried with him that the exhaust pipe was defective. Tr. 74, 85. This evidence was not rebutted by the operator.

The Judge also found that although the defect in the exhaust pipe was apparent when the truck engine was started, there was no visible hole in the exhaust system that made the condition readily apparent. 32 FMSHRC at 1367. However, contrary to his finding that the condition was not readily apparent, as the Judge recognized, a layer of soot had built up on the truck because of the fumes caused by the faulty exhaust pipe. *Id.* at 1365, 1366; Tr. 57. Indeed, as the Judge further found, Sequoia's mechanic admitted "that the leak caused soot to accumulate on the frame of the truck." 32 FMSHRC at 1366; Tr. 145-46. There is also evidence that the exhaust could be smelled. Tr. 118. On remand, we instruct the Judge to reconcile this evidence with his finding that there were several mitigating factors in regards to negligence.[10]

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the limited detail provided.

[10] We note that when Inspector Brock found "moderate" negligence, this finding recognized the existence of mitigating circumstances. *See* 30 C.F.R. § 100.3(d), Table X (defining "moderate negligence" as "[t]he operator knew or should have known of the violative

C. **Citation No. 7496262: Mirrors and headlights**

The Judge found that there were significant mitigating circumstances related to the degree of gravity that warranted reducing the civil penalty proposed for the cracked upper side mirror and missing lower side mirror described in Citation No. 7496262. 32 FMSHRC at 1369. The Judge stated that although the upper side mirror was cracked, it was still functional. *Id.* He also stated that these haulage trucks were not dumping in the vicinity of an elevated area, and that the lower mirror, which was adjusted to view the position of the rear tires, "is not normally relied on." *Id.*

There is considerable evidence in the record that appears to contradict the Judge's finding that the bottom mirror would not be used. Inspector Brock testified that a driver would use the bottom mirrors to see the truck's tires when backing up, and that a driver would need to see the bottom back of the tires when backing under the refuse bin. Tr. 156-57, 158. On the date of the inspection, the trucks were using the top refuse bin, which was the bin that trucks had to back under in order to use. Tr. 159-60. The inspector also testified that the cited truck traveled at night, on steep grades, up and down hills, and around other equipment and miners, and that the area of the refuse site was wet and slick. Tr. 71-72, 158-60, 173, 178-79. He stated that a driver would need to back up several times during any shift and put the truck in reverse. Tr. 160-61. On remand, the Judge is instructed to reconcile his gravity findings with such evidence.

The Judge's finding that there were mitigating circumstances relating to gravity also appears inconsistent with his holding that the cracked and missing side view mirrors, alone, provided an adequate basis for designating the violation as S&S. 32 FMSHRC at 1369. The Judge reasoned that side view mirrors protect both the truck operator and miners who may be exposed to the risk of being struck while working in proximity to the truck. *Id.* He also found that it was reasonably "likely that this haulage truck [would] be operated under circumstances that require a lower side view mirror to ensure that the vehicle does not back through a berm installed in an elevated area." *Id.* The Judge did not adequately explain his seemingly inconsistent gravity and S&S findings and is instructed to do so on remand.

D. **Citation No. 7496263: Accumulation of oil on hood**

With respect to the violative hydraulic oil accumulation alleged in Citation No. 7496263, the Judge affirmed the S&S allegations, noted the "serious gravity" of the violation, and raised the level of negligence cited from moderate to "at least [] moderately high." *Id.* at 1371. The Judge characterized the violation as "the proverbial 'accident waiting to happen'" and noted that the condition was obvious in that it was readily observable on the hood of the truck and had existed for several shifts. *Id.* Nonetheless, the Judge assessed a penalty of $3,500, rather than the penalty of $5,503 proposed by the Secretary, a reduction of 36%. *Id.* at 1370, 1371.

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condition or practice, but there are mitigating circumstances").

The Commission has repeatedly recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). The Commission has stated that a Judge "need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his penalty assessments." *Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011) (citations omitted).

Here the Judge made no findings that would explain a significant reduction in the penalty amount from that proposed by the Secretary. In fact, the reduction seems inconsistent with the Judge's finding that there was a higher degree of negligence than that alleged in the citation. We instruct the Judge on remand to provide an adequate explanation for any penalty reassessed.

E. Citation No. 7496266: Inoperative backup alarm

At the refuse site, trucks dumped a wet mixture of rock and mud. Tr. 307. Sequoia's mechanic, Willie Fee, testified that when a refuse truck dumped its load, it sometimes backed into previously dumped material, and mud pushed into the backup alarm, muting its sound. Tr. 317-18, 321; 32 FMSHRC at 1372. Fee stated, "the situation we had up on the refuse was very messy and muddy. And every time you'd back in, it just kept – it was a continuous problem with mud pushing up into the backup horn." Tr. 321. Although the cited inoperative backup alarm was noted for several months in the preshift checklist, Fee testified that he periodically washed the backup alarm but did not report that he had cleaned it. Tr. 308-10, 319-20. Fee agreed that the problem with mud packing into the alarm would continue to occur until the horn was moved, which it eventually was. Tr. 322-23.

The Judge determined that the violation of section 77.410(c) resulted from the operator's moderate, rather than high, negligence.[11] 32 FMSHRC at 1372. The Judge reasoned, "[t]he admitted muddy conditions are a mitigating factor, however Sequoia is responsible for maintaining the alarm in functioning condition." *Id.*

We conclude that the Judge erred in finding that the muddy conditions were a mitigating factor. As the record indicates, the muddy conditions were a recurring condition, and the effect on the alarm of backing into mud was known to the operator. Tr. 317-23. We instruct the Judge on remand not to consider the muddy conditions as a mitigating factor in his penalty reassessment.[12]

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[11] Although the Secretary has not challenged the Judge's determination that the level of negligence was moderate (PDR at 20 n.15), the Secretary has challenged the Judge's finding that the muddy conditions were a mitigating factor (*id.* at 17-18).

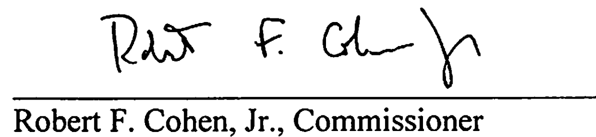
[12] Commissioner Cohen would find it appropriate for the Judge to take into consideration Sequoia's efforts, albeit ineffectual, to keep the backup alarm clean.

III.

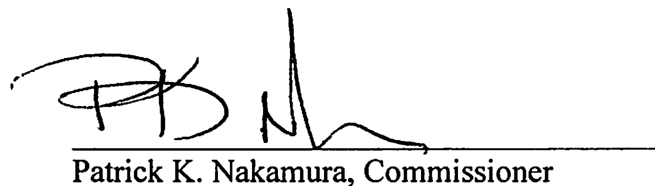
Conclusion

For the reasons set forth above, we vacate the penalties assessed by the Judge with respect to Citation Nos. 7496260, 7496262, 7496263 and 7496266, and remand for the reassessment of appropriate civil penalties. On remand, the Judge shall reassess the penalties in recognition that the proposed penalties were impacted by the amendments to Part 100 and reconcile seemingly unsupported or inconsistent findings as discussed in this decision.

Mary Lu Jordan, Chairman



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Commissioners Young and Althen, concurring:

We concur with the decision to remand this case, but disagree with the majority's reasoning. The majority finds the Judge abused his discretion asserting that the Judge (1) "failed to recognize in his decision that the four proposed penalties were significantly impacted" by the Secretary of Labor's 2007 revised penalty regulations, slip op. at 5, and (2) improperly relied upon the Department of Labor's Mine Safety and Health Administration's ("MSHA's") Assessed Violation History Report. Slip op. at 6.

By remanding on these grounds, the majority avoids a principal argument advanced by the Secretary – that the Judge "abused his discretion by considering a factor outside those listed in Section 110(i), [30 U.S.C. § 820(i),] i.e., the amounts of previous penalties." PDR at 11.

This important question deserves resolution. However, ruling upon that issue requires us to consider in context the use the Judge made of the prior penalties and the Secretary's objections to that specific usage. Consequently, we would remand the case for a more specific explanation by the Judge of the use he made of prior penalty amounts in imposing penalties in this case.

A. The Majority's Reasoning Fails to Reach the Real Issue in Dispute

1. The Judge's failure to expressly mention the changes in the penalty regulation made nearly a year before the violation and three years before his decision does not invalidate his decision.

The majority says the Judge "failed to recognize" the increase in the amounts of penalties. This is a mere assumption, arising from the fact that the Judge did not explicitly mention the increase in his opinion.[1] The failure of the Judge to state explicitly that penalty regulations were amended nearly a year before the violations cited in February 2008 and more than 3 years before the September 21, 2010 decision is hardly remarkable. Indeed, it would be more surprising for an ALJ to mention a revision to the regulations that had occurred three years previously, when this Judge has considered penalties in dozens of cases since the revision.

Just as the failure to cite specific evidence does not mean that it was not considered (*Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)), the failure to discuss explicitly a three-year-

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[1] In the same sense, the Secretary also "failed to recognize" the increase in penalties under the revised regulation. The Secretary's counsel did not note the changed penalty regulations on Government Exhibit 12. Nor did we see any place in the transcript where counsel informed or reminded the Judge of any change. Indeed, in demanding that the Judge not refer to prior penalties, the Secretary demands that the Judge ignore evidence the Secretary placed into the record.

old change in the penalty regulations does not mean the Judge was not aware of such changes, did not recognize that the changes had been made, or did not take those changes into account.[2]

2. **<u>Use of the Assessed Violation History is part of, rather than an abuse of, the penalty process.</u>**

The majority also apparently finds fault in the Judge's reference to MSHA's Assessed Violation History Report in his assessment of penalties. Whether or not the majority actually intends to impeach the usefulness of the Assessed Violation History, characterizing it as a mere "overview" misapprehends and understates the value of the information contained in the report, including information regarding prior penalties. Further, it avoids altogether any discussion of the Commission's decision in *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012) overruling *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (Sept. 1996).[3]

An operator's history of previous violations is a statutory criterion, and MSHA's Assessed Violation History Report was the only evidence introduced at the hearing on this criterion.[4] To refute the suggestion that the Assessed Violation History Report is of marginal concern, one need only note that the Commission has vacated assessments where the Judge did

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[2] To illustrate its position, the majority states that for one of the penalties the prior penalty scheme would have yielded a penalty of $629 rather than the Secretary's assessment of $5,503. A problem with the illustration is that it fails to mention that the Judge's assessment of $3,500 was five and a half time greater than $629. Similarly, the Secretary did not appeal the Judge's reduction in the negligence finding for Citation No. 7496266 from high to moderate. That reduction would have reduced the operator's point total by 15 points from 106 to 91 under the current penalty regulations, and the assessed penalty from $3,996 to $1,200. However, the Judge assessed a penalty of $2,200 that was nearly twice the amount under the revised, "enhanced" penalty regulations.

[3] The majority's finding that the Assessed Violation History Report does not provide sufficient information to allow a meaningful comparison with the charged violations repeats a criticism by commenters on the history of repeat violations element in the enhanced penalty regulation rulemaking. Those comments were rejected by the Secretary in adopting the regulations. 72 Fed. Reg. 13592, 13608-09 (Mar. 22, 2007). Indeed, the revised regulations aggregated significant and substantial ("S&S") and non-S&S violations for purpose of the history of repeat violations despite arguments that such aggregation ignores an important factual distinction between violations. *Id.*

[4] The majority does not distinguish between the Assessed Violation History introduced by the Secretary in this case, which contained history from before and after implementation of the revised penalty regulations in April 2007 and the current format for the Assessed Violation History exhibit format. Instead, the majority appears to be commenting upon Assessed History Violation Reports generally.

not give it sufficient consideration. *Sec'y of Labor on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 556-57 (Apr. 1996) ("The judge failed to consider the operator's general history of previous violations submitted into evidence by the Secretary as the Assessed Violation History Report. . . . [W]e conclude that the judge erroneously limited the scope of the history criterion. We therefore remand the matter to the judge to evaluate the operator's history of violations.").

Although the Assessed Violation History report does not contain information on the facts underlying prior violations or precise negligence or gravity point information, it does help Judges understand and evaluate the prior performance of the operator. It specifies the date of each prior violation, the specific standard violated, type of action, whether the violation was found to be significant and substantial, and the amount of the penalty.

This information, standing alone, is useful for reviewing the operator's history of prior violations, but a more refined perspective can easily be gleaned from the data. It is unlikely that the appropriateness to an operator's size or the effect of a penalty on an operator's ability to continue in business will have changed significantly, and the history of prior violations is a rolling consideration.[5] Therefore, although the information regarding negligence and gravity will not be "precise," a Judge may conclude with a reasonable degree of accuracy the total penalty points assigned for negligence and gravity for prior violations. Such information is not merely credible, quality data – it is often the only available evidence of prior history.

B. The Majority Declines to Address Whether an Administrative Law Judge May Use Prior Penalty Assessments in Imposing a Final Penalty Amount.

There is an important unanswered question at the center of this case – whether Administrative Law Judges may use prior penalty amounts in assessing penalties. Citing *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006), the Secretary asserts that "an ALJ may not rely on such amounts [past penalties] to arrive at penalties for new violations." PDR at 11. In *Jim Walter*, we held that a judge could properly "note" the equivalency between penalties assessed and past penalties, but could not use past penalties to calculate an assessment simply because prior assessments were not a relevant factor under section 110(i) of the Mine Act. 28 FMSHRC at 608. The Commission has consistently ruled that, in assessing penalties, a Judge may take into account only the six criteria listed in section 110(i). *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 041427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished).

Thus, the Secretary asserts a specific limitation upon the Judge's considerations in setting a final penalty amount. The Secretary contends that "[t]he ALJ . . . abused his discretion by

[5] Good faith may not be assumed. However, based upon the penalty assessment before the Judge, the Judge may be able to make reasonable inference regarding good faith.

considering a factor outside those listed in Section 110(i), i.e., the amounts of previous penalties." PDR at 11.

We would hold that this issue is not ripe for consideration because the Judge did not identify the reason for his mention of prior penalties, but it is the heart of the Secretary's argument. Armed, following remand, with an understanding of the reason the Judge cited the prior penalties, we may fully evaluate the basis for the Judge's reference to prior penalties.

The Secretary's reliance upon *Jim Walters* may seem doomed by the Commission's decision in *Black Beauty Coal Company,* 34 FMSHRC 1856 (Aug. 2012). In that case, as here, the Secretary contended "that the Judge erred in considering deterrence as a separate component in the Judge's consideration of the appropriateness of the penalties." *Id.* at 1857. The Commission disagreed and found that a Judge may consider the deterrent effect of a penalty as a consideration separate and apart from the six statutory criteria. *Id.* at 1868-69.

However, *Black Beauty* was decided in the context of a settlement, where a hearing record had not been fully developed. Furthermore, the Commission decision was issued without the benefit of a full briefing on the issues or oral argument. The Secretary continues to maintain before us, in this case, that Commission Judges may not base penalties on factors outside the six statutory criteria in section 110(i).

Finally, in *Black Beauty*, the Commission held that "the Judge did not abuse her discretion by considering the deterrent effects of the penalty amounts . . . ." *Id.* at 1869. However, the Commission provided no guidance or standards against which this newfound authority might be evaluated. It is thus possible that the decision in *Black Beauty* might be limited to the facts of that case, which overruled our decision in *Ambrosia Coal and Construction Company.*[6] only "[t]o the extent that the case suggests that a Judge may not explicitly consider deterrence *in the analysis of the six statutory factors and the overall penalty.*" *Id.* at 1868 (emphasis added).

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[6] In *Ambrosia*, a unanimous Commission panel including Chairman Jordan held:

> [A]lthough deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994) (a judge's consideration is limited to the statutory penalty criteria). Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

18 FMSHRC at 1565 (footnote omitted).

It is unclear how *Black Beauty* would affect the Judge's consideration of the penalty, and how the Secretary might respond to its express application in this case. Thus, on remand we would require the Judge to state whether and how *Black Beauty* applies to control or influence his decision on an appropriate penalty.

We note that *Black Beauty, supra,* did not consider prior penalty amounts as a sub-criterion of the statutory element of history of previous violations. However, penalty amounts are included on the Assessed Violation History Report and, therefore, are placed in evidence in virtually every penalty proceeding. As the majority in *Black Beauty* noted, the legislative history of the Mine Act shows that the history of penalty amounts was an important concern of Congress. 34 FMSHRC at 1865-66. Indeed, in addition to the references cited by the majority in *Black Beauty*, the Senate Report contained charts comparing assessed and collected penalties at the Scotia mine, the average penalty assessment per violation, and refers once to the amount of penalties in the context of the penalty criteria being included in the Mine Act. S. Rep. No. 95-181, at 41-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978) (hereinafter "*Legis. Hist.*"). The Senate Report further emphasizes the Commission's role in preventing the unwarranted lowering of penalties.[7] *Legis. Hist.* at 44-45.

This discussion in the Mine Act's legislative history occurs in conjunction with the specific penalty criteria being written into the Mine Act. Further, prior penalty amounts may be seen as relating uniquely to the history of previous violations.[8] Use of prior penalties as part of consideration of previous violations would thus necessarily be integrated into that one of the six statutory factors and probably would not be given the weight accorded such penalties in a separate, free-standing deterrence consideration. It is therefore crucial that the Judge specify how the prior penalty amounts were used, either as part of his conclusion of the operator's history of violations or as a basis for determining the amount needed to achieve deterrence.

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[7] The Conference Report states that the Congress acceded to the Senate Report on penalties thereby perhaps confirming that penalty amounts are part of the history of previous violations criterion for assessment of penalties. S. Conf. Rep. No. 95-461, at 58 (1977), *reprinted in Legis. Hist.* at 1279, 1336. Support for this view is found in the Senate Report stating, "That the amount assessed and collected for such violations actually decreased rather than increased raises serious questions in the Committee's mind as to whether MESA was properly following the statutory criteria for the assessment of penalties." *Legis. Hist.* at 630.

[8] The use of prior penalties is not part of, and would not easily fit within, the Secretary point system for assessment of penalties. However, given that Congress has entrusted the Commission with discretionary authority to set final penalties, it does not seem untoward for the Commission to consider permitting its Judges to take into account a sub-criterion of a statutory penalty criterion that is part of violation history but not amenable to regulatory scoring.

While the Judge may have taken the prior penalties into account as part of a consideration of history of prior violations, his assessment of specific penalties in earlier, discrete sections of his opinion cited mitigating factors other than previous violation history. It therefore seems more likely that the Judge may have used the penalties in considering a deterrence argument by the Secretary or simply as a separate deterrence evaluation.

The Judge's reference to a Secretarial argument of a need for the operator "to display greater efforts" (32 FMSHRC at 1372) is textbook "deterrence" language. Therefore, he may have found it appropriate to accomplish the general purpose of deterrence without imposing an excessive burden upon the operator.[9] This thesis is consistent with the Judge's announcement of his preliminary decision at the close of the hearing; wherein he noted that the penalties assessed were "relatively high given the history of violations," and the previous proposed penalties in the Assessed Violation History Report. Tr. 357. Here, the Judge references both the history of prior violations and, in the same breath characterized the penalties imposed as "really significantly higher than in the past," which would, indeed, be consistent with the progressive enforcement scheme and deterrent purpose of the Act. Tr. 358.

C. Conclusion

Rather than avoiding the central and important issue raised by the Secretary through a finding of abuse of discretion, we would remand the case for an explanation by the Judge of the reason he cited prior penalties amounts. Such an explanation would provide the Secretary an opportunity to consider his position with respect to those reasons. If the Secretary then continued to assert the Judge could not refer to prior penalties, the Commission could act on the basis of a completely briefed and argued record. For that reason, we would remand this case to the Administrative Law Judge for clarification of the reason he referred to prior violations and the use, if any, he made of them.[10]

Michael G. Young, Commissioner

William I. Althen, Commissioner

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[9] This is a subjective viewpoint invited by the result in *Black Beauty* and would not be any more susceptible to objective review than the result in that case.

[10] Given the majority's (in our view unwarranted) skepticism, we would also require the Judge to explain whether he was aware of and/or took into account the change in penalty regulations in referring to the prior penalties.

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