FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 27, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 95-459
JIM WALTER RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Marks and Riley, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), and involves the question whether Administrative Law Judge William Fauver erred in assessing a civil penalty by considering Adeterrence,@ a factor not among those set forth in section 110(i) of the Mine Act, 30 U.S.C.

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

' 820(i).[2] The judge assessed a civil penalty of $15,000, more than double the penalty proposed by the Secretary of Labor. 18 FMSHRC 906, 912 (June 1996) (ALJ). The Commission granted the petition for discretionary review filed by Jim Walter Resources, Inc. (AJWR@) challenging the penalty assessment. For the reasons that follow, we vacate the judge=s penalty assessment and remand for reassessment.

I.

Factual and Procedural Background

JWR owns and operates the No. 7 mine, an underground coal mine in Alabama. 18 FMSHRC at 906; JWR Prehearing Resp. at 1, Stip. 1; Tr. 109, 163. On June 8, 1995, John Terpo, an inspector for the Department of Labor=s Mine Safety and Health Administration, observed substantial accumulations of coal, coal dust and float coal dust around the West A belt line. 18 FMSHRC at 907. Twelve rollers were totally submerged in coal dust, and 32 were turning in combustible accumulations. *Id.* Three other rollers were locked up and Aextremely hot.@ *Id.* At the seventh discharge point, the bottom belt was running on top of the accumulations, which at this point averaged two feet deep for about 300 feet. *Id.* Based on his observations, Inspector Terpo issued Order No. 3194917 under section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2), for violation of 30 C.F.R. ' 75.400[3] based on extensive combustible accumulations in the West A belt entry. *Id.*[4] JWR admitted the violation, but challenged the inspector=s designation of the violation as significant and substantial and resulting from JWR=s unwarrantable failure.

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[2] Section 110(i) provides in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this [Act]. 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.

[3] Section 75.400 states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

[4] Inspector Terpo also issued JWR four citations for accumulations of combustible material on the two section belts that dumped material onto the West A belt, for failing to

maintain the West A belt in safe condition, and for an inadequate preshift examination. 18 FMSHRC at 907. These citations are not at issue in this appeal.

The judge concluded that the violation was S&S and the result of JWR=s unwarrantable failure. 18 FMSHRC at 908-10. With respect to the civil penalty, the judge specifically discussed three of the six penalty criteria: the operator=s history of previous violations, negligence, and gravity. *Id.* at 910-12.[5] As to the operator=s history of previous violations, the judge found that JWR had a Avery poor record of violations of ' 75.400[,]@ that JWR=s record in this regard had worsened over the previous two-year period, and that its Aoverall compliance history under the Mine Act . . . is very poor.@ *Id.* at 910-11. The judge also concluded that, in view of the Aobvious, extensive and dangerous@ accumulations, JWR=s negligence was high. *Id.* at 911. Based on the presence of extremely hot rollers, rubbing points creating friction due to contact between the belt and the steel belt structure, and substantial accumulations, the judge determined that the gravity of the violation was high. *Id.* The judge further stated:

> Respondent=s prior history and the instant violation demonstrate a serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent=s repeated violations of ' 75.400 indicate that there has been no deterrent effect from prior civil penalties.
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> Considering Respondent=s very poor compliance history, the need for an effective deterrent, and the six statutory criteria as a whole, I find that a civil penalty significantly greater than the $7,000 proposed by the Secretary should be assessed. Accordingly, I find that a civil penalty of $15,000 is appropriate for the violation proved in this case.

Id. at 912.

II.

Disposition

JWR argues that in A[c]onsidering . . . the need for an effective deterrent, *and* the six statutory criteria as a whole,@ the judge enhanced the penalty based on a factor, deterrence, not

[5] The judge introduced his discussion of the penalty factors by stating, ASection 110(i) of the Act provides the following six criteria for assessing civil penalties[.]@ 18 FMSHRC at 910. However, he went on to discuss only three of the section 110(i) factors. *Id.* at 910-12.

set forth in section 110(i). PDR at 2.[6] The Secretary responds that, although the judge may not rely on deterrence as Aa penalty consideration that is in addition to the six statutory criteria,@ in this case all the judge did was make explicit that he was assessing a penalty, based on the six criteria, that provided an effective deterrent. S. Br. at 7-8. The Secretary asserts that this is consistent with the deterrent purpose of penalties under the Mine Act. *Id.* at 6-7.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984)). In *Sellersburg*, the Commission stated that, in assessing a civil penalty, A[f]indings of fact on each of the statutory criteria@ must be made by the judge Anot only [to] provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also [to] provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.@ *Sellersburg*, 5 FMSHRC at 292-93.

The Commission has also held that a judge may not go beyond the six criteria set forth in section 110(i). In *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (September 1996), the Commission vacated an assessment of civil penalties based in part on deterrence, stating:

> [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. . . . Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

Id. at 1565 (citing *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994)).

The judge=s statements that Athere has been no deterrent effect from prior civil penalties[,]@ and that his penalty assessment was based in part on Athe need for an effective deterrent, *and* the six statutory criteria as a whole[,]@ 18 FMSHRC at 912 (emphasis added), indicate that he may well have considered deterrence as a separate factor in his analysis. Accordingly, we vacate his penalty assessment and remand with instructions to reassess the penalty considering only the six criteria set forth in section 110(i).

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[6] JWR designated its petition as its brief.

On remand, the judge should make specific findings on all six penalty criteria. Although stipulations in the record contain facts pertaining to the size of the operator=s business and the effect of the penalty on its ability to continue in business, the judge failed to make the requisite findings in his decision.[7] With respect to the criterion of the operator=s good faith attempts to achieve rapid compliance, the judge recited in his findings of fact and discussion of the unwarrantable failure issue that JWR assigned 20 miners to clean up the accumulations after notification of the order and that it took the miners seven hours to clean up the accumulations. 18 FMSHRC at 907, 910. He also stated:

> The abatement work was prompt, but this must be considered in relation to the withdrawal order, which stopped the belt line until the accumulations were removed. There was no evidence of clean up work at the time the order was issued.

Id. at 910. Because the judge did not indicate how or whether these findings and conclusions relate to his penalty assessment, he should do so on remand.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s penalty assessment and remand for reassessment.

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Marc Lincoln Marks, Commissioner

[7] The parties agreed that JWR is a large operator and that payment of the proposed assessment will have no effect on the operator=s ability to continue in business. JWR Prehearing Resp. at 1, Stips. 3, 5; S. Resp. to Prehearing Order at 1, Stips. 3, 5.

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James C. Riley, Commissioner

Jordan, Chairman, dissenting:

The majority opinion effectively reads the deterrent function of civil penalties out of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). It vacates the judge=s penalty assessment, fearing that he might have Aconsidered deterrence as a separate factor in his analysis.@ Slip op. at 4.

To the contrary, I believe that the judge properly evaluated the role that deterrence must play in setting a penalty, and accordingly would affirm his penalty determination.[1] He did not include it among the initial criteria (set forth in the Mine Act) he used to determine the penalty. He did not include it as a Aseventh penalty criterion@ or a subsequent multiplier. Rather, he applied the statutory criteria, and, at the same time, rightfully acknowledged that the resulting penalty must provide an effective deterrent, consistent with Commission case law and the legislative history of the Mine Act.[2] He did state that the operator=s past history of violations

[1] Unlike my colleagues in the majority, I believe that there is no need to remand for further analysis of the six statutory criteria. The judge adequately addressed four of the criteria in his decision. The parties stipulated as to the remaining two criteria. Slip op at 4, n.7. Thus, we can enter findings on these questions instead of remanding them to the judge. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 262-68 (February 1997); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984).

[2] In *Ambrosia Coal & Constr. Co.*, the Commission, quoting the legislative history of the Mine Act, noted that Athe purpose of civil penalties is to >convinc[e] operators to comply with the Act=s requirements.@ 18 FMSHRC 1565, n.17 (September 1996) (also citing *Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992) (recognizing importance of civil penalties as deter-

showed that prior civil penalties had not effectively deterred safety violations. 18 FMSHRC 906, 912 (June 1996) (ALJ). But in taking this into consideration, he was simply articulating a basic premise of the Mine Act **C** that the point of a civil penalty is to ensure that the violation does not reoccur.[3] As the D.C. Circuit noted in *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989), ACongress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations.@

The record of past violations in this case is substantial. During the preceding two years, the Department of Labor=s Mine Safety and Health Administration issued 291 citations and orders to the No. 7 mine charging violations of this very same standard. 18 FMSHRC at 911. Even more disturbing, however, is the fact that the violations increased rather than decreased during this time. From June 8, 1993, through June 7, 1994, JWR was issued 123 citations and orders charging violations of section 75.400. The following year the number of charges increased to 168. *Id.*

The judge carefully looked at this compliance history, took into account the instant accumulation violation, and found the operator to have demonstrated a Aserious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine.@ 18 FMSHRC at 912. He understood that in the process of employing the statutory criteria to set a penalty, he could acknowledge the need for deterrence, particularly in considering the factors of history and negligence. The judge simply applied the standards, and subsumed in that analysis was the proper realization that the final outcome must, consistent with fundamental Mine Act principles, discourage future health and safety violations.

My colleagues, however, seem to view any *express* reference to deterrence as an indication that the judge has gone beyond the six criteria set forth in section 110(i), 30 U.S.C.

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rence)).

[3] In reviewing penalty regulations under the Mine Act=s predecessor legislation, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976), the Supreme Court observed that a Amajor objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.@ *National Indep. Coal Operators= Ass=n v. Kleppe*, 423 U.S. 388, 401 (1976).

' 820(i). Apparently, our judges must treat the deterrent function of a penalty like the proverbial emperor=s new clothes. Although it is an obvious consideration when assessing a penalty, the judges must never publicly acknowledge that fact.

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Mary Lu Jordan, Chairman