

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 2, 1996

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 94-710-M
 :
WALLACE BROTHERS, INC. :

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

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”), involves the penalties proposed by the Secretary of Labor for two violations of 30 C.F.R. § 56.14107(a)¹ by Wallace Brothers, Inc. (“Wallace”). Wallace conceded the violations but contended that the proposed civil penalties were too high. After an evidentiary hearing, Administrative Law Judge Arthur J. Amchan assessed a \$1,300 penalty for each citation. *Wallace Brothers, Inc.*, 17 FMSHRC 1380, 1384 (August 1995) (ALJ). Wallace filed a petition for discretionary review challenging the judge’s penalty assessments. For the reasons set forth below, we vacate and remand.

¹ 30 C.F.R. § 56.14107(a) provides:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

I.

Procedural and Factual Background

On May 11, 1994, inspector Rodney Ingram of the Mine Safety and Health Administration (“MSHA”) issued two citations to Wallace, alleging separate violations of 30 C.F.R. § 56.14107(a). Citation No. 4129345 alleged that the standard was violated because a 5 inch by 8 inch gap existed in the guard of a self-cleaning tail pulley on a portable crusher. Tr. 15. Citation No. 4129346 alleged that the back side of a V-belt drive was unguarded. Tr. 22. The inspector gave Wallace 2 days to abate the conditions. On June 8, the inspector returned and, upon discovering that the cited conditions had not been abated, issued two withdrawal orders pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). On June 9, the violations were abated.

Following an evidentiary hearing, the judge assessed a \$1,300 penalty for each citation. 17 FMSHRC at 1384. The judge reached the \$1,300 figure by multiplying the most likely penalty (\$50) times the number of days (26) the conditions went unabated. *Id.* at 1383. The judge noted that the Secretary had proposed a penalty of \$1,500 for each citation and Wallace contended that the penalties should be \$210 and \$159. *Id.* at 1381-82. The judge rejected Wallace’s alternative penalties as too low, stating that such low penalties would “invite dilatory conduct[.]” *Id.* at 1383. He noted that “[a]lthough the proposed penalty assessment lists only the numbers of the section 104(a) citations, the document and attached narrative clearly indicate that the penalties are for the section 104(b) orders as well.” *Id.* 1381 n.1.

II.

Disposition

On review, Wallace challenges the judge’s decision on two grounds.² Wallace contends that the judge failed to address all six statutory criteria contained in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). W. Br. at 1-2. Wallace also states that the legislative history of the Act indicates that the six penalty criteria “are to be used as avenues for mitigating the penalties” not to “enhance the penalties[.]” as it asserts the judge did here. *Id.* at 3. The Secretary agrees with Wallace’s first contention, i.e., that the judge failed to address all six statutory criteria contained in section 110(i) of the Mine Act, but he disagrees with Wallace’s second contention, i.e., that the

² In its petition, Wallace also raised the issue of whether the Commission is authorized to assess a penalty of up to \$5,000 per day under section 110(b) of the Act, as it asserts the judge did in this case. Pet. at 2. Because Wallace did not refer to this issue in its brief, we need not address it. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

six penalty criteria serve only to mitigate proposed penalties and not to enhance them. S. Mot. at 1-3.³

A. Statutory Penalty Criteria

Section 110(i) requires the Commission to consider six specified criteria in assessing civil monetary penalties. *See Sellersburg Stone Co.* 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Section 110(i) states, in pertinent part:

[T]he 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.

30 U.S.C. § 820(i). Further, the Commission and the courts have held that section 110(i) requires a judge to make findings of fact on the statutory criteria. *Dolese Brothers Co.*, 16 FMSHRC 689, 695 (April 1994); *Pyro Mining Co. v. FMSHRC*, 3 MSHC (BNA) 2057, 2059, 785 F.2d 310 (Table) (6th Cir. 1986) (“[n]ot only must the Commission consider [the] criteria, it is our opinion that the Commission must provide in its order findings of fact on each of the statutory criteria.”); *Sellersburg*, 5 FMSHRC at 292.

Because the judge failed to consider the criteria set forth in section 110(i) of the Act or to make findings of fact with respect to them, we vacate the penalties assessed. We remand this proceeding to the judge for further analysis consistent with the foregoing principles.

B. Penalty Amounts

The Commission and its judges are not bound by the Secretary's proposed penalties. *See, e.g., Sellersburg*, 5 FMSHRC at 290-93 (there the Secretary originally proposed penalties of \$1,000, \$78 and \$78 for three violations and the judge assessed penalties of \$7,500, \$1,000 and \$1,000, respectively). When a civil penalty petition is filed and Commission jurisdiction attaches, the judge assesses a penalty *de novo*, based upon the statutory penalty criteria and the record

³ The Secretary did not file a brief; however, on December 18, 1995, he filed a motion to remand the section 110(i) issue to the judge. In light of our disposition, the Secretary's motion is moot.

evidence developed in the course of the adjudication. *Id.* at 291-92; *United States Steel Mining Co., Inc.*, 6 FMSHRC 1148, 1151 (May 1984).

Nothing in the language of section 110(i) suggests that the six criteria may serve only to reduce penalties proposed by the Secretary. “[T]he penalties assessed *de novo* in a Commission proceeding appropriately can be greater than, less than, or the same as those proposed by the Secretary.” *Sellersburg*, 5 FMSHRC at 293.

We find no merit to Wallace’s contention that the penalty criteria can be used only to mitigate a proposed penalty. Accordingly, on remand, the judge may exercise his discretion in assessing penalties, guided by the penalty criteria.

III.

Conclusion

For the foregoing reasons, we vacate the judge's civil penalty assessments and remand this case to the judge for consideration and application of the section 110(i) civil penalty criteria to the facts of this case.

Mary Lu Jordan, Chairman

Joyce Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner