FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 5, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 94-370
THUNDER BASIN COAL COMPANY	:	

BEFORE: Marks, Riley, and Verheggen, 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@). At issue is whether former Commission Administrative Law Judge Arthur J. Amchan properly applied the penalty assessment criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i), in assessing a civil penalty of $1300 against Thunder Basin Coal Company (AThunder Basin@) for a violation of 30 C.F.R. ' 40.4 and its subsequent failure to abate that violation. 17 FMSHRC 2184, 2189 (December 1995) (ALJ). The Commission granted the petition for discretionary review filed by the Secretary of Labor challenging the judge=s penalty assessment. For the reasons that follow, we vacate the judge=s penalty assessment and remand for reassessment.

[1] Chairman Jordan recused herself in this matter and took no part in its consideration. 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.

I.

Factual and Procedural Background

This case is the culmination of lengthy litigation involving designation of miners= representatives, pursuant to section 103(f) of the Mine Act, 30 U.S.C. ' 813(f), and 30 C.F.R. Part 40,[2] at the Black Thunder Mine, a large nonunion coal mine operated by Thunder Basin near Wright, Wyoming. In September 1990, eight miners at the mine designated two officials of the United Mine Workers of America (AUMWA@) as their section 103(f) representatives. 17 FMSHRC at 2184. Thunder Basin refused to recognize the two UMWA officials as miners= representatives or to post the notice so designating them, as required by section 40.4,[3] on the grounds that they were not employees and that their designation was motivated primarily by the desire of some miners to assist the UMWA in its efforts to organize employees at the mine. *Id.* at 2184-85. In March 1992, Thunder Basin sought and obtained an injunction from the U.S. District Court for the District of Wyoming prohibiting the Department of Labor=s Mine Safety and Health Administration (AMSHA@) from enforcing the Part 40 designation of the two UMWA officials as miners= representatives. *Id.* at 2185. On appeal, the U.S. Court of Appeals for the Tenth Circuit and the Supreme Court both ruled that the district court lacked subject matter jurisdiction to issue the injunction. *Id.*; *see also Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992), *aff=d sub nom. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). The Tenth Circuit and the Supreme Court both specifically rejected Thunder Basin=s argument that it would be denied

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[2] Section 103(f) provides:

> [A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. ' 813(f). Regulations promulgated pursuant to this section, which establish procedural and administrative requirements for the designation of a miner representative, are set forth at 30 C.F.R. Part 40.

[3] Section 40.4 provides:

> A copy of the information provided the operator [concerning the miners= designation of representative] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

30 C.F.R. ' 40.4

due process if it was forced to risk substantial civil penalties by not complying with the designation of representatives before the merits of its legal arguments were decided by the Commission. 969 F.2d at 975-77; 510 U.S. at 216-18.

On January 21, 1994, two days after the Supreme Court issued its decision, James A. Herickhoff, president of Thunder Basin, wrote a letter to the MSHA district manager in Denver, Colorado, requesting that MSHA issue a citation to resolve the validity of the designation of representatives by miners at the Black Thunder mine. 17 FMSHRC at 2185. The letter stated that Thunder Basin expected MSHA to specify an abatement time Asufficient for the parties to pursue resolution of this important issue before the Commission and the courts.@ *Id.* On February 22, 1994, MSHA issued a citation alleging that Thunder Basin violated section 40.4. *Id.* The citation required abatement of the violation within 15 minutes. *Id.* When this period elapsed without compliance by Thunder Basin, MSHA issued an order pursuant to section 104(b) of the Mine Act, 30 U.S.C. ' 814(b). *Id.*[4] Later that day, Thunder Basin filed applications for temporary relief and an expedited hearing with the Commission. *Id*. at 2186.

On February 28, 1994, MSHA sent a letter to Thunder Basin requesting the company to abate the section 40.4 violation, and notifying it of MSHA=s intention to begin assessing a daily penalty if the violation was not abated by March 1, 1994. S. Br. to ALJ, Ex. B. On March 11, 1994, MSHA informed Thunder Basin of its intent to assess a daily penalty of $2000 for each day the operator continued to refuse to post the designation form. 17 FMSHRC at 2186. On March 25, 1994, Judge Amchan issued an order denying Thunder Basin=s application for temporary relief. *Id.*; *Thunder Basin Coal Co.*, 16 FMSHRC 1033 (April 1994) (ALJ). Two days later, on March 27, MSHA informed Thunder Basin that assessment of a $2000 daily penalty would commence that day. *Id*. On March 28, Thunder Basin filed a petition for discretionary review of the judge=s decision. *Id*. On April 8, the Commission affirmed the judge=s decision to deny the application for temporary relief. *Thunder Basin Coal Co.*, 16 FMSHRC 671 (April 1994). Later that day, Thunder Basin posted the miners= representative notice. 17 FMSHRC at 2186.

On May 31, 1994, the Secretary filed with the Commission a civil penalty petition in which it proposed a total penalty of $26,360: $360 for Thunder Basin=s initial section 40.4 violation and a daily penalty of $2000 for its failure to abate the violation during the 13-day period from March 27 to April 8, 1994. *Id.* at 2187; Pet. for Assessment of Penalty. Thunder Basin filed an answer and an unopposed motion to stay the penalty proceeding pending the outcome of the underlying proceeding involving its contest of the section 40.4 citation and section 104(b) order, which was granted by Judge Amchan. Answer and Unopposed Mot. for Stay; Stay of Proceedings dated Aug. 2, 1994.

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[4] This order did not require Thunder Basin to withdraw miners from any area of the mine or to cease any of its operations. *Id*. at 2185-86.

On August 24, 1994, Judge Amchan affirmed the citation issued to Thunder Basin for its refusal to post the miners= designation of representatives. *Thunder Basin Coal Co.*, 16 FMSHRC 1849 (August 1994) (ALJ). The judge concluded that the disposition of the case was controlled by the Commission=s decision in *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993), *aff=d*, 40 F.3d 1257 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995).[5] 16 FMSHRC at 1850. The Commission did not grant Thunder Basin=s petition for discretionary review of the judge=s decision, which thus became a final order of the Commission. 17 FMSHRC at 2186 n.2. On appeal, the decision was affirmed by the Tenth Circuit in *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (1995). 17 FMSHRC at 2186.

In July 1995, following the Tenth Circuit=s decision affirming the Commission=s final order, Judge Amchan set a hearing date in the penalty proceeding. Notice of Hearing dated July 10, 1995. The hearing was continued and later canceled pursuant to a joint motion of the parties in which they agreed that no material evidentiary facts relating to the penalty assessment were in dispute and that they would stipulate to the relevant facts concerning four of the six statutory penalty criteria. Joint Mot. to Govern Further Proceedings. On November 14, 1995, the Secretary and Thunder Basin submitted stipulations relating to all of the statutory penalty criteria except negligence and good faith. 17 FMSHRC at 2187; Section 110(i) Stips.[6]

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[5] In *Kerr-McGee*, the Commission held that the designation of union employees as miners= representatives was consistent with section 103(f) of the Mine Act and did not present an impermissible conflict with the National Labor Relations Act. 15 FMSHRC at 360-62. The Commission=s decision in *Kerr-McGee* was affirmed by the D.C. Circuit on December 2, 1994 (40 F.3d at 1257), following the judge=s decision affirming the underlying citation in this case.

[6] The parties stipulated that Thunder Basin had 23 violations of the Mine Act in the two years preceding this violation, and that it had no prior violations of section 40.4 and no prior section 110(b) penalties assessed against it. 17 FMSHRC at 2187. The parties also stipulated that Thunder Basin is a large operator, that the proposed penalty of $26,360 would not affect its ability to continue in business, and that the gravity of the violation was low since the violation was

Based upon his evaluation of the penalty assessment criteria set forth in section 110(i) of the Mine Act, Judge Amchan assessed a daily penalty of $100 for the period from March 27 to April 8, 1994 **C** a total penalty of $1300. 17 FMSHRC at 2187-89. Noting that the parties had stipulated with respect to four of the six statutory penalty criteria, the judge determined that the only criteria at issue were negligence and the good faith of Thunder Basin in achieving abatement. *Id.* at 2187. Finding that Thunder Basin=s failure to post the miners= representative notice was intentional, rather than negligent, the judge concluded that the Areal question@ was its Agood faith.@ *Id.* He described the dispositive issue as Awhether [Thunder Basin] should be assessed a substantial civil penalty for its insistence on exhausting all avenues of judicial review prior to complying with the citation.@ *Id.* at 2188.

The judge reasoned that the assessment of a penalty in this case required a balancing of two considerations: (1) Thunder Basin=s insistence on getting a Asecond bite at the apple@ in the adjudication process despite the Commission=s controlling decision in *Kerr-McGee*, and (2) the very remote possibility of any danger resulting from the failure to abate. *Id.* at 2189. Balancing these factors, the judge concluded that the $2000 daily penalty proposed by the MSHA was Amuch too high given the low gravity of the violation,@ and that an appropriate penalty was $100 per day for the 13-day period from March 27 to April 8, 1994 **C** a total penalty of $1300. *Id.*

The Commission granted the Secretary=s petition for discretionary review challenging the judge=s penalty assessment.

II.

Disposition

The Secretary argues that the judge erred by failing to assess any civil penalty for the underlying section 40.4 violation. S. Br. at 7-8; S. Reply Br. at 1-7. The Secretary also argues that the judge erred by not properly applying the six statutory penalty criteria in assessing a daily penalty for Thunder Basin=s failure to abate the section 40.4 violation. S. Br. at 8-21. Specifically, the Secretary contends that the judge failed to properly consider the negligence criterion in determining an appropriate daily penalty. *Id.* at 11-14; S. Reply Br. at 8-9. The Secretary also contends that the judge failed to properly balance the six statutory penalty criteria, and erred by giving controlling weight to the gravity criterion. S. Br. at 14-16. The Secretary contends that the judge=s assessment of a daily penalty of $100 for the failure to abate constitutes

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not Asignificant and substantial,@ no persons were likely to be affected, no lost workdays could be expected, there was no likelihood of recurrence, and the order was marked Ano [a]ffected area.@ *Id.;* Section 110(i) Stips. at 1-2.

an abuse of discretion. *Id.* at 16-21. The Secretary argues that the nominal penalty assessed by the judge will undermine effective enforcement of the Mine Act and the role of the Commission as arbiter of disputes arising under the Act. *Id.* at 20-21; S. Reply Br. at 11-13. The Secretary also disputes Thunder Basin=s argument that its failure to abate the violation was not the result of a lack of good faith. S. Reply Br. at 9-11.

Thunder Basin argues that the judge did not fail to assess a penalty for the section 40.4 violation, as alleged by the Secretary, because his decision indicates that the $1300 penalty assessed was based upon the both the underlying violation and the 13-day period of non-abatement. T.B. Br. at 8-9. Thunder Basin also argues that the judge properly considered the statutory penalty criteria, including negligence, and did not give undue weight to the gravity of the violation, and that there is no basis for the Secretary=s assertion that the judge=s penalty assessment is not supported by substantial evidence. *Id.* at 9-14. In addition, Thunder Basin contends that the statutory criteria warrant the imposition of no more than a nominal penalty in this case, and that there is no deterrent purpose to be served by imposition of a larger penalty, because it acted reasonably and in good faith to obtain a prompt resolution of the issues relating to the validity of the miners= designation of representative. *Id.* at 14-25.

A. Governing Principles

Section 110(a) of the Mine Act, 30 U.S.C. ' 820(a), requires the assessment of a civil penalty for all violations of the Mine Act and the mandatory standards and regulations promulgated thereunder.[7] Section 104(b) provides that, if the Secretary finds that a mine operator has not totally abated a violation within the time set in the citation, and the period of time set for abatement shall not be extended, he shall issue an order withdrawing miners from the affected area. Section 110(b), 30 U.S.C. ' 820(b), provides for the assessment of a daily civil penalty of up to $5000 for each day during which the operator fails to correct the violation for which a citation has been issued.[8]

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[7] Section 110(a) provides, in part:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation.

30 U.S.C. ' 820(a).

[8] Section 110(b) provides:

> Any operator who fails to correct a violation for which a citation has been issued under section [104(a)] within the period permitted for its correction may be assessed a civil penalty of not

more than $5,000 for each day during which such failure or violation continues.

30 U.S.C. ' 820(b).

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 Act.[9] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the

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[9] 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 the violation.

30 U.S.C. ' 820(i).

Commission must determine whether the judge=s findings with regard to the penalty criteria are supported by substantial evidence.[10] Assessments Alacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal.@[11] *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make A[f]indings of fact on each of the criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also 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.

2. Assessment of a Penalty for the Underlying Section 40.4 Violation

The Mine Act contains separate provisions authorizing the assessment of civil penalties for violations of the Act and mandatory health or safety standards, and for the failure to timely abate such violations, with different specified maximum penalties for each. While the judge acknowledged that the Secretary proposed the assessment of separate penalties of $360 for the underlying section 40.4 violation and $26,000 for the failure to abate that violation ($2000 daily penalty for a period of 13 days), in making his penalty assessment he focused on the failure to

[10] 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). ASubstantial evidence@ means Asuch 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)).

[11] The Commission has explained that A>[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.=@ *Broken Hill Mining Co.*, 19 FMSHRC 673, 676 (April 1997) (quoting *Sellersburg*, 5 FMSHRC at 294 (citation omitted)).

abate and never explicitly addressed the issue of an appropriate penalty for the violation itself. 17 FMSHRC at 2187-89. The judge analyzed the statutory penalty criteria primarily with respect to facts surrounding the failure to abate, and did not separately discuss facts relating to the section 40.4 violation. *Id.* Given the mandatory language of section 110(a) **C** providing that an operator found to have violated the Act or a mandatory health or safety standard A*shall* be assessed a civil penalty@ (30 U.S.C. ' 820(a) (emphasis added)) **C** the judge=s failure to assess any penalty for the section 40.4 violation amounts to legal error that necessitates a remand.

While Thunder Basin contends that the $1300 penalty was intended by the judge to apply to both the section 40.4 violation and the subsequent failure to abate, there is no indication in the judge=s decision that this was in fact his intention.[12] Although, as the Secretary concedes (S. Reply Br. at 7 n.3), it would not be improper for the judge to assess one total penalty for both the violation and the failure to abate, the judge must at least indicate that this is his intention and provide some analysis of the statutory penalty criteria with reference to the violation. Because the judge failed to do either, we remand the case for assessment of a separate penalty for the section 40.4 violation.

C. The Application of Section 110(i) Penalty Criteria

[12] Thunder Basin=s suggestion (T.B. Br. at 9, 11, 22-23) that the $1300 penalty assessed by the judge reflects a quadrupling of the $360 penalty proposed by the Secretary for the section 40.4 violation finds no support in the judge=s decision, and is inconsistent with the analysis employed by the judge in determining an appropriate penalty in this case. It is apparent from the judge=s decision that the $1300 total penalty was based on assessment of a reduced daily penalty of $100 for the 13 days from March 27 to April 8, 1997. 17 FMSHRC at 2189. The judge does not even mention the $360 penalty proposed for the section 40.4 violation in the penalty assessment section of his decision. *Id.* at 2187-89.

We also conclude that the judge abused his discretion in analyzing the statutory penalty criteria with respect to Thunder Basin=s failure to abate the section 40.4 violation, and therefore vacate his penalty assessment and remand for reassessment.[13]

First, it does not appear that the judge actually considered all of the statutory criteria in determining an appropriate penalty for Thunder Basin=s failure to abate. While the parties stipulated as to the facts with respect to four of the six statutory penalty criteria, the judge appears to have totally disregarded three of these four factors (other than gravity) in assessing a penalty. At least two of the these three factors **C** size and ability to continue in business **C** weigh against a significant reduction in the penalty assessed for Thunder Basin=s failure to abate. While there is no requirement that equal weight must be assigned to each of the penalty assessment criteria, it is well established that all six statutory criteria must at least be considered in assessing civil penalties and that a judge=s failure to do so constitutes reversible error. *See Wallace Bros., Inc.*, 18 FMSHRC 481, 483 (April 1996), and cases cited; *Mettiki Coal Corp.*, 13 FMSHRC 760, 773 (May 1991). *See also Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984). In *Jim Walter Resources, Inc.*, 19 FMSHRC 498 (March 1997), the Commission vacated a judge=s penalty assessment where the judge failed to Amake specific findings on all six penalty criteria,@ including criteria that were the subject of stipulations by the parties. *Id.* at 501.

[13] Commissioner Riley notes his dissenting colleague=s observation that, Awe have allowed penalty assessments to stand that were supported by far less analysis.@ Slip. op. at 14 (citing *Sunny Ridge Coal Co.*, 19 FMSHRC 254 (February 1997)). Having dissented in that case on the very issue for which it is cited (19 FMSHRC at 276-78), Commissioner Riley is confident that the Commission=s disposition of the instant case is consistent with his position in *Sunny Ridge.*

The judge=s analysis of the negligence criterion also represents an abuse of discretion. The judge=s only mention of this criterion **C** one of two statutory criteria that the parties did not stipulate to **C** was his observation that Thunder Basin=s failure to post the notice of representative was intentional rather than negligent. 17 FMSHRC at 2187. It appears that the judge concluded that, because the relevant conduct of Thunder Basin was intentional, the negligence criterion was essentially inapplicable. While an intentional violation will not always be found to be indicative of high negligence,[14] the Commission has held that some types of intentional conduct warrant a finding of high negligence. *See Consolidation Coal Co.*, 14 FMSHRC 956, 961, 970 (June 1992) (affirming judge=s finding of high negligence where operator intentionally changed its method of reporting hours worked by miners, thereby taking Athe law into its own hands by deciding for itself what the law means and how it can best be applied@). Indeed, Aintentional misconduct@ is one of the standard phrases used by the Commission to describe an unwarrantable failure. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *S & H Mining, Inc.*, 17 FMSHRC 1918, 1922-23 (November 1995). The judge=s failure to provide any meaningful analysis of the negligence criterion, or to factor that criterion into his penalty assessment for Thunder Basin=s failure to abate, constitutes reversible error.[15]

With respect to gravity, it has been recognized that allowing non-employees to serve as miners= representatives is consistent with Congress= underlying objectives of improving miner health and mine safety, since third parties may provide valuable safety and health expertise, use their knowledge of other mines to spot problems and suggest solutions, and take actions without the threat of pressure from the employer. *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1263 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995) (citing *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 451-52 (10th Cir. 1990)). It follows that, as a result of

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[14] *See, e.g.*, *Mettiki*, 13 FMSHRC at 770-71; *Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1379 (July 1990).

[15] Thunder Basin asserts that an intentional violation does not merit a finding of high negligence when the operator=s conduct Awas based . . . on its erroneous legal interpretation of the Secretary=s authority,@ relying on *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). T.B. Br. at 9 n.8. This reliance is misplaced, however, since in *U.S. Steel* there was no prior Commission decision comparable to the controlling *Kerr-McGee* decision in this case addressing the precise legal issue in dispute.

Thunder Basin=s refusal to honor the miners= designation of their section 103(f) representatives, the miners were deprived of the full measure of protection because their selected representatives were unable to point out safety and health hazards that the miners themselves might not have recognized or been willing to report. Therefore, Thunder Basin=s failure to abate the section 40.4 violation could have compromised the safety of miners. However, since the Secretary stipulated that there is no likelihood of injury due to Thunder Basin=s violation (17 FMSHRC at 2187), the Commission is precluded from applying its own analysis to the question of gravity.

D. The Daily Penalty Assessment

Finally, it appears from the judge=s decision that, in reducing the daily penalty assessed for Thunder Basin=s failure to abate to $100 from the $2000 amount proposed, a 95% reduction, he gave controlling weight to the low gravity of the violation and may not have adequately considered other factors that cut against a reduction in the proposed penalty **C** in particular, Thunder Basin=s lack of good faith in failing to abate the violation. Despite identifying Thunder Basin=s good faith as the Areal question@ in assessing a penalty, finding that MSHA reasonably refused to extend the abatement period, and concluding that Thunder Basin acted unreasonably in relying on assurances that it would not be subject to daily penalties if it chose to litigate rather than abate (taken from decisions that predated the Commission=s controlling decision in *Kerr-McGee*), the judge appears to have assigned little weight to this lack of good faith in determining an appropriate penalty for the failure to abate. 17 FMSHRC at 2187-89. *See Jim Walter Resources*, 19 FMSHRC at 501 (vacating penalty assessment where judge Adid not indicate how or whether [his] findings and conclusions [regarding operator=s good faith attempts to achieve compliance] relate to his penalty assessment@). Given the Awide divergence between the penalties proposed by the Secretary and those assessed by the judge,@ which amounted to a 95% reduction in the proposed penalty, the judge was, at a minimum, required Ato provide a sufficient explanation of the bases underlying the penalties assessed.@ *Sellersburg*, 5 FMSHRC at 293.

We also note that the Secretary demonstrated considerable restraint and forbearance in assessing a penalty for Thunder Basin=s failure to abate the violation. The Secretary was statutorily authorized to seek a daily civil penalty of up to $5000 per day for the failure to abate, and could have sought daily penalties for a far longer period of time, beginning on February 22, 1994 **C** the day the section 104(b) order issued. Instead, the Secretary gave Thunder Basin several opportunities to abate the violation and waited until March 27, several days after the judge denied the operator=s motion for temporary relief, to begin imposition of a daily penalty of $2000 **C** only 40% of the authorized maximum daily penalty. 17 FMSHRC at 2186. Given the significant restraint demonstrated by the Secretary in assessing a penalty for Thunder Basin=s failure to abate the section 40.4 violation, in the face of controlling Commission precedent, for a month-and-a-half after the issuance of a section 104(b) order, the judge=s further reduction of that proposed penalty by a factor of 95% constitutes an abuse of discretion.

For a company with the size and resources of Thunder Basin, a daily penalty of $100, even multiplied over 13 days to yield a total penalty of $1300, is likely to have little financial impact,

and therefore minimal deterrent effect. If so, then the penalty assessed for Thunder Basin=s failure to abate would not achieve the intended purpose of civil penalties under the Mine Act, which is to A>convinc[e] operators to comply with the Act=s requirements.=@ *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (September 1996) (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978)). It has been recognized that Astiffer penalties against larger mines are necessary, at least in part, to ensure that operators of mines with more complex management structures would notice and correct violations.@ *Coal Employment Project v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989). Moreover, section 110(b) of the Act, which authorizes the Commission to assess a penalty of up to $5000 a day for each day that a violation continues, demonstrates Congress= emphasis on the need for significant penalties in response to operator recalcitrance in situations where, as here, the violation is not abated in a timely manner.

A civil penalty of the magnitude assessed by the judge in this case is likely to discourage operators, particularly large companies with extensive financial resources, from abating violations while they litigate their validity **C** a result that, as the judge acknowledged, is contrary to the enforcement scheme embodied in the Mine Act. 17 FMSHRC at 2188-89. Significantly, in the *Kerr-McGee* case, which first raised the issue of the validity of a designation of union employees as miners= section 103(f) representatives, the operator abated its section 40.4 violation in response to the threatened imposition of daily penalties before proceeding to litigate the matter before the Commission and the D.C. Circuit, even though that issue was then an unsettled question of first impression. 15 FMSHRC at 355. In this case, by contrast, Thunder Basin, a large operator represented by able counsel, made a conscious decision not to abate its section 40.4 violation and to continue litigating the validity of the citation notwithstanding contrary Commission case law. It must therefore be prepared to bear the consequences of that decision.

Civil disobedience is an honorable tradition in American jurisprudence. However, it is not undertaken without risk by those who believe they are making a principled stand. Many civil rights protestors, with a far greater claim of injustice, fully expected legal sanction for their civil defiance. Only when their suffering awakened public consciousness did their civil disobedience begin to achieve the goal of changing the law.

Here we have a corporate actor engaging in a legal stand-off with a governmental agency over what it believes is a matter of principle. Certainly Thunder Basin, or any other litigant, should not be exposed to greater punishment for forcefully exercising due process rights. However, no party is, or should be, automatically entitled to a discount from a lawful penalty of the magnitude applied here merely because they invoke the righteous mantle of civil protest. This is especially true where the amount of a daily sanction for noncompliance is known and its potential accumulation is entirely in the hands of the protesting party.

In our view, these deficiencies in the judge=s penalty assessment amount to an abuse of discretion. Accordingly, we vacate the judge=s assessment and remand for reassessment of a penalty consistent with this decision.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s penalty assessment and remand to the Chief Administrative Law Judge for reassignment and reassessment of civil penalties.[16]

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[16] Judge Amchan has since transferred to another agency.

Commissioner Verheggen, dissenting:

I join in my colleagues= decision with the exception of Sections II.C and II.D, from which I dissent. In those sections, my colleagues find an abuse of discretion where I find none.

The principles governing the Commission=s de novo authority to assess civil penalties for violations of the Mine Act are well established. First, Afindings of fact on the [six] statutory penalty criteria must be made.@ *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984). Findings on each of the criteria may be made either by the judge or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. When reviewing a judge=s factual findings on the six penalty criteria, we apply the substantial evidence test. 30 U.S.C. ' 823(d)(2). Having made findings on the criteria, a judge=s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act=s penalty assessment scheme. *Sellersburg*, 5 FMSHRC at 294. *But see Jim Walter Resources, Inc.*, 19 FMSHRC 498, 501 (March 1997) (ADeterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.@) (citation omitted). We review a judge=s penalty assessment under an abuse of discretion standard. *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984); *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986) (the Commission=s judges are accorded broad discretion in assessing civil penalties under the Mine Act).

Here, the parties stipulated the facts as to four of the six criteria, stipulations which the judge duly noted in discussing his penalty assessment. 17 FMSHRC at 2187.[1] The judge was thus required to make findings on only two criteria: the degree to which Thunder Basin was negligent, and the company=s demonstrated good faith in Aattempting to achieve rapid compliance after notification of a violation.@ 30 U.S.C. ' 820(i). The judge essentially found that Thunder Basin was not negligent at all. Although I believe that this finding is not clearly articulated, it nevertheless is supported by substantial evidence. The Secretary herself defines negligence in terms of the risk of harm arising out of a particular course of conduct. 30 C.F.R. ' 100.3(d). Here, the Secretary *stipulated* that there was no likelihood of injury due to Thunder Basin=s

[1] The Commission has been reluctant to discount stipulations on the penalty criteria entered by litigants. In *Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991), although the judge made an implicit finding of no good faith abatement, in vacating the judge=s penalty assessment the Commission found that Mettiki abated the two violations at issue Ain good faith,@ after noting that evidence supported the parties= stipulation to this effect.

violation. 17 FMSHRC at 2187. It is hard to imagine any more convincing evidence in support of the judge=s conclusion. By couching his finding in terms of Thunder Basin acting Aintentionally@ (*id*.), the judge confused the issue. Insofar as his finding is unclear, however, I would have the Commission enter its own finding of no negligence based on the compelling evidence cited above. *See Sellersburg*, 736 F.2d at 1153.

The judge also found that the company=s failure to abate the violation was unreasonable in light of a Commission decision, *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993), *aff=d*, 40 F.3d 1257 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995), that arguably controlled the outcome of this case. This finding is amply supported by the relevant evidence, which is simply the timeline of this case, recited by the judge in some detail. 17 FMSHRC at 2185-86.

The only question remaining is whether the judge *abused his discretion* when assessing the daily penalty for Thunder Basin=s continuing violation of 30 C.F.R. ' 40.4. I differ from my colleagues and conclude that he did not.

After making the requisite findings, including noting the parties= stipulations, the judge discussed the factors that most affected his assessment: the gravity of the violation and Thunder Basin=s abatement efforts. My colleagues are unable to cite a single instance where we have directed one of our judges to go beyond what the judge did here. In fact, we have allowed penalty assessments to stand that were supported by far less analysis. In *Sunny Ridge Coal Co.*, 19 FMSHRC 254 (February 1997), the judge made no separate findings of fact on any of the penalty criteria with respect to three highwall violations. *Id*. at 262-64, 265-66, 268. A majority of Commissioners nevertheless culled both the judge=s decision and the record and found facts on which findings could be entered. *Id*. After all the findings were in, the majority stated:

> The question remains whether, in light of the . . . findings, the penalty assessed by the judge is excessive. The 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, discretion bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act=s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984). Although the penalty assessed by the judge exceeds that originally proposed by the Secretary before the hearing, based on the facts developed in the adjudicative record, *we cannot say that the penalty is inconsistent with the statutory criteria or the Act=s deterrent purposes*. We thus find that the judge=s penalty assessment did not constitute an abuse of discretion.

Id. at 263-64 (emphasis added, footnotes omitted).

The judge=s penalty in *Sunny Ridge* was affirmed despite the fact that neither the judge nor the Commission discussed the interrelation between the factual findings on the criteria and the

penalties assessed. Here, too, it is impossible to say that Judge Amchan=s penalty assessment is inconsistent with the statutory criteria or the Act=s deterrent purposes. Certainly, he did not abuse his discretion. If anything, his assessment improves upon the Secretary=s penalty proposal of $360 for the underlying violation and $2,000 per day for 13 days for the continuing violation. 17 FMSHRC at 2187. There is no apparent rational relationship between the Secretary=s *nominal* proposed penalty for the underlying violation and the much higher proposed daily penalty, which the judge rejected as Amuch too high given the low gravity of the violation.@ *Id*. at 2189. In light of the findings on each of the criteria, the only consideration that would have justified a daily penalty significantly higher than the underlying penalty was Thunder Basin=s failure to abate the violation in light of the *Kerr-McGee* decision, which the judge found to be unreasonable.[2] This is exactly one of the grounds on which the judge imposed a more than nominal daily penalty. *Id*.

I would thus affirm the judge=s assessment of a daily penalty of $100 per day for 13 days.

Theodore F. Verheggen, Commissioner

[2] In light of the six statutory penalty criteria of section 110(i), I fail to see the relevance of what my colleagues characterize as the Aconsiderable restraint and forbearance [demonstrated by the Secretary] in assessing [the daily] penalty.@ Slip op. at 10. The manner in which the Secretary exercises her prosecutorial discretion is not a factor the judge could have considered under section 110(i).