FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

May 25, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 97-302
HUBB CORPORATION	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Hubb Corporation ("Hubb") committed significant and substantial ("S&S") violations of two mandatory safety standards. 20 FMSHRC 615, 617-19, 620-22 (June 1998) (ALJ). He found that the violations were of high gravity and assessed penalties of $4,000 for each violation. *Id.* at 620, 622. The Commission granted Hubb's petition for discretionary review challenging the judge's penalty assessments. For the following reasons, we vacate the penalty assessments and remand for reassessment.

Our decision in this matter is one of three decisions we are issuing today regarding the Commission's penalty assessment authority under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[1]

[1] The other decisions concerning Commission penalty assessments we are issuing today are *Cantera Green*, Docket No. SE 98-141-M, and *Douglas R. Rushford Trucking*, Docket No. YORK 99-39-M.

I.

Factual and Procedural Background

On November 7, 1996, Inspector William R. Johnson of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the 005 Section at Hubb's No. 5 Mine in Perry County, Kentucky, and found that the ventilation deflector curtain in the No. 7 heading was 66 feet beyond the deepest point of penetration of the working face. 20 FMSHRC at 617; G. Ex. 5 at 7. He issued a section 104(d)(1) order (No. 4582535) alleging an S&S violation of 30 C.F.R. § 75.370(a)(1)[2] due to Hubb's unwarrantable failure to follow its approved ventilation plan, which provided that the maximum distance from the end of the ventilation curtain to the point of deepest penetration of the working face should be 40 feet. 20 FMSHRC at 617, 619-20; G. Ex. 5 at 8.

Also on November 7, Inspector Johnson observed two blocks of rib in the No. 6 entry that were loose from the wall. 20 FMSHRC at 620. One block was 15 feet long, 6 feet high, and 1 foot thick, and was located just inby the last open crosscut. *Id.* The other block was 10 feet long, 4 feet high, and 1 foot thick, and was located just inby the next-to-last open crosscut. Tr. 287; G. Ex. 7. The inspector issued a section 104(d)(1) order (No. 4582536) alleging an S&S violation of 30 C.F.R. § 75.202(a)[3] resulting from Hubb's unwarrantable failure. 20 FMSHRC at 620, 622. The Secretary of Labor proposed $6,000 and $6,500 penalties for the ventilation and rib violations, respectively. S. Pet. Assessment of Penalty, Ex. A. Although Hubb did not dispute either violation, it did dispute the Secretary's S&S and unwarrantable failure designations for both violations. H. Post-hearing Br. at 15-16, 19-20.

The judge determined that Hubb violated 30 C.F.R. § 75.370(a)(1) by failing to follow the approved ventilation plan. 20 FMSHRC at 617. He concluded that the violation was S&S because of the lack of adequate ventilation at the face, the mine's history of methane releases, the possibility of an explosion caused by sparks created by the continuous miner's bits and, in the event of an explosion, the possibility of injury to seven miners. *Id.* at 617-18. The judge determined that, because Hubb management was not aware of the violation prior to citation, the violation was not the result of unwarrantable failure, and he modified the order to a section 104(a) citation that was S&S. *Id.* at 620. He found that the violation resulted from "more than moderate" negligence and was of a high degree of gravity, in that it could have resulted in miners suffering serious burns or suffocation. *Id.* The judge assessed a penalty of $4,000. *Id.*

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[2] 30 C.F.R. § 75.370(a)(1) states in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the [MSHA] district manager."

[3] 30 C.F.R. § 75.202(a) states in pertinent part that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs . . . ."

The judge found that Hubb violated 30 C.F.R. § 75.202(a) by failing to adequately ensure that the two blocks of rib would not fall on persons traveling or working nearby. 20 FMSHRC at 620. He determined that the rib violation was S&S because it exposed miners to possible rib falls. *Id.* at 621. However, he concluded that, because Hubb management was not aware of the violation prior to citation, the violation was not due to unwarrantable failure, and he amended the order to a section 104(a) citation that was S&S. *Id.* at 621-22. The judge determined that the violation resulted from "not more than moderate" negligence but was of a high degree of gravity, in that it could have resulted in a fatality. *Id.* at 622. The judge assessed a penalty of $4,000. *Id.*

II.

Disposition

Hubb first argued that the judge erred in assessing $4,000 penalties for each violation because he did not make findings sufficient to waive the assessment formula under 30 C.F.R. § 100.3, and assess the penalty under 30 C.F.R. § 100.5. H. Br. at 4-6. The Secretary responded that, because 30 C.F.R. Part 100 is only binding on the Secretary and not Commission judges, the judge acted within his discretion in assessing a $4,000 penalty for each violation. S. Br. at 6-15. In its reply brief, Hubb acknowledges that the judge could not have assessed the penalties under 30 C.F.R. Part 100. H. Reply Br. at 1. However, Hubb argues that the judge was required to consider the criteria listed in section 110(i) of the Mine Act, 30 U.S.C. § 820(i),[4] when assessing the penalties, and that he failed to consider the criterion of good faith in attempting to achieve rapid compliance as applied to Hubb. H. Reply Br. at 1.

Hubb also asserts that substantial evidence does not support the judge's findings that the ventilation and rib violations were of high gravity and could have resulted in serious injuries or fatalities. H. Br. at 7-8. Regarding the ventilation violation, Hubb contends that there was no danger of a serious injury or fatality because no methane was present at the time of the violation. *Id.* at 7. Regarding the rib violation, Hubb argues that there was no likelihood of any fatalities from a rib fall because of the size of the rib blocks in question and the fact they were hard to remove. *Id.* at 8; H. Reply Br. at 4-5.

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[4] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] 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).

The Secretary contends that the judge found correctly that there was high gravity associated with the ventilation violation because the mine had a history of methane releases and sparks from the bits of the continuous miner "created a reasonable likelihood of an explosion [that] would likely cause a serious or fatal injury . . . ." S. Br. at 11-12. The Secretary also argues that the judge determined correctly that the rib violation involved high gravity because it was undisputed that there were cracks around the cited ribs and that miners traveled close to the cited ribs. *Id.* at 12-15. She requests that the Commission affirm the judge's decision in its entirety. *Id.* at 16.

In reviewing a judge's penalty assessment, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria.[5] While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

A. Gravity

The gravity penalty criterion contained in section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In evaluating the seriousness of a violation, the Commission has focused on "the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. The judge's discussions of gravity are admittedly terse. Nevertheless, we conclude that his findings are sufficient to support his conclusions of high gravity for both violations.

1. Ventilation Violation

We are not persuaded by Hubb's contention that the absence of methane at the time of the inspection, and that the continuous miner will automatically cut off power if 2 percent or more methane is detected, requires the Commission to reverse the judge's high gravity finding. The judge accepted Inspector Johnson's uncontradicted testimony that the mine had a history of methane releases, that during the ventilation violation there was a lack of adequate ventilation at the face, that sparks from the continuous miner provided ignition sources, and that in the event of an explosion, seven miners could have suffered burns. 20 FMSHRC at 617-20. MSHA Inspector Darlus Day also gave uncontradicted testimony that additional ignition sources sometimes occur when sparks are caused by rocks or roof bolts falling from the roof and striking

[5] 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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

rocks on the ground. Tr. 370, 385, 398. Accordingly, we find that substantial evidence supports the judge's high gravity determination.[6]

2. Rib Violation

We disagree with Hubb's argument that, because the cited rib blocks were small, hard to remove, and unlikely to fall, substantial evidence does not support the judge's finding that the rib violation was of a high degree of gravity. H. Br. at 8; H. Reply Br. at 4. The judge considered Inspector Johnson's uncontradicted testimony that cracks ran the length of the blocks. 20 FMSHRC at 620-21. He noted that Johnson had previously investigated rib falls that had resulted in injuries and fatalities and that Johnson believed that the cited blocks might fall. *Id.* at 620. He further considered Johnson's testimony that all miners in the unit passed near the cited blocks in shuttle cars and, although the shuttle cars had canopies, the miners inside could still be injured by falling rib because the sides were open. *Id.* The judge also noted that neither section foreman "[Scott] Day nor Denny Whitaker, Hubb's superintendent, contradicted or impeached Johnson's testimony regarding the exposure of miners to the hazard contributed to by the violation at issue." *Id.* at 619, 621. We find that the evidence relied on by the judge constitutes substantial evidence which supports his determination that the rib violation was of high gravity.[7]

B. Abatement, Violation History, Size, and Effect on Ability to Continue in Business

1. Motion to Strike

The Secretary filed a motion to strike those portions of Hubb's reply brief that argue the judge failed to consider Hubb's good faith in achieving rapid compliance under section 110(i). S. Mot. to Strike at 1. She contends that the issue is not before the Commission because Hubb did not raise it in its petition for discretionary review. *Id.* In response to the Secretary's motion to strike, Hubb argues that it raised the good faith criterion under section 110(i) because it raised a similar good faith requirement in its original brief when it discussed the penalty assessment requirements of section 100.3(f). H. Resp. to Mot. to Strike at 1-2.

Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review or by the Commission sua sponte.

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[6] Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The judge's uncontested S&S findings concerning the likelihood of an explosion and the severity of the resulting injuries (*see* 20 FMSHRC at 617-19) provide further support for the judge's high gravity determination.

[7] As with the curtain violation, the judge's uncontested S&S findings (*see* 20 FMSHRC at 621) provide further support for the judge's high gravity determination for the rib violation.

See Wyoming Fuel Co., 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table) (holding that Commission "review is limited to the questions raised in the petition and by the Commission sua sponte"); *Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997) (same).

As the Secretary points out, instead of citing the abatement penalty criterion under section 110(i) in its petition, Hubb mistakenly discussed the abatement penalty criterion under sections 100.3 and 100.5. H. PDR at 6-8. It is well settled that the Commission assesses penalties de novo and is not bound by the Secretary's Part 100 regulations. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (Apr. 1998); *Sellersburg*, 5 FMSHRC at 291, *aff'd*, 736 F.2d at 1152. The first time Hubb referenced the section 110(i) penalty criteria was in its reply brief.

The abatement penalty criteria in section 100.3(a)(5) and in section 110(i), however, share virtually identical language. The good faith penalty criterion is described in section 100.3(a)(5) as "[t]he demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation" (30 C.F.R. § 100.3(a)(5)) while in section 110(i) it is described as "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)). In view of the complete substantive overlap of the two provisions, we find that Hubb's discussion of the penalty criteria under section 100.3 in its petition was sufficiently related to the good faith penalty criterion under section 110(i) to conclude that Hubb raised the criterion in its petition. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1999) (holding that, although not explicitly discussed in petition, issue was raised because it was sufficiently related to another issue raised in petition); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (finding that issue was raised in petition by implication). Therefore, we deny the Secretary's motion to strike those portions of Hubb's reply brief that argue the judge failed to consider Hubb's good faith in achieving rapid compliance under section 110(i).

2. Consideration of the Section 110(i) Penalty Criteria

As a general rule, Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.,* 8 FMSHRC 491, 492 (Apr. 1986). We have held, however, that such discretion is not unbounded 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,* 5 FMSHRC at 290-94). In *Sellersburg*, we stated unequivocally that "[w]hen an operator contests the Secretary's proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria *must* be made." 5 FMSHRC at 292 (emphasis added). In addition, our Procedural Rules also make this duty unequivocally clear. Rule 30(a) provides:

> In assessing a penalty the Judge *shall* determine the amount of penalty in accordance with the six statutory criteria contained in

> section 110(i) . . . and incorporate such determination in a written decision. The decision *shall contain findings of fact and conclusions of law on each of the statutory criteria* and an order requiring that the penalty be paid.

29 C.F.R. § 2700.30(a) (emphasis added).

The requirement that our judges make findings of fact on each of the section 110(i) penalty criteria serves two important and distinct purposes. First, from a strictly due process standpoint, these findings provide the respondent and the regulated community with the appropriate notice as to the basis upon which the penalty is being assessed. *Sellersburg*, 5 FMSHRC at 292-93. Second, findings of fact on the section 110(i) penalty criteria supply the Commission and any reviewing court with the information needed to accurately determine if the penalties assessed by the judge are appropriate, excessive, or perhaps insufficient. *Id.* This is consistent with the broader requirement that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). As the Commission explained in an earlier decision: "Our function is essentially one of review. Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively." *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) (citations omitted).

This latter purpose is particularly important in the instant case, where the judge made a significant reduction in the penalties he assessed ($4,000 per violation) from the penalty amount proposed by the Secretary ($6,500 and $6,000). As a unanimous Commission stated in *Sellersburg*:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293.

Despite the Commission's clear mandate in *Sellersburg* and related cases, and in its Procedural Rules, we have repeatedly found it necessary to remand cases for penalty assessments because judges have failed to enter the requisite findings. *See, e.g., Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 142 (Feb. 1999); *Rock of Ages*, 20 FMSHRC at 126; *Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997); *Fort Scott*, 19 FMSHRC at 1518; *Thunder Basin Coal Co.*,

19 FMSHRC 1495, 1502-03 (Sept. 1997). In the majority of cases heard under the Act, records are developed on the section 110(i) criteria and penalties are assessed properly and efficiently. Cases in which this does not occur, however, have become frequent enough to give us pause. We intend that the three decisions we issue today will convey our message that it is imperative that this Commission avoid giving short shrift to our statutory duty to assess Mine Act penalties under section 110(i).

Therefore, we remand this case for reassessment of civil penalties because the judge failed to make findings on several of the section 110(i) penalty criteria, in accordance with the express requirements of the Mine Act. We agree with Hubb that, as to both violations, the judge did not make findings on the operator's good faith in achieving rapid compliance when he assessed penalties under section 110(i).[8] Furthermore, as to both violations, the judge made no findings on the operator's size, effect on ability to continue in business, and history of violations[9] penalty criteria under section 110(i). We also note that at trial the Secretary did not introduce adequate evidence or advance any arguments on the section 110(i) criteria.

Accordingly, we vacate the penalties imposed for the two violations and remand for entry of detailed findings as to each of the six section 110(i) criteria and reassessment of an appropriate penalty for each violation.

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[8] Chairman Jordan notes that although the judge erred by failing to even acknowledge the need to consider the operator's "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of a violation" (30 U.S.C. § 820(i)), she believes this factor carries little weight in the instant case. Since the operator in this case received a withdrawal order, not merely a citation, it could not resume normal operations until it had achieved compliance. In light of this fact, Chairman Jordan believes prompt abatement should not serve as a mitigating factor.

[9] Although the judge stated that he took "into account Hubb's history of violations" when assessing the ventilation violation (20 FMSHRC at 620), he failed to make any separate findings of fact, as required by section 110(i), concerning Hubb's previous violations. When he makes such a finding on remand, we direct him to review Hubb's previous violations and enter a *qualitative* finding rather than merely bare information on the number of Hubb's violations. *See Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1305 n.14 (Dec. 1998).

III.

Conclusion

For the foregoing reasons, we vacate the penalty assessments for both violations and remand for reassessment for both violations.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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