## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1996

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. VA 93-145-M |
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| MECHANICSVILLE CONCRETE, INC. | : | |
| t/a MATERIALS DELIVERY | : | |

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

DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

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"), raises the issues of whether a judge on his own initiative can designate a violation of a mandatory safety standard to be significant and substantial ("S&S")[2] and whether the judge's penalty assessment for the violation was proper. Administrative Law Judge Arthur Amchan concluded that a violation by Mechanicsville Concrete, Inc. t/a Materials Delivery ("Mechanicsville") of 30 C.F.R. § 56.14100(b) (1995)[3] was S&S, although the Secretary's citation had not contained that allegation, and assessed a penalty of $200. 16 FMSHRC 1444, 1449-52 (July 1994) (ALJ). The Commission directed review *sua*

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[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[3] Section 56.14100(b) provides:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

*sponte* of the judge' s S &S determination (*see* section 113(d)(2)(B) of the Act, 30 U.S.C. § 823(d)(2)(B))[4] and granted Mechanicsville's petition for discretionary review only to the extent it requested review of the penalty. For the reasons that follow, we reverse the judge' s S &S determination and affirm his penalty assessment.

I.

Factual and Procedural Background

Mechanicsville owns and operates the Branchville pit, a sand and gravel mining operation in Southampton County, Virginia. 16 FMSHRC at 1445. On May 10, 1993, Charles Rines, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of equipment at the mine, including a front-end loader.
*Id.* at 1449-50. The vehicle, which could lift and transport more than three tons of material per bucketful, was used to mine sand and gravel, move raw material to the preparation plant for processing, and load processed materials into customers' trucks. Tr. I 84-85, 93, 97-98.[5]

Inspector Rines observed that the windshield wiper and blade were missing from the vehicle. 16 FMSHRC at 1450. Accordingly, he issued a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.14100(b). 16 FMSHRC at 1450; Gov't Ex. 7. Inspector Rines did not allege the violation was S&S. *Id.*

The judge found that Mechanicsville violated the regulation by failing to have a windshield wiper arm and blade on the front-end loader. 16 FMSHRC 1451. In addition, the judge determined that the violation was S&S, concluding that he had the authority under section 105(d) of the Mine Act, 30 U.S.C. § 815(d), to "find an 'S&S' violation *sua sponte* . . . ." 16 FMSHRC at 1452. The Secretary had proposed a civil penalty of $50; the judge assessed a civil penalty of $200 for the violation. *Id.*

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[4] Section 113(d)(2)(B) provides in relevant part:

> [A]fter the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review . . . . The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved.

[5] The hearing was conducted on March 22 and 23, 1994. "Tr. I" refers to the March 22 hearing transcript; "Tr. II" refers to the March 23 hearing transcript.

II.

Disposition

The Secretary asserts that the judge did not have authority to find a violation S&S where the citation issued by the Secretary did not allege an S&S violation. S. Br. at 3-8. He argues that his enforcement responsibility and authority under the Mine Act are exclusive and that the judge's action was, in effect, an attempt to review the Secretary's enforcement decision. *Id.* at 5-7. The Secretary argues that the judge assessed an appropriate penalty. *Id.* at 9-10.

Mechanicsville does not take a position on the judge's authority to find a violation S&S where the Secretary has declined to do so. Mechanicsville contends, however, that the judge improperly enhanced the penalty. M. Br. at 4. It submits that the judge erred in denying its motion to strike certain evidence of prior violations. *Id.*

A. Whether the Judge Had Authority to Find the Violation S&S

We agree with the Secretary that the judge erred in determining on his own initiative that the violation was S&S. The Mine Act confers enforcement authority upon the Secretary. *Thunder Basin Coal Co. v. Reich*, 127 L. Ed. 2d 29, 36, 40 (1994). Under section 103(a) of the Act, 30 U.S.C. § 813(a), the Secretary's representatives are required to make frequent inspections of mines and to investigate whether operators are in compliance with the requirements of the Act. Section l04(a) delegates to the Secretary authority to issue citations for violations of the Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act. Sections 104(d)(1) and 104(e), 30 U.S.C. § 814(d)(1) and (e), expressly provide that the Secretary possesses authority to designate a violation S&S. *See Consolidation Coal Co.*, 6 FMSHRC 189, 191-92 (February 1984) (inspector' s S &S findings under section 104(d)(1)). The Commission adjudicates disputes under the Mine Act (*see* sections 105 and 113, 30 U.S.C. §§ 815 and 823); the Commission has no enforcement responsibility under the Act. *See Thunder Basin*, 127 L. Ed. 2d. at 36. The Commission does not have authority to inspect mines, investigate violations, or issue citations. The Commission has concluded that its administrative law judges are not authorized representatives of the Secretary and do not have authority to charge an operator with violations of section 104 of the Mine Act. *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).

The Supreme Court has held that an administrative agency has virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *see Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 538 (D.C. Cir. 1986). The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993). We perceive no material difference between the Secretary's discretion on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S. In making his

*sua sponte* determination, the judge essentially made a prosecutorial decision to designate the citation as S&S in the first instance--an exercise of enforcement authority reserved for the Secretary--along with an adjudicatory determination to affirm that designation. In so doing, the judge, contrary to the Mine Act's statutory scheme, usurped the Secretary's role of enforcing the Mine Act.

The judge claimed authority to designate Mechanicsville's violation S&S based on section 105(d) of the Mine Act, which gives the Commission authority to affirm, modify, or vacate a citation.[6] The Commission has held that section 105(d) permits a judge to modify a citation or order so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (October 1982). The Commission emphasized that the judge did not add new findings to create a 104(d)(1) citation. *Id.* at 1796. By contrast, the Commission has overturned a judge's modification of an imminent danger withdrawal order issued under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), to a failure to abate withdrawal order issued under section 104(b) of the Act, 30 U.S.C. § 814(b). *Mettiki*, 13 FMSHRC at 764-65. The Commission reasoned that the modification was not appropriate because the judge added new findings to create a section 104(b) order. *Id.* at 765. The Commission emphasized that findings necessary to establish an imminent danger order were different from findings required to establish a section 104(b) order. *Id.* Here, the judge similarly erred by adding a new finding and conclusion, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury[7] and was therefore S&S. 16 FMSHRC at 1450-52.

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[6] Section 105(d) states, as pertinent:

> [T]he Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 [U.S.C.], but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

[7] Our dissenting colleague relies on the fact that, in responding to statement 10.B. on the citation form, "Injury or Illness could reasonably be expected to be," the inspector checked the box indicating "Fatal." Slip op. at 7-8. Commissioner Marks fails to acknowledge that, in responding to statement 10.A., "Injury or Illness . . . (is)," the inspector checked the box indicating "Unlikely." In order to establish the third element of an S&S determination, *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), requires "a reasonable likelihood that the hazard contributed to will result in an injury."

B. Whether the Judge Erred in His Penalty Assessment

In contested civil penalty cases, the Mine Act requires that the Commission make an independent penalty assessment based on the statutory criteria of section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." 5 FMSHRC at 294 (citation omitted).

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.[8] 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).

The judge found that Mechanicsville's history of violations warranted assessment of a substantial penalty. 16 FMSHRC at 1452. Mechanicsville claims the judge erred in basing his penalty assessment in part on violations set forth in Gov't Exs. 9 through 12. M. Br. at 4. Mechanicsville asserts that these exhibits should have been stricken, pursuant to its motion made at hearing, because they were not produced by the Secretary pursuant to Mechanicsville's discovery requests. *Id.*

We conclude that the judge did not err in refusing to strike the exhibits. The citations therein were relevant to the issue of the operator's history of violations. Section 110(i) sets forth the operator's history of previous violations as a factor to be considered in assessing a civil penalty. As the judge correctly noted, all but one of the citations were listed in the Secretary's prehearing report, which indicated they might be introduced. Tr. II 13-14, 16-17; S. Resp. to

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[8] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 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 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Notice of Hr'g at 5. There was no showing of prejudice. *See Materials Delivery*, 15 FMSHRC 2467, 2469 (December 1993) (ALJ) (three citations in the exhibits had previously been litigated). 15 FMSHRC at 2469; Tr. II 17. Moreover, Mechanicsville, which was represented by counsel, asked the judge to strike the exhibits only after they had been admitted into evidence without objection. Gov't Ex. 9 (Tr. I 118); Gov't Ex. 10 (Tr. I 129); Gov't Ex. 11 (Tr. I 132); Gov't Ex. 12 (Tr. I 138-39). Failure to object to an offer of evidence when the offer is made waives on appeal any argument against its admission. 1 John W. Strong et al., *McCormick on Evidence* § 52, at 200 (4th ed. 1992); *see In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1864 (November 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995).

Mechanicsville does not dispute the judge's other penalty criteria findings, including high negligence and high gravity. 16 FMSHRC at 1452. Accordingly, we conclude that the assessed penalty was within the judge's discretion and is supported by substantial evidence.

III.

Conclusion

For the foregoing reasons, we conclude that the judge lacked authority to find, *sua sponte,* that Mechanicsville's violation was S&S and we reverse the judge's conclusion that the violation was S&S. We affirm the judge's assessment of a $200 civil penalty.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

The majority has determined that the judge does not have the authority to conclude that a violation is significant and substantial when the Secretary has failed to formally make such a charge. I disagree and dissent on this issue.

In reaching their conclusion, the majority stresses that the Act gives the Commission no enforcement responsibility and that the Commission has no authority to investigate or inspect mines, issue citations, or charge operators with section 104 violations. Slip op. at 3. I don't disagree generally with that statement. However, I find those observations irrelevant to the analysis.

My colleagues veer off the rails by concluding that the judge's action in this case was essentially "a prosecutorial decision to designate the citation as S&S in the first instance--an exercise of enforcement authority reserved for the Secretary . . ." and that in doing so he "usurped the Secretary's role of enforcing the Mine Act." Slip op. at 3-4. They go further, concluding that the judge "erred by adding a new finding and conclusion, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." Slip op. at 4. They are wrong.

As long recognized by the Commission, and as apparently understood today by the majority, the Commission's holding in *Consolidation Coal Co*., 4 FMSHRC 1791 (October 1982), reflected a recognition that section 105(d) of the Act authorizes the judge to modify citations "so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." Slip op. at 4. For reasons explained below, I conclude that is precisely what occurred in this case, i.e., the judge's ruling is based on allegations contained in the original citation. Therefore, I find that the judge acted within his authority and in accordance with his duty as an administrative law judge when he concluded that the subject violation was S&S.

The violation in issue was one of five separate violations charged by the Secretary on May 10, 1993, and ultimately sustained by the judge. All five violations related to the highly dangerous condition of the cited front-end loader. In addition to the citation on review, which was issued because the sole windshield wiper arm and blade was missing, the loader was also cited for: a broken windshield and right side glass; an inoperable parking brake; an inoperable horn; and an inoperable back-up alarm. In all citations, *except* the windshield arm/blade citation, the inspector checked the S&S box on the citation form. The inspector testified that he **did not check the S&S** box on the windshield arm/blade citation **because it was not raining** at the time of his inspection. *See* Tr. I 105-06, 166.

The majority's conclusion on this issue is totally reliant upon the fact that the inspector checked "no" next to the S&S box on Citation No. 4085282. Gov't Ex. 7 (statement 10. C.). However, the majority fails to recognize that, on the *same citation*, in response to statement

10.B., "Injury or Illness could reasonably be expected to be," a check appears in the box indicating "FATAL." Gov't Ex. 7 (statement 10.B.) (emphasis supplied). Thus, in this case, the Secretary came before the judge **charging** that the violation *could reasonably be expected to be a fatality*. At the hearing before the judge, this charge was supported by unrefuted testimony from the inspector that rain and early morning dew on the windshield causes a "distorted view of everything in front of you." Tr. I 104-05.[1] Moreover, the inspector testified that the loader *is* operated in the early morning and when it is raining. *Id.* at 105. Significantly, on cross-examination the inspector refused to agree that there was no likelihood of an accident resulting from the violation. *Id.* at 204-06.[2] Thus, the record before the judge included: the Secretary's **charge** that the violation could result in an *injury reasonably expected to be fatal*; the testimony of the inspector, refusing to agree on cross-examination, that there was no likelihood of an accident; and most importantly, the inspector's testimony that he would have checked the box designating the violation S&S if it had been raining at the time of citation. Given the foregoing, I conclude that the judge had both a duty and obligation to rectify what was a misapprehension of law by the inspector.[3]

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[1] The inspector's testimony on cross-examination further establishes the dangerous condition of the loader at the time of citation:

> The windshield was broken in several places. That affected the vision of the operator that was operating that piece of equipment. It was spider-webbed in front of it. You got an illusion whenever you would look through this broken glass.

Tr. I 170.

[2] In a purported defense of the dangerous condition of the loader, the operator's counsel callously challenged whether a miner would actually be killed by the loader because the ground was sandy, not hard asphalt, and because the loader was two feet above the ground. Tr. I 165-66, 207-09, 223.

[3] The Commission case law is well settled. In evaluating whether a violation is S&S it is necessary to consider the violation in the context of "continued normal mining operations." *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984); *see also Monterey Coal Co.,* 7 FMSHRC 996, 1001-02 (July 1985). "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.,* 11 FMSHRC 1432, 1435 (August 1989), *citing Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986), and *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (August 1985). Here, the testimony established that the loader was used in rainy conditions. Tr. I 105.

The administrative law judge has the duty to determine whether the evidence of record supports the Secretary's charge. But for his belief that the absence of rain at the time of citation restricted him from formally charging S&S, the Secretary's inspector and principal witness clearly indicated that he believed the violation was S&S. The judge's authority is not limited to either *agreeing* with the levels of gravity charged by the Secretary or determining that the Secretary's charges of gravity should be *diminished*. The judge also has both the duty and authority to determine, in view of the record, that the gravity of the charges made by the Secretary should be *increased*. The Secretary clearly supports this view.

> To the extent that the judge determines that the evidence presented at the hearing indicates that the gravity of a particular violation is higher than that initially determined by the Secretary, the judge can properly consider this evidence in evaluating the gravity of the violation for purposes of assessing an appropriate civil penalty.

S. Br. at 9.

That is precisely what the judge did in this case. The record clearly indicates that the Secretary believed the gravity of the violation to be S&S but for his inspector's misapprehension of the breadth of the law.

The majority also intimates that no basis for the S&S conclusion exists in this case. *See* Slip op. at 4 (different findings required). I disagree. In this case the evidence in the record is adequate to determine that all *Mathies* elements were satisfied. *See Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (January 1984). Moreover, as the Secretary acknowledges, "the penalty criterion of gravity encompasses the same factors or evidence evaluated in determining whether a violation is significant and substantial." S. Br. at 10 n.7, *citing Quinland Coals, Inc*., 9 FMSHRC 1614, 1622 n.11 (September 1987).

For the foregoing reasons, I dissent and would affirm the judge's conclusion of S&S.

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Marc Lincoln Marks, Commissioner