FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 10, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 99-39-M
DOUGLAS R. RUSHFORD TRUCKING	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Gary Melick, upon remand for reassessment of penalty, correctly assessed a penalty against Douglas R. Rushford Trucking ("Rushford"). 22 FMSHRC 1127 (Sept. 2000) (ALJ). For the reasons that follow, we vacate the judge's penalty and remand for the reassessment of the civil penalty.

I.

Factual and Procedural Background

This is the second time that this proceeding has been before the Commission. A summary of the background facts and the judge's initial decision (22 FMSHRC 74 (Jan. 2000) (ALJ)) is found in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000) ("*Rushford I*"). Briefly, a Rushford employee was fatally injured when, as he was inflating a tire on a fuel truck, the wheel rim exploded and struck him in the head. At the time, he had not been using a stand-off inflation device. 22 FMSHRC at 599. MSHA charged Rushford with violating 30 C.F.R. § 56.14104(b)(2), which requires stand-off inflation devices to be used during tire inflation to prevent injury from wheel rims by permitting individuals to stand outside of the potential trajectory of wheel components. The Secretary proposed a civil penalty of $25,000. 22 FMSHRC at 599. The judge found a violation and determined that it was significant and

substantial ("S&S") and a result of Rushford's unwarrantable failure. *Id.* He assessed a $3000 civil penalty. *Id.*

On review, the Commission affirmed the judge's finding of a violation and its characterization as S&S and unwarrantable, but concluded that the judge neglected to make findings on all of the penalty criteria set forth in Mine Act section 110(i), 30 U.S.C. § 820(i),[1] particularly with respect to the gravity of the violation. 22 FMSHRC at 602. In our opinion remanding this proceeding, we instructed the judge to provide a more complete explanation of his penalty assessment. *Id.* We held that, if the judge decided a substantial reduction in the penalty proposed by the Secretary of Labor was warranted, he must explain the rationale for the reduction, especially in light of his finding of "gross negligence." *Id.* We also directed the judge to examine Rushford's lack of history of violations, which the Secretary claimed was a result of Rushford's failure to file quarterly reports and consequently could not be considered a mitigating factor in a penalty assessment. *Id*. Because the record was unclear on this point, we indicated that the judge could reopen the record to assist in his examination of Rushford's history of violations. *Id.* The judge held a supplemental hearing on August 24, 2000.[2]

On remand, the judge discussed each of the section 110(i) criteria. He determined that an increase in the penalty he had originally assessed was warranted because Rushford's lack of history of violations stemmed in part from its mistaken failure to file quarterly forms and, according to the Commission's instructions, could not be a mitigating factor. 22 FMSHRC at 1128-30. The judge found that Rushford was very small, and that it exhibited good faith in achieving rapid compliance by purchasing a stand-off device and posting the requirement that it be used at the mine. *Id.* at 1130-31. The judge noted the operator's acknowledgment that a $25,000 penalty would result in hardship, but would not cause it to cease operations. *Id.* Relying on *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984), he observed that without proof that the imposition of penalties would adversely affect an operator's ability to continue in business, there is a presumption that no such adverse effect would occur. 22 FMSHRC at 1131. He determined that the violation, which caused a fatality,

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[1] Section 110(i) of the Mine Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" the six statutory penalty criteria:

> [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.

[2] Hearings in this case were held on August 26, 1999 ("Tr. I"), August 27, 1999 ("Tr. II"), October 5, 1999 ("Tr. III") and August 24, 2000 ("Tr. IV").

was of "high gravity." *Id.* The judge stated that, although the violation was the result of "high" and "gross" negligence, he considered that Rushford's negligence resulted from a "self-imposed ignorance" of the standard rather than any "intentional non-compliance," making the violation arguably "not the result of unwarrantable failure." *Id.* at 1130. The judge assessed a penalty of $4000, concluding that the Secretary's proposed penalty of $25,000 lacked analytical support and was disproportionate to an appropriate consideration of the penalty criteria. *Id*. at 1132-33.

II.

Disposition

On appeal, the Secretary argues that the judge's penalty assessment on remand was flawed. PDR at 2.[3] She asserts that the judge erred in determining that, because the violation was the result of operator "self-imposed ignorance" of MSHA standards, the operator's negligence was reduced for penalty assessment purposes. *Id*. at 5-7. That determination, according to the Secretary, is inconsistent with the judge's original decision, the Commission's decision and Commission precedent. *Id.* She contends that the judge also erred by requesting the Secretary to provide underlying information for her penalty assessment. *Id.* at 9-16. Rushford did not file a brief with the Commission.

Although Commission judges are accorded considerable discretion in assessing civil penalties under the Mine Act, in reviewing a judge's penalty assessment, the Commission must determine whether the factual findings of the penalty are supported by substantial evidence and are consistent with the statutory penalty criteria set forth in Mine Act section 110(i). *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). 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).

We agree with the Secretary that the judge's negligence determination on remand, on which he relied to reduce the penalty (*see* 22 FMSHRC at 1130), conflicts with his original decision. 22 FMSHRC 74. On remand the judge held that Rushford's "self-imposed ignorance of the . . . standard" made the violation "at least arguabl[y] . . . not the result of unwarrantable failure." 22 FMSHRC at 1130. However, in his original decision, the judge found that the violation was a result of unwarrantable failure and "high negligence." 22 FMSHRC at 77-78. Those findings stemmed from "the evidence that Rushford had never bothered to obtain a copy

[3] The Secretary designated her petition for discretionary review ("PDR") as her brief.

of the health and safety regulations governing the operation of [the] mine,"[4] that the appropriate tire inflating device was not available at the mine, and that the mine owner "did not even know what a stand-off inflation device was." *Id*. The judge concluded: "these factors clearly support a finding of unwarrantability and gross negligence." *Id*. at 78.

In *Rushford I*, the Commission directed the judge to explain his reduction in the proposed penalty in light of his finding of gross negligence. 22 FMSHRC at 602. Instead of giving the required explanation on remand, the judge attempted to retract his earlier gross negligence finding. However, because the judge's original findings of gross negligence and unwarrantable failure were not appealed to the Commission, those issues were not subsequently remanded to him, and instead became the law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (holding that on remand, judge could not revisit unappealed portions of initial decision). Accordingly, to the extent the judge's remand decision purported to retract his initial findings of gross and high negligence, the judge erred.

Additionally, the judge's reasoning that "self-imposed ignorance" reduces an operator's negligence conflicts with Commission precedent. In the context of Mine Act section 110(c), 30 U.S.C. § 820(c),[5] we have held that in order to show section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Prabhu Deshetty*, 16 FMSHRC 1046, 1051-53 (May 1994). In *Deshetty*, the Commission affirmed a high negligence determination despite Deshetty's claim that he was not aware of whether the cited conditions were prohibited under the law. 16 FMSHRC at 1053. In *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984), the Commission explained that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." The judge's negligence discussion also contravenes the general principle that ignorance of the law is no defense. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996) (providing that ignorance of law is not a defense to a claim for punitive damages in a case arising under Title VII); *McGee v. C.I.R.*, 979 F.2d 66, 70 (5th Cir. 1992) (providing that innocent spouse relief under the Internal Revenue Code is "designed to protect the innocent, not the intentionally ignorant").

Because the judge's discussion of negligence in his penalty assessment on remand is

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[4] Rushford was not aware of the standard at issue because it did not have a copy of the Code of Federal Regulations governing its mining operation. Tr. III 109-10. Its office manager testified that no one, including the mine owner, asked her to obtain a copy of the regulations. Tr. III 111.

[5] Section 110(c) cases are instructive because they involve allegations of aggravated conduct. *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1245 (Aug. 1992). We have also held that highly negligent conduct "suggests an aggravated lack of care" and unwarrantable failure. *Mettiki Coal Corp*., 13 FMSHRC 760, 770 (May 1991) (citing *E. Assoc. Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991)).

"infected by plain error," the judge, in assessing a penalty of $4000, committed an abuse of discretion. *See U.S. Steel*, 6 FMSHRC at 1432. We therefore vacate his penalty.[6]

Having found that the judge committed legal errors in considering the section 110(i) penalty criteria, we remand the matter for the assessment of a new penalty amount. However, we leave undisturbed the following findings made by the judge on the six statutory penalty criteria. As to the history of violations criterion, we affirm as supported by substantial evidence the judge's findings on remand that the lack of history of violations was due to both MSHA's error in classifying the mine as "closed" as well as to Rushford's failure to file the required quarterly reports with MSHA. 22 FMSHRC at 1129. Accordingly, the lack of history of violations is neither an aggravating nor a mitigating factor for penalty purposes.[7] With respect to the criteria of size and good faith abatement, the judge found, and we affirm, that Rushford is a very small operator, and demonstrated good faith in complying with the standard after the fatality. *Id*. at 1130-31. These two findings support some mitigation of the penalty. We also leave undisturbed the judge's finding that a penalty as high as $25,000, the amount proposed by the Secretary, would have no adverse effect on Rushford's ability to continue in business. *Id*. at 1131. This finding on the ability to continue in business criterion does not weigh in favor of reducing the proposed penalty. As discussed herein, the law of the case with respect to negligence is controlled by the judge's finding from his original decision that the violation was a result of "high and gross negligence." 22 FMSHRC at 77-78. This finding on the negligence criterion

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[6] Because we have determined that the judge's penalty assessment was erroneous, we do not reach the Secretary's additional arguments challenging that penalty.

[7] We reject the judge's implication that the Commission should have declined review of the Secretary's claim, that the lack of history of violations could not be a mitigating factor, on the basis that it was a "new" theory, raised for the first time on review. 22 FMSHRC at 1128. Under Mine Act section 110(i), the judge had to consider and address on the record before him the history of violations penalty criterion. *Sec'y on behalf of Hannah v. Consolidation Coal Co.,* 20 FMSHRC 1293, 1299-1303 (Dec. 1998) (holding that judge must consider all six penalty criteria and ensure that a complete record is made on all criteria); 29 C.F.R. § 2700.69(a) (requiring judge's decision to include "all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion *presented by the record*") (emphasis added). The record evidence before the judge showed that MSHA did not inspect the mine from 1993 to 1998 and that the operator did not file quarterly reports during that time. Tr. I 239-244, 263-276, 290-300; Tr. III 128. Mine Act section 113(d)(2)(A)(iii), 30 U.S.C. § 823(d)(2)(A)(iii), proscribes appealing any question of law or fact to the Commission, over which the judge was not afforded an opportunity to pass. Here, the judge had the opportunity to pass on, and indeed decided, the issue of the impact of the lack of violations on the penalty assessed, without any examination or discussion of why Rushford had not been inspected for five years prior to the subject violation. 22 FMSHRC at 80. The issue was before the judge and should have been addressed in his original decision and the Commission properly requested the judge to re-examine it on remand.

serves as an aggravating factor for penalty purposes. We also affirm the judge's finding that the violation, "which caused the death" of the Rushford employee in this case, was of high gravity. 22 FMSHRC at 1131. This gravity finding also serves as an aggravating factor for penalty purposes. *Id*. Finally, we find Rushford's alleged ignorance about a protective device as well known as stand-off inflation equipment, which is ubiquitious in any industry working with split rim truck tires (Tr. I. at 420), truly remarkable and unfortunate. For the benefit of the entire mining community, it is important to emphasize that, in this case, for the lack of a common and inexpensive safety device, a miner died.

We thus remand the assessment of the amount of the penalty to the judge, the trier of fact in the first instance. *Sellersburg*, 5 FMSHRC at 294.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand for the assessment of a civil penalty in accordance with this opinion.

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Mary Lu Jordan, Chairman

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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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