FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 12, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. LAKE 2017-99
SOLAR SOURCES MINING, LLC	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and concerns a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Solar Sources Mining, LLC. The citation alleges that Solar Sources failed to provide berms of substantial construction at a dump site as required by the mandatory safety standard at 30 C.F.R. § 77.1605(l) ("Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."). Gov. Ex. 3.

Solar Sources contested the citation before the Commission. After a hearing, an Administrative Law Judge affirmed the alleged violation, found the violation was "significant and substantial," ("S&S")[1] and held that the violation was the result of high negligence and an unwarrantable failure to comply with the standard. 40 FMSHRC 462 (Mar. 2018) (ALJ). The Judge assessed a civil penalty of $68,300, the same penalty that the Secretary had originally proposed.

Solar Sources filed a petition for discretionary review, which the Commission granted. On review, Solar Sources contends that the Judge erred in assessing the penalty because he failed to make adequate findings for each of the penalty criteria in section 110(i), 30 U.S.C. § 820(i), of the Mine Act as part of his analysis.

Given that the Judge clearly failed to follow Commission precedent and fell far short of making adequate findings, we agree. For the reasons contained herein, we vacate the Judge's

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

penalty assessment and remand the case to the Judge to complete his penalty criteria findings and reassess a penalty.

I.

Factual and Procedural Background

This proceeding arises from an accident that occurred at the Shamrock Mine, an Indiana surface coal mine operated by Solar Sources. On June 27, 2016, miner Shawn Standish was on his second trip of the morning, driving a haul truck carrying slurry to the mine's dump pit. Standish backed his truck up to the edge of the dump pit and stopped the vehicle. He felt the truck's rear tires sink. Standish attempted to accelerate away from the edge, but his truck would not move. Standish made the decision to abandon the truck as it continued to sink. He climbed from its cab and jumped. The truck descended over the edge, landing upside-down 47 feet into the pit. Standish landed on the ground above, breaking both heels and one ankle.

MSHA Inspector Jason Noel investigated the accident. Noel issued a section 104(d)(1)[2] order, alleging that Solar Sources failed to conduct an adequate on-shift examination of the dump site as required by 30 C.F.R. § 77.1713(a). Gov. Ex. 4. The Judge vacated the order, finding that the cited exam actually occurred about 20 minutes prior to the start of the day shift.[3] The Secretary did not petition the Commission for review of the Judge's decision and, therefore, this order is not before us.

Noel also issued a section 104(d)(1) citation, alleging that a berm of substantial construction was not provided at the dump site as required by 30 C.F.R. § 77.1605(l). Gov. Ex. 3. The Judge affirmed the citation, finding that Solar Sources failed to provide berms as required by section 77.1605(l). 40 FMSHRC at 491-92. The Judge found that wet slurry repeatedly falling onto the berm during the dumping process compromised the integrity of the berm. He also found that although it is likely that the berm was originally substantially constructed, it had deteriorated over time. The Judge concluded that the violation was S&S, the result of high negligence, and an unwarrantable failure to comply with the safety standard. The Secretary had proposed a $68,300 civil penalty through his special assessment protocol at 30 C.F.R. § 100.5. The Judge assessed the exact same amount as the proposed penalty, finding it to be "consistent with the record and the evidence introduced at hearing." *Id.* at 495 (citing *Rock N Roll Coal Co.*, 38 FMSHRC 2831, 2865 (Nov. 2016) (ALJ)).

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[2] Section 104(d)(1) authorizes the Secretary to issue a citation alleging an unwarrantable failure to comply with a mandatory safety standard and to issue an order withdrawing miners from any affected area if the Secretary determines that a second unwarrantable failure to comply occurs within the subsequent 90 days. 30 U.S.C. § 814(d)(1). An "unwarrantable failure" represents aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

[3] The Order alleged "[t]he certified person conducting the exam drove by the gob dump and only glanced the area." Gov. Ex. 4. The Judge reasoned that an examination that occurs prior to the start of a shift does not constitute an *on-shift* examination; the safety standard requires that the examination take place *during* the shift. *See* 40 FMSHRC at 490.

Solar Sources contends that the Judge erred in assessing a civil penalty because he assessed a civil penalty without associated findings for each of the statutory penalty criteria set forth in section 110(i) of the Act. Solar Sources further maintains that the Judge erred when he found that the Secretary's "Narrative Findings for a Special Assessment" were consistent with the Judge's own findings and conclusions.

The Secretary maintains that the Judge made the required penalty criteria findings throughout his decision, and that substantial evidence in the record supports the Judge's penalty assessment.

II.

Disposition

The Mine Act bifurcates, between the Secretary and the Commission, the responsibility to propose and assess civil penalties. The Secretary *proposes* a civil penalty pursuant to section 105(a) of the Mine Act. 30 U.S.C. § 815(a). Then, if the operator contests the citation, a Commission Administrative Law Judge adjudicates the case and *assesses* the penalty.

The Secretary has promulgated penalty regulations for two types of proposed assessments: regular assessments and special assessments. Proposed regular assessments are made pursuant to 30 C.F.R. § 100.3. Regular penalty proposals result from the assignment of points to the appropriateness of the penalty to the size of the business, the operator's history of violations, negligence, and gravity based on the allegations in the citations.[4] The cumulative total of the points determines a penalty proposal through reference to a penalty table. MSHA promulgated the regular assessment regulations through notice-and-comment rulemaking.

Proposed special assessments are governed by 30 C.F.R. § 100.5, which only provides that "MSHA may elect to waive the regular assessment under [section] 100.3 if it determines that conditions warrant a special assessment." Section 100.5(b) states that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in [section] 100.3(a). All findings shall be in narrative form." 30 C.F.R. § 100.5(b).

Section 105(d) of the Mine Act, in turn, provides mine operators with the right to contest the Secretary's proposed civil penalty before the Commission. 30 U.S.C. § 815(d). Pursuant to section 110(i) of the Act, the Commission *independently assesses* a civil penalty *de novo* based on findings of fact and consideration of six penalty factors:

> [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

[4] MSHA does not assign points for the effect upon the ability to stay in business or good faith in achieving rapid compliance.

> [operator] charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Upon finding a violation, a Judge assesses a penalty after a due process hearing and findings of fact. 30 U.S.C. § 815(d), 820(i); 29 C.F.R. § 2700.30(a). In assessing a penalty *de novo*, a Judge is neither bound by the Secretary's Part 100 regulations nor by the originally proposed penalty. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983). Judges are accorded broad discretion to assess civil penalties, but their decisions must reflect proper consideration of the section 110(i) penalty criteria. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). The Judge must provide an explanation if the penalty assessment substantially diverges from the Secretary's proposed *regular* assessment. *Sellersburg*, 5 FMSHRC at 293. The Commission reviews the Judge's penalty determination under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000).

In *Sellersburg*, the Commission established an abiding rule for penalty assessments. The Commission requires that, in assessing a penalty, the Judge must make:

> [f]indings of fact on ***each of the statutory 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.

5 FMSHRC at 292-93 (emphasis added).

In *Cantera Green*, 22 FMSHRC 616, 621 (May 2000), the Commission further explained:

> [w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.

In *Cantera Green*, the Commission vacated and remanded penalty assessments because the Judge failed to fully consider the statutory criteria for each citation at issue and also "failed to adequately explain the basis for the penalties he assessed for the violations . . . ." *Id.* at 626.

The obligation to make findings on the penalty criteria is not merely a Commission predilection. Due process demands that the Commission inform operators adequately, and with sufficient specificity, of the basis upon which the Commission imposes a penalty. If the Judge does not provide a discussion of the penalty criteria, including when appropriate how the penalty

criteria interplay with one another, then the respondent is not informed sufficiently of the reasoning for a civil monetary penalty.

Further, without a cogent explanation by the Judge of the assessment, the Commission and reviewing courts cannot perform their review function conscientiously. A sufficient explanation is essential to the fair review of an assessment. Thus, in discussing each of the six criteria, the Judge must provide a clear and sufficient understanding of the basis for the assessed penalty.

This duty applies not only to making findings on each of the penalty criteria but also to analyzing any relationships between the criteria that may affect the ultimate penalty assessment. Thus, for example, a discussion of the size of a mine and the frequency of violations in juxtaposition may be informative to the reasoning behind a penalty evaluation more fully than looking at each criterion as a distinct element of a penalty.

We need not plow through a tedious review of the dozens of remands of penalty assessments due to the failure of Judges to make the necessary findings. Contrary to our dissenting colleague's assertions (slip op. at 33-36), remands are not extraordinary and are, in fact, necessary when a Judge does not follow Commission directives. Twenty years ago, the Commission remarked on the failure of Judges to meet the requirements rooted in due process and an adequate basis for review:

> 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).

Hubb Corp., 22 FMSHRC 606, 612 (May 2000).[5]

[5] Commission Procedural Rule 30(a) instructs Judges that their decisions "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). This requirement serves two functions. First, the findings provide the operator with notice as to the basis of the penalty assessment. Second,

Despite the decision in *Hubb*, the Commission continues to find it necessary to remand penalty determinations when Judges fail to supply adequate penalty assessments—that is, an assessment meeting the requirements of due process and adequately explaining the penalty assessment to allow Commission review. *E.g. Virginia Slate Co.*, 24 FMSHRC 507, 514-15 (June 2002); *Sedgman*, 28 FMSHRC 322, 342-44 (June 2006); *Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014).[6] That is precisely the situation with this Judge and this case.

Of course, the Commission does not exalt form over substance. It is not possible to enunciate a precise formula for recitation of penalty factors that would fit all cases. Consequently, as must be obvious, the evaluation of compliance with the requirement for an adequate review of all criteria is case-specific. The Commission does not remand assessments imposed with less than perfection when the Judge's explanation is sufficient in the context of the totality of the case to meet the requirements of due process and fair and informed review. *E.g.*, *Spartan Mining Co.*, 30 FMSHRC 699, 724 (Aug. 2008) (stating that the operator took issue only with the two factors of negligence and gravity upon which the Judge based his assessment); *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016) (noting that the Judge made findings on five factors and making a finding on the sixth factor that the Commission found did not disturb the penalty assessed by the Judge).

The outcome of this case, therefore, does not depend upon identification of a legal standard for making penalty assessments. The standards are well established. Each decision must be case-specific, and the Commission's decision turns on whether the Judge's exposition of the penalty factors permits the Commission to determine that the Judge has fully considered the penalty criteria individually and in relationship to one another.

As set forth below, the Judge's discussion in this case falls far short of meeting the standard necessary for fair review, as required by Commission case law. Therefore, the only proper course is remand.[7]

A. The Judge Erred by Failing to Fully Consider the Statutory Penalty Criteria.

In the proceeding before us, the Judge assessed a $68,300 civil penalty and provided only a terse statement of the basis for his assessment.

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the Commission is provided the information necessary to review the Judge's assessment. *See Sellersburg*, 5 FMSHRC at 292-93.

[6] The requirement for a sufficient explanation applies to *all assessments*. However, it is notable that the Mine Act utilizes a graduated scheme of enforcement. That graduated approach applies to the assessment of penalties—that is, penalties for violations increase toward a statutory maximum as they approach severely violative conduct. In considering imposition of a maximum (or close to maximum) penalty, it becomes particularly important under a graduated scheme of enforcement to completely discuss the full impact of each penalty criterion.

[7] Commissioner Traynor concurs on Parts A and B of this opinion, but writes separately to dissent from Parts C and D.

> Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, the penalty proposed by the Secretary should be applied. [FN 15]
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> [FN 15] ***The other statutory factors were duly considered.*** From the parties' stipulation, it is noted that the factors of good faith and the ability to continue in business did not impact the penalty determination. Regarding production, Atkinson informed that the mine produces about 1.6 million (tons). Tr. 301. This means the Shamrock Mine is a large mine. The violation history is reflected in Exhibit P 2 . . . .

40 FMSHRC at 495 & n.15 (emphasis added).

From the foregoing, it is obvious that the Judge limited his analysis discussion to only two of six statutory factors in the text. In a footnote, he summarily discharged the "other statutory factors" as "duly considered." This abrupt footnote is no demonstration that he considered all criteria sufficiently. In addition to the overall short shrift given these statutory criteria, the Judge's decision was totally deficient of any evaluation of "the operator's history of previous violations" and "the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation." *See* 30 U.S.C. § 820(i); 29 C.F.R. § 2700.30(a).

The record contains highly relevant evidence regarding the operator's violation history. Yet, the Judge did not engage in any analysis and did not make any finding on the possible significance of such evidence. The Judge merely references Government Exhibit P-2.[8]

The Judge's decision is devoid of reasoning as to whether this record of compliance had any effect on the penalty given his negligence and gravity findings. Judges must bear in mind that they are imposing civil penalties to incentivize compliance rather than criminal penalties to punish a crime. An operator's history of violations may be highly relevant to incentivizing compliance. In the absence of circumstances not present here, it is error to ignore the history of violations in imposing a penalty merely by noting an exhibit in the record.[9]

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[8] Ironically, that exhibit reveals a positive compliance record in that the operator had not had a berm violation in six years and only two such violations in its entire history. It did not have any unwarrantable failures in the 15 months preceding the citation. In fact, the operator had received only 19 citations under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for which it was penalized a total of $13,276.

[9] In *Wolf Run Mining Company*, 35 FMSHRC 536 (March 2013), the Commission stated that consistent with the graduated enforcement scheme of the Act, an operator's past history of

Moreover, the parties expressly argued the importance of the history of violations to the proper penalty. *See* Oral Arg. Tr. 15 ("a very good assessment history, very few . . . ."); Oral Arg. Tr. 66 ("a lot of violations for a company"). Thus, the Judge's error of omission here is especially obvious because the significance of the history of violations was a matter of specific dispute. This is a "question of fact" that remains unresolved, despite our colleague's protestations to the contrary. Slip op. at 33 & n.5.

The Judge also erred in stating that the parties had entered stipulations with respect to two penalty factors. 40 FMSHRC at 495 n.15 ("[f]rom the parties' stipulations, it is noted that the factors of good faith and ability to continue in business did not impact the penalty determination."). It is clear from the record that they *had not* entered into such stipulations. The parties' joint stipulations have no reference at all to either good faith abatement or the impact of a $68,300 penalty.[10]

In fact, the parties argued over the significance of the operator's response to compliance "after notice of violations." The parties continue to dispute the sufficiency of the operator's efforts and, therefore, the Judge must make such a finding before reassessing a penalty.[11]

Accordingly, remand is essential in this case in the interest of justice. On remand, we direct the Judge to make specific findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. He must review these factors taking into account the findings on the other penalty criteria. The Judge must then consider his penalty criteria findings along with the record evidence, reassess a civil penalty, and explain his rationale in an independent and reasoned manner.[12]

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significant violations should be considered in considering assessing higher penalties. *Id.* at 542. By parity of reasoning, an operator's history of few violations is relevant in considering the assessment of higher penalties.

[10] Because Solar Sources did not contend that payment of the penalty would affect its ability to stay in business, the mistake as it relates to that particular penalty criterion was harmless error. In *Sellersburg*, the Commission held, "In the absence of proof that the imposition of authorized penalties would adversely affect its ability to continue in business, it is presumed that no such adverse effect would occur." 5 FMSHRC at 294.

[11] The Secretary argues that Solar Sources did not demonstrate good faith abatement efforts. Oral Arg. Tr. 37-38, 57.

[12] The Commission is concerned exclusively with the adjudicative process and does not have a basis, at this point, for determining whether or not the amount assessed by the Judge was appropriate.

B. The Judge Need Not Reconcile the Differences Between His Penalty Analysis and the Secretary's Narrative Findings for a Special Assessment.

In assessing the $68,300 penalty, the Judge stated that "the special assessment in this matter is consistent with the record and the evidence introduced at hearing." 40 FMSHRC at 495 (citing *Rock N Roll Coal*, 38 FMSHRC at 2865). The Judge cited the non-precedential ALJ decision *Rock N Roll Coal* rather than the Commission's relevant decision, *The American Coal Company*, 38 FMSHRC 1987 (Aug. 2016) ("*AmCoal I*"). We note, however, that *Rock N Roll Coal* actually contains findings for each of the penalty criteria and an explanation of the significance of those findings exerted on that Judge's penalty calculation. 38 FMSHRC at 2865-66. Here, the Judge made no such findings. He gave no such explanation. Hence, he did not follow *Rock N Roll Coal* in a proper manner. There is certainly no error in citing a colleague's decision; however, the Judge is bound by Commission precedent and his reliance on a non-precedential ALJ decision should have detailed and clarified how his own independent judgment was informed by the decision in *Rock N Roll Coal.*

Solar Sources contends that the Judge erred by finding that the Secretary's "Narrative Findings for Special Assessment" [13] was consistent with the record evidence when, in fact, there were discrepancies between the Judge's findings and the Secretary's allegations. Specifically, the Secretary alleged that the operator knew or should have known of the poor condition of the berms because a certified person had performed an on-shift examination prior to the accident. Notably, the order alleging an inadequate on-shift examination was vacated by the Judge. Furthermore, the Secretary's narrative alleged that the berms were constructed of slurry while the Judge found that, originally, the berms had been constructed of shot rock.

We find that the Judge's error was *not* in failing to reconcile any differences between his findings and the Secretary's pre-hearing allegations, but instead was in failing to exercise his own responsibility to conduct an independent and reasoned analysis, using *the record evidence. See AmCoal I*, 38 FMSHRC at 1995 ("The Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and *the record.*") (emphasis added).

[13] The portion of the Secretary's "Special Assessment Narrative Form" used to derive the amount of the special assessment penalty proposal does not appear in this record. It was, however, provided to the mine operator in *AmCoal I.* 38 FMSHRC at 1996. The Secretary bears the burden of justifying his penalty proposal under the criteria, and "[w]hen a violation is specially assessed that obligation may be considerable." *Id.* at 1993. Providing a rationale for a special assessment is essential to providing more clarity to the Judge, and to the Commission on review, and the Secretary is obliged to provide more than an opaque process and a secret theory of the case. *See Sellersburg*, 5 FMSHRC at 292-93 (explaining that requirement to discuss penalty criteria is necessary to provide adequate foundation for review).

On remand, the Judge is directed to independently reassess a penalty in accordance with *AmCoal I*. The Judge must then explain the rationale for his penalty assessment using the statutory penalty criteria and the record evidence.[14]

C. The Judge is Not Required to Reconcile His Reassessed Penalty with the Amount Proposed by the Secretary According to his Special Assessment Procedures.

In remanding this matter for penalty reassessment, we note that the United States Court of Appeals for the District of Columbia Circuit mused in the recent case, *American Coal Company v. FMSHRC*, that Commission case law "*seems to point in two directions*" regarding Commission Judges' use of the Secretary's penalty proposal as any sort of reference point. 933 F.3d 723, 728 (D.C. Cir. 2019). In strongly affirming the Commission's independence in determining penalties, the District of Columbia Circuit stated a perception that, for it, seems to have been troubling—namely:

> the Commission's precedent seems to point in two directions. On the one hand, an ALJ's penalty 'assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use [as] a guidepost for his/her assessment' *American Coal*, 38 FMSHRC at 1990. On the other hand, ALJs are supposed to provide 'an explanation of any substantial divergence from the penalty proposal of the Secretary.'

Id.

The court's apparent impression of an inconsistency in Commission law demands prompt clarification. Affected parties, Commission Judges, and courts must understand the fundamental importance of the Commission's penalty directives—especially because the "two directions" noted by the court *are not* separate, divergent paths. To the contrary, each directive is a discrete, bedrock principle of the Commission's jurisprudence that operates with the other to ensure fair, equitable, and consistent penalty assessments.[15] The rationale for these directives rests upon the fundamental distinction between regular and special assessments.

Many Commission decisions state, directly or indirectly, that the Secretary's penalty proposal is not a baseline or starting point, while other decisions require Judges to explain any substantial divergence from the penalty proposal of the Secretary. *Compare AmCoal I*, 38

[14] "While the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." *Cantera Green*, 22 FMSHRC at 621.

[15] The circuit court correctly recognized that the Commission split evenly in its review of the Administrative Law Judge's decision. Accordingly, it found that it would "review the ALJ's legal determinations *de novo* and factual determinations for substantial evidence." 933 F.3d at 726. On this point, no Commission decision was cited by the circuit court and it is unknown the extent to which, if at all, the court reviewed the separate opinions of the Commissioners.

FMSHRC at 1990 (stating that "the Secretary's [penalty] proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment") *with Sellersburg*, 5 FMSHRC at 293 (requiring "a sufficient explanation of the bases underlying the penalties assessed by the Commission" for assessments which substantially diverge from MSHA's proposal).

While, at first, these may appear to be on divergent paths, they work together to preserve the credibility of the administrative scheme and avoid the appearance of arbitrariness. In their proper context, each of these principles is correct. They are complementary approaches that serve the same important objective.

(1) *The Basic Principles*

We established basic principles, long ago, for the fair and consistent assessment of penalties, which include both "directions" referred to by the circuit court along with a third important principle, in a case decided relatively soon after full implementation of the Mine Act. *Sellersburg*, 5 FMSHRC at 290-94. In *Sellersburg*, the operator challenged an Administrative Law Judge's penalty assessments as excessive and an abuse of discretion. The operator further argued that the Judge erred by not following sufficiently the Secretary's penalty assessment regulations. In support of its position, the operator noted the wide divergence between the penalties proposed by the Secretary and those assessed by the Judge, as well as the Judge's failure to consider each of the statutory penalty criteria.

In considering these challenges, the Commission identified three principles that continue to guide Commission penalty jurisprudence:

1. The Secretary's penalty proposals *do not bind* the Commission. The Commission assesses penalties *de novo* in accord with section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.* at 291-92.

2. Judges *must make* findings of fact *for each* of the six statutory penalty criteria. *Id.*

3. Judges *must explain* any substantial divergence from the penalty proposal of the Secretary regarding regular assessments. *Id.* at 293.

The first two principles follow directly from the plain words of the Mine Act. The court's decision in *American Coal* is the latest in a long line of decisions that leave no doubt whatsoever about the Commission's authority to set penalties of contested citations and orders after hearing. Further, Commission case law, including the present case, reiterates the necessity for findings *on each* of the six penalty factors identified in the Mine Act. *See, e.g., Dolese Bros. Co.*, 16 FMSHRC 689, 695-96 (Apr. 1994) (remanding to the Judge where he failed to enter findings on four of the penalty criteria).

The third *Sellersburg* principle does not flow directly from the plain wording of the Mine Act. It arises from the Commission's proper concern for the fair and equitable administration of

penalty assessments across a large, diverse industry, whose operators vary greatly in their types, sizes, sophistication, and safety performance.[16]

From these and other factors and subcategories, it is clear that the Commission sets penalties over an almost limitless number of permutations of penalty factors. Rather than promulgating rules or establishing generalized guidelines for the evaluation and weighing of penalty factors through case law, the Commission has relied upon the substantial divergence principle to establish general uniformity in the assessment of penalties. As explained below, however, this third principle cannot be applied to *special assessments* because it is grounded on the general transparency and consistency of MSHA's process for developing *regular assessment* proposals.

(2) *Regular Assessments*

On May 30, 1978, MSHA published final rules pertaining to the proposed assessment of civil penalties under the Mine Act for coal mines and metal and nonmetal mines. 43 Fed. Reg. 23514, 23515 (May 30, 1978). The rules continued the use of a formula system developed by the Mine Enforcement Safety Administration ("MESA") for imposition of most penalties under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). The formulaic system results in "regular" penalties. 30 C.F.R. §100.3. Regular penalties account for approximately 99 percent of the penalties proposed by MSHA.[17]

Under the regular point system, MSHA assigns numerical points to four of the six penalty factors—size of operator, frequency of violations, negligence, and gravity. The cumulative total of the points determines a penalty through reference to a penalty table. 30 C.F.R. § 100.3(g). This regular system achieves a kind of standardized and normative assignment of penalties across all sizes and kinds of operators and degrees of negligence and gravity.[18] The Commission recognized this benefit in *Sellersburg*, holding:

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[16] Operators range in size from family-owned businesses to multinational corporations. Moreover, even among similar types of operations of the same general size, mines have varying histories of violations. Negligence for a specific violation may fall along the continuum between no negligence and willful or intentional misconduct, and the gravity, as characterized by the Secretary, may also vary greatly.

[17] In *AmCoal I*, 38 FMSHRC at 1987, the Secretary submitted a supplemental statement in response to questioning at the Commission's oral argument in that case, stating that "In fiscal year 2015, slightly less than one percent of all assessments – 1,069 of 115,483, or .925 percent – were special assessments." Sec'y letter dated May 2, 2016 at 3.

[18] The regulations recognize the need for fairness in the assessment of penalties across the range of operators. Section 100.1 of the regulations provides:

> This part provides the criteria and procedures for proposing civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act). The purpose of this part is ***to provide a fair and equitable procedure for the application of the***

> When based on further information developed in the adjudicative proceeding, it is determined that penalties are appropriate which substantially diverge from those originally proposed [by the Secretary], 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.**

Sellersburg, 5 FMSHRC at 293 (emphasis added).

MSHA's regular penalty system represents the agency's professional judgment on the relative importance of the facts of violation and each of the penalty factors and sub-factors. Given the normative formula used by MSHA to propose a penalty of record, the regular penalty system is useful for proposing, insofar as possible, fair and equal penalties across many operators and many penalty factors. When an operator receives a proposed assessment, it has a basis for determining how the penalty was calculated.

This transparency promotes public confidence in the penalty system, and the Commission has recognized the need to preserve consistency and transparency in our proceedings, while allowing our Judges to make generally binding findings of fact and to apply the law so that each case is decided on the particular facts and circumstances in the record. Commission Judges have the authority to assess the penalties, but the Commission has determined to provide instructions regarding that authority to accommodate the interests of fairness and consistency.

Thus, when the penalty assessed by the Judge substantially diverges from a proposed, *regularly assessed* penalty, the Commission *requires* Judges to provide an explanation for the divergence to avoid an appearance of arbitrariness in penalty assessments.[19] Judges have

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> ***statutory criteria*** in determining proposed penalties for violations, to maximize the incentives for mine operators to prevent and correct hazardous conditions, and to assure the prompt and efficient processing and collection of penalties.

30 C.F.R. § 100.1 (emphasis added).

[19] Accordingly, the Commission routinely refers to the role of regular penalty assessments in evaluating citations. *See Unique Electric*, 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998); *Thunder Basin,* 19 FMSHRC at 1504; *Dolese Bros. Co.*, 16 FMSHRC at 695 (finding that the Judge was required to explain a 60% increase in his civil penalty assessment). *See also Dan J. Sheehan Co. v. OSHRC*, 520 F.2d 1036, 1040-1042 (5th Cir. 1975); *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451, 456 (10th Cir. 1976).

properly followed the Commission's directive in literally hundreds of cases over the years since *Sellersburg* was issued in 1983.[20]

Recognition of the normative benefits of regular assessments does not diminish the Commission's duty and authority to set penalties independently based upon findings of fact on all penalty factors. Rather, the Commission has provided a directive to Judges in order to harmonize its exercise with the need for fairness and transparency in penalty assessments. While we reaffirm the requirement to explain an assessment that is substantially divergent from a proposed *regular* penalty, the Commission must recognize the differences between regular and specially assessed MSHA penalty proposals.

(3) ***Special assessments***

Special assessments require a different analysis than regular penalty proposals. MSHA calculates special penalties to substantially increase penalties calculated under the regular point system, in order to address agency enforcement priorities. It does so by adding points to the negligence and gravity elements, without accounting for other statutory penalty criteria or considering the specific facts of the violation. Considering a penalty thus calculated in the same manner as a regular assessment is inconsistent with *Sellersburg*, because the proposed special assessment is itself a substantial divergence from a regular penalty.

(a) The Regulatory Guidance for MSHA

As promulgated in 1978, section 100.5 (then section 100.4) identified specific categories of violations for review for possible special assessment.[21] *See* 30 C.F.R. § 100.4 (1978); 43 Fed.

[20] Of course, the circuit court is correct that, from the statutory perspective of the language of the Mine Act, the Secretary's proposed regular penalty is a litigating position. *American Coal*, 933 F.3d at 727. However, as a matter of Commission case law, the Commission has recognized that the penalty proposed through the regular penalty assessment procedures results from the only existing system designed to provide a measure of uniformity to assessments across the multi-factored penalty process. *AmCoal I*, 38 FMSHRC at 1990-92, 1994-95. As the circuit court also recognizes, Congress empowered the Commission to assess penalties of contested citations and orders after a due process hearing under the Mine Act. *American Coal*, 933 F.3d at 725. Given the Congressional basis for the Commission's authority, courts undoubtedly must defer to reasonable guidelines established by rule or case law by the Commission to superintend Administrative Law Judges in the assessment of penalties.

[21] The 1978 rule actually stated that special assessments may be appropriate in cases of "fatalities and serious injuries, unwarrantable failures to comply with mandatory health and safety standards or patterns of violations under section 104 of the Act, the operation of a mine in the face of a closure order, the failure to permit an authorized representative of the Secretary of Labor to perform an inspection or investigation, discrimination violations under section 105(c) of the Act, failure to abate a violation within the prescribed period, violations by individuals, violations by designated independent contractors, and in other appropriate cases." 30 C.F.R. § 100.4 (1978). Prior to enactment of the MINER Act of 2006, that list had been refined to the following:

Reg. 23517, 23519 (May 30, 1978). In 2007, however, MSHA amended section 100.5 to eliminate any identification of categories of violations for possible special assessment. *See* 72 Fed. Reg. 13592, 13621-22 (Mar. 22, 2007). As amended, section 100.5 gives MSHA open-ended authorization for special assessments. The principal operative provision of the current section 100.5 is subsection (a) that states only, "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." Subsection (b) provides that all findings shall be in narrative form. 30 C.F.R. § 100.5.

MSHA, then, makes special assessments through a combination of internal discretionary decisions and a special assessment formula. Neither of these aspects of special assessment has received public notice and comment. Thus, neither the consistency nor transparency of the regular penalty process is inherent in the special assessment process.[22]

The formula for special assessments provides for substantial increases in negligence and gravity points versus those that would be regularly-assessed, but the agency's authority to refer a penalty for special assessment is not limited to considerations of negligence or gravity. There is no penalty increase in the formula based on the size of the operator or frequency of violations. Accordingly, if a mine operator has an excessive history of violations, MSHA arbitrarily adds points to negligence and gravity rather than frequency to increase the total points for assessment.

Based upon the addition of points to negligence and gravity, the addition of penalty points through special assessment often results in a multiple (quadruple or quintuple) increase in the penalty. These enhanced proposed penalties arise only from the independent decisions of MSHA officials to heavily penalize a particular violation.

> (1) Violations involving fatalities and serious injuries;
> (2) Unwarrantable failure to comply with mandatory health and safety standards;
> (3) Operation of a mine in the face of a closure order;
> (4) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
> (5) Violations for which individuals are personally liable under section 110(c) of the Act;
> (6) Violations involving an imminent danger;
> (7) Discrimination violations under section 105(c) of the Act; and
> (8) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

30 C.F.R. § 100.5 (2006).

[22] Recently, however, an Executive Order was issued emphasizing the importance of transparency in administrative enforcement actions generally and especially for policies affecting enforcement. *See* Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.

Accordingly, while the regulatory guidance may provide some assistance *to MSHA* in specially assessing a penalty, it does not provide adequate guidance to a Judge to ultimately set the appropriate penalty.

(b) MSHA'S Program Policy Manual Guidance

MSHA's Program Policy Manual ("PPM") also provides some guidance to the agency on proposing special assessments, but it also falls short of proper guidance to a Commission Judge. MSHA announced via its PPM that it affirmatively will specially assess a few specific types of violations, but the types of violations subject to consideration have already been changed without input from the public, and the non-binding guidance in the PPM may be changed again, at any time, without notice or comment. III MSHA, U.S. Dep't of Labor, PPM, Part 100, at 101-02 (Dec. 2013).

Separately, the PPM identifies violations that MSHA officials *must* consider for special assessment. III, MSHA, PPM, Part 100, at 101. Together, these categories encompass more than 60 mandatory standards as well as all violations involving an injury or allegedly flagrant violation. The breadth of scope within which the agency exercises its discretion to specially assess is enormous and unregulated.[23] Coupled with the fact that MSHA assesses less than one percent of its penalties under the special assessment program, this vast expanse radically increases the danger for arbitrariness, because, obviously, not every violation so considered results in a special assessment. Oral Arg. Tr. 60.

The PPM also provides a summary of the internal procedures used to make special assessment decisions—generally, completion of a Special Assessment Recommendation ("SAR") form by a District Manager, transmittal of the SAR to the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI") typically for a final decision, but there is no limiting principle that determines which of these considered violations will be specially assessed, or how that conclusion is reached. *Id.* at 102-03. As a result, MSHA may issue citations with congruent fact patterns to mines of the same size and violation history, but then propose assessments in which the proposed penalties for one operator or citation are many multiples higher than the proposed penalty for the other operator or citation. *E.g.*, *The American Coal Co.*, 40 FMSHRC 1011, 1043-44 (Aug. 2018) ("*Amcoal II*") (sep. op. of Acting Chairman Althen and Comm'r Young).

There is no structural requirement that MSHA ever account for the basis for its decision to specially assess a penalty. The Secretary provides a special assessment narrative that briefly explains the factual allegations in support of the specially assessed penalty. However, this document does not explain *why* MSHA singled out this particular citation for special assessment.[24]

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[23] MSHA has asserted that its authority to specially assess a penalty is plenary and unreviewable.

[24] MSHA does maintain such records—MSHA Form 7000-32—but it refuses to provide those records to respondents. Unfortunately, the narrative MSHA does provide may contain only cursory explanations of the basis for a special assessment. *See AmCoal II*, 40 FMSHRC at 1027

Further, the Secretary often claims that records related to the special assessment are privileged and thus not available for the respondent or the Judge. *See, e.g.*, *Big Ridge, Inc.*, 34 FMSHRC 2999 (Nov. 2012) (ALJ). Of course, MSHA has the right to invoke evidentiary privileges. However, this secrecy related to special assessments creates impediments to responding to MSHA's case and may adversely affect the Judge's ability to evaluate the case properly.

(c) Commission Guidance to Judges on Special Assessments

Thus, the *American Coal* court's characterization of the proposed special assessment as a "litigation proposal" is entirely apt. Like all litigating positions, favorable consideration of the agency's proposal for a high penalty is subject to the Secretary's presentation of proof of facts warranting a high penalty. The mere fact the Secretary has proposed a high penalty is irrelevant. As we have held, and as appellate courts have affirmed, the Judge must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point.

For all these reasons, the rationale of the *Sellersburg* principle regarding substantial divergence cannot be applied to specially proposed penalties. Doing so would perversely undermine the basis for *Sellersburg*'s duty to explain. Indeed, understanding that MSHA seeks a far larger penalty than the amount that the regular assessment formula would dictate, the entire focus of a Judge's independent penalty inquiry must be on the factual findings as they relate to the penalty criteria, rather than on the amount sought by MSHA.

We have recognized the distinction between regular and special assessments, and today we emphasize it. Two principles apply uniquely to special assessments.

First, the Commission has held that MSHA "bear[s] the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed, that obligation may be considerable." *AmCoal I*, 38 FMSHRC at 1993. In *American Coal*, 933 F.3d at 727, the court stated that MSHA did not bear any "burden" with respect to a penalty and backhanded MSHA's penalty assessment as if it were unimportant—an impotent litigating position. It is necessary to understand, therefore, that when the Commission used the term "burden" in *AmCoal I*, 38 FMSHRC at 1993, it did not do so in terms of a preponderance of proof standard of review. Instead, the Commission meant that, in seeking to sustain the litigating position regarding a special assessment—that is, an especially large penalty—the Secretary must present evidence to sustain, in the Judge's discretion, the need for a large penalty. This requirement recognizes that MSHA is seeking an extraordinary penalty and must justify its litigation proposal with evidence on each of the penalty factors.

(Aug. 2018) ("[t]ypically, the narrative findings for special assessments are brief and conclusory"). In this case, the narrative was more robust than in other cases thereby illustrating one of the difficulties of an arbitrary system in which the degree of information may vary widely depending upon the individual judgment of the person preparing the material.

Second, MSHA's opaque process for deciding to assess specially and MSHA's consideration of only two penalty factors in the assignment of penalty points is not a suitable basis for a penalty decision by the Commission. Therefore, when MSHA proposes a special assessment, the Judge must base a decision only upon a complete review of the evidence pertaining to each of the penalty factors, a weighing of those factors in the context of the facts, and a final resolution based only upon such careful and fully explained review.

No significance attaches to MSHA's penalty which is specially proposed for litigation purposes. The Judge must assess the penalty *de novo* based only upon the Judge's findings of fact related to each penalty criterion.[25] Of course, it is entirely appropriate for a Judge to fully consider the agency's proposal to treat a given violation as especially egregious for enforcement purposes. The agency may argue that a violation is exceptional and deserves an enhanced penalty by explaining its decision before the Judge and supporting the explanation with evidence. Because the Mine Act provides the Commission and its Judges with the ultimate authority to assess penalties, a Commission Judge may agree with the agency's proposed special assessment, or may assess a greater or lesser amount that is appropriate in his or her assessment of the statutory factors.

MSHA's regulations in section 100.3 are a useful tool in maximizing judicial efficiency and ensuring that *regular assessments* are consistent, fair, and equitable. For that reason, the Commission requires Judges to explain significant deviations from proposed regular assessments.

When MSHA proposes a *special assessment*, however, there must be a full explication of the allegations related to each penalty factor. The Judge's penalty assessment must be commensurate only with the actual factual findings after hearing. Should the Judge elect to explain a difference from MSHA's proposed assessment, that is clearly an option. This safeguard against arbitrary sanctions is entirely consistent with *Sellersburg* and with the Commission's historical exercise of its independent statutory authority.

D. The Concerns in the Dissenting Opinions are Misplaced.

Finally, we must review, albeit briefly, our colleagues dissenting views regarding the directives established in this opinion. Our colleagues respond to this straightforward opinion that essentially only reaffirms the right and duty of the Commission to set penalties. Although they write separately, they say essentially the same thing and are both misplaced.

Contrary to the declaration of our colleagues, our instruction to Judges is firmly grounded on our majority decision in *AmCoal I and is* precedential. It goes without saying that the manner in which the Commission instructs Judges to assess penalties under section 110(i) of the Mine Act is not a matter for dispute between parties to a Commission proceeding. Our charge, as a

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[25] In *AmCoal II*, 40 FMSHRC at 1035-38, then Acting Chairman Althen and Commissioner Young addressed the almost inevitable tug of an MSHA penalty proposal as an anchor to the Judge's decision. Judges must avoid the unconscious effect of the special assessment and act only based on the penalty criteria.

Commission, is to set forth policies, interpretations, and rules, including those governing penalty assessments under section 110(i).

As a corollary to this principle, our colleagues are incorrect in suggesting that we could only offer this opinion if the issue of divergence between a Commission assessment and a MSHA proposal was raised in a Petition for Discretionary Review. Slip op. at 23-24 & n.1, 36-37. The principle discussed here involves only a legal issue, and more specifically, a legal issue raised by the Commission to assure fairness and transparency in its decisions. We review legal issues *de novo*, and it is obviously necessary for us to apply the correct legal standard in deciding cases on review.[26]

The correct legal standard, as it applies to special assessments, was articulated by the Commission's majority decision in *AmCoal I.* Our decision in that case is a natural extension of the principles of *Sellersburg*. In fact, the Commission's institution of the *Sellersburg* requirement to explain substantial divergences between the Judge's penalty and an MSHA regularly proposed penalty *did not arise* out of a petition for discretionary review raising the issue of explanation of differences. The Commission, there, affirmed its right and duty to assess final penalties. In doing so, it also imposed a duty to explain a substantial divergence in the Judge's assessment from a proposal arrived at through the formally instituted, transparent, regular penalty point system adopted by MSHA. As we have explained, *Sellersburg* has functioned as a counter to potentially arbitrary outcomes, as was *AmCoal I.* Here, we refine that instruction consistently with its original and ongoing purpose.

The indecision reflected by a divided Commission created in *AmCoal*, 40 FMSHRC 1011, is what the circuit court perceived as incoherence driven by legal principles in tension. As our opinion reflects, however, there is no actual tension. Rather, both the *Sellersburg* and *AmCoal I* precedents are intended to ensure consistent, fair, and principled penalty assessments. It was incumbent on the Commission to correct the court's misapprehension of our precedents and the operation of the Secretary's special assessment program. That, we have done.[27]

Here, we reaffirm the core principle that Commission Judges have the authority and duty to set penalties and that MSHA's proposed assessments constitute litigating positions. Moreover, in this opinion, the Commission clarifies that Judges *are not required* to explain their divergence from a special assessment.[28] To be clear, there is, however, absolutely no prohibition

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[26] Beyond the practical necessity of applying the correct standard, Solar Sources did in fact *specifically* object to the Judge's conclusions as to the penalty and his failure to "adequately explain the basis for the $68,300 penalty . . . *as the Commission directed in American Coal*, 38 FMSHRC 1987 (August 30, 2016), on how penalties, *including special assessments*, are to be calculated." PDR at 2 (emphasis added).

[27] The Commission's instruction certainly does not create any danger or even significant changes to the fair assessment of penalties that our colleagues seem to fear or infer in their opinions.

[28] The views of the dissenters are internally irreconcilable. They recognize, even emphasize, the independence of our Judges' penalty decisions *but then* find we must require

on a Judge to explain a divergence should the Judge be so inclined. Our colleagues do not dispute that MSHA's special assessments are opaque.[29] This obscurity gives MSHA the ability to enhance penalties at its sole discretion without ever committing to a rationale upon which that determination rests. Further, MSHA has not submitted any substantive aspect of the special assessment procedures to public notice and comment and it changed its special assessment procedures from a clearly-expressed, publicly-vetted process.[30] The Commission has never reckoned with this departure from principles of administrative law.

Thus, *requiring* our Judges to explain divergences from opaque MSHA penalty assessments serves neither the goal of transparency and public trust nor the principles of fair and objective assessments.[31] On the contrary, such a requirement would interject a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, whether or not the reason for the enhancement has been validated by the trial process.

We thus agree that the fact that the penalty is specially assessed—standing alone—is completely irrelevant. Rather, the Judge must consider the proffered basis for the enhanced penalty and the evidence supporting it. The Commission then reviews the Judge's decision to determine whether substantial evidence supports findings of fact that underlie the penalty assessment and, in turn, whether the assessment is arbitrary and capricious when based upon facts supported by substantial evidence. The views of our colleagues notwithstanding, this is not a "new" or "additional" burden of proof on the Secretary (slip op. at 26-27, 37-39); it is the same burden he bears on every other issue under the Mine Act and the Administrative Procedure Act, 5 U.S.C. § 500 et seq.[32]

Judges to take into account or at least explain variances from opaque special assessments. Slip op. at 24-26, 37-39. Such a belief is at odds with the status of a Secretary's special penalty proposal as a uniquely unexplained litigating position.

[29] The dissenters do not identify any benefit for requiring an explanation for a variance from an assessment that was arbitrary from the outset. The decision to assess specially is discretionary and not governed by any mandated rules. In turn, MSHA makes the assessment through a system in which facts of the case may have no bearing upon the increase in the penalty.

[30] *See* slip op. at 14-15 and n.21, *supra.*

[31] Our dissenting colleagues note the motivation for *Sellersburg*—without any reference to language in *Sellersburg* or any other case to support that speculation. Slip op. at 25-26, 37-39.

[32] One dissenting colleague goes so far as to presume that by retaining the *Sellersburg* explanation requirement for regular penalty assessments, we find that regular penalty assessments are "inherently reasonable." Slip op. at 38. She misses the point entirely. We do not find any penalty to be "inherently reasonable;" we credit regular assessments as the product of a transparent process that provides a basis for the Secretary's litigating position. There is a bulwark in that process against arbitrary results, unlike with special assessments. This is the entirety of the problem: The rationale for the application of *Sellersburg* does not apply to special

Our decision today does not make any draconian changes, or indeed changes at all, in the assessment process. We only reinforce the need for *all* penalties to be independently assessed, consistent with the Mine Act and our precedents. In order for us to ensure that is done in this case, and in future cases, we remind our Judges that they are free from unintended and irrational restraint, or anchoring, in their discretionary decision-making. Where the Secretary properly explains the basis for a special assessment, the Judge's independent assessment will be informed by the facts of the case, and not a perceived need to justify a variance from an opaque special assessment.

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assessments, because the Secretary has refused to provide regularity and transparency to that process.

We trust that the equivalency our colleague draws between regular and special assessments does not mean that she actually finds special assessments to be inherently reasonable, despite the Secretary's obdurate failure to lift the veil and commit to a thesis for such assessments as a matter of policy. Such a position would be contrary to the principle we reinforce today: the right and duty of Judges to make independent assessments in every case, without being tethered to a policy decision whose foundations may or may not remain viable post-hearing.

III.

Conclusion

In light of the guidance set forth in this Decision, and returning to the citation at issue, remand is essential in this case in the interest of justice. Accordingly, we direct the Judge to exercise his responsibility to conduct an independent and reasoned analysis, using the record evidence. That analysis is to include findings of fact or meaningful explanation on each of the statutory penalty criteria, and particularly in this case, to make findings regarding the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation, consistent with the requirements of Commission Procedural Rule 30(a) and section 110(i) of the Mine Act. The Judge should then reassess a civil penalty in accordance with the established Commission precedent of *AmCoal I.* Accordingly, we vacate the Judge's penalty assessment and remand the case to the Judge so that he may enter a penalty assessment consistent with this opinion.[33]

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

[33] Commissioner Traynor concurs with the decision to remand this case to the Judge based on Parts A and B only.

Commissioner Traynor, concurring with the majority on Parts A & B and dissenting from the majority on Parts C & D:

I agree with the majority's conclusions that the Judge erred in failing to fully consider the statutory penalty criteria and with their finding that the Judge need not reconcile the differences between his penalty analysis and the Secretary's narrative findings. In fact, had the majority's analysis ended here—where it should have—I would have likely signed their opinion. Yet, for the reasons described herein, I regretfully cannot.

The majority purports to decide issues that were not raised before the Judge in the proceeding below, not addressed in the operator's petition for discretionary review, and not briefed to us. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823 (d)(2)(A)(iii), requires a party to "separately number[] and plainly and concisely state[]" each issue for which review is sought and further states that "[i]f granted, review shall be limited to the questions raised by the petition." Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), echoes this restriction. Here, the question of whether a Judge needs to adhere to our decision in *Sellersburg Stone Company*, 5 FMSHRC 287 (Mar. 1983), and explain any substantial deviation between the Secretary's special assessment and the Judge's penalty assessment was not raised in Solar Sources' petition. Nor was there an issue raised of whether a Judge must meet a newly announced and "considerable" burden to justify penalty amounts assessed in cases involving special assessment proposals. Accordingly, the parties did not have notice or the opportunity to be heard before the Commission on the issues implicated in the majority's attempt to upend long-settled legal principles.[1] These issues, which have nothing to do with resolution of the issues raised in Solar Sources' petition, are not properly before the Commission.

Tacitly acknowledging their opinion exceeds the scope of the PDR, the majority claims that it has the right to "review legal issues *de novo*." Slip op. at 18. The Mine Act provides a mechanism for the Commission to review legal issues or Commission policy *sua sponte*, but the majority did not utilize it here. 30 U.S.C. § 823(d)(2)(B).[2] Because the majority has addressed

[1] The majority claims that Solar Sources specifically addressed these issues in its PDR when it alleged that the Judge did not "adequately explain, the basis for the $68,300 penalty . . . as the Commission directed in *American Coal*, 38 FMSHRC 1987 (Aug. 30, 2016)" ("*AmCoal I*"). PDR at 2; slip op. at 19 n.26. They are incorrect. In *AmCoal I*, the Commission found error in a Judge's *de novo* penalty assessments and accordingly remanded the citations—originally subjected to the Secretary's special assessment procedures—ordering the Judge to reassess the penalties consistent with the opinion. 38 FMSHRC at 1998. Notably, *American* repeatedly cites *Sellersburg* favorably, for the exact legal proposition that the majority now aims to overturn, stating explicitly that the Judge is "require[d] [to] explain a substantial divergence from the [specially assessed] penalty proposed by the Secretary." *Id.* at 1996. In fact, the *American* decision noted that *Sellersburg* requirements "do[] not constrain the independence of the Judge to make a final penalty assessment . . . ." *Id.* Accordingly, the majority's instructions here are certainly *not* "firmly grounded on our majority decision in *AmCoal I* and [] precedential." Slip op. at 18. Nor can Solar Sources' PDR be construed as the majority suggests.

[2] "At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review but only upon

legal issues *sua sponte*, without a prior grant of review, they act *ultra vires* of the Mine Act. 30 U.S.C. § 823(d)(2)(B). ("If a party's petition for discretionary review has been granted, the Commission *shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.*") (emphasis added).

Though much of what the majority opinion purports to decide exceeds our statutory authority and is therefore without precedential value, I write for the benefit of our Judges and the public about two particular aspects of the majority's approach to penalty assessment that are inconsistent with over 35 years of precedent and practice. First, the decision in *American Coal Co. v. FMSHRC*, 933 F.3d 723 (D.C. Cir. 2019), is the most recent in a long line of precedents prohibiting our Judges from exercising their penalty assessment authority differently depending on whether the Secretary proposes penalties under his regular or special assessment regulations. Second, equally settled law prohibits our Judges from subordinating their assessment role to the point counting system used to compute the Secretary's proposals or any inflexible standard of proof irrelevant and ill-suited to their independent exercise of wide discretion.

A. Judges Should Continue to Explain Any Substantial Divergence Between a Proposed Penalty and Final Assessment Without Regard for How the Secretary Proposed the Penalty.

In *American Coal*, the D.C. Circuit uncritically observed that our precedent "seems to point in two directions" by: 1) requiring that our Judges make an assessment independent from the Secretary's penalty proposal while at the same time 2) explaining any substantial divergence from the proposal. 933 F.3d at 728. The majority misreads the opinion, projecting on the court a "troubling" perception of "an inconsistency in Commission law" that "demands prompt clarification." Slip op. at 10. Yet nothing in the court's opinion describes the "two directions" as troubling, inconsistent, incompatible, unworkable or in need of change. Ultimately, the court endorsed our "two directions" as equally necessary by affirming in that case "*all that matters here* is that the ALJ satisfied *both* of those standards, provided an independent and reasoned basis for the penalty calculation, and supported all relevant factual determinations with substantial evidence." 933 F.3d at 728 (emphasis added). Even in a case involving a proposal for a penalty that was specially assessed, the court held it *matters* that our Judges explain any substantial divergence from the government's proposal.

In an opinion it frames as a response to the D.C. Circuit, the majority in this unrelated case purports to release our Judges from the responsibility of satisfying one of these two standards—the substantial divergence explanation—in those cases in which the Secretary proposes a special rather than regular assessment. This would create the first ever exception to what has for several decades been a universal requirement in all civil penalty cases that our Judges explain any substantial divergence between the Secretary's proposal and the final assessment. *See Sellersburg*, 5 FMSHRC at 287. The majority's rationale for this carve-out is couched in a lengthy explanation of how the Secretary's discretionary decision to propose a

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the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved . . . ." 30 U.S.C. § 823(d)(2)(B).

specially assessed penalty is different than the computation of points under the regular assessment proposal process. In short, the majority claims the original rationale for the substantial divergence explanation in our *Sellersburg* decision—avoiding the appearance that penalties are arbitrarily raised or lowered after contest—is not present unless the Secretary's proposed penalty is rooted in the regular assessment process point calculations. This conclusion flows from the majority's belief that only explanations of a divergence from a penalty computed by the regular point system can preserve "consistency" and "transparency" in our penalty proceedings. Slip op. at 13-15.

In *Sellersburg*, we were not, as the majority contends, motivated to require an explanation of substantial divergence by a desire to foster consistent penalty assessments. Nor did we seek to foster "consistency" in penalty assessments or "equal penalties across many operators . . . ." *Id.* at 13. Consistency is not referenced anywhere in the *Sellersburg Stone* opinion or in the Mine Act. And it is not a goal our Judges are required by any other source of law to pursue.[3] *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186 (1973) (rejecting argument that agency must achieve "uniformity of sanctions for similar violations" where no such requirement is found in the enabling statute).

Transparency motivated our *Sellersburg* decision. There, we introduced the concept of a substantial divergence explanation with the observation that in our early penalty assessment cases "the Secretary's proposed penalties are usually of record in a Commission proceeding." 5 FMSHRC at 293. We wanted to ensure the Secretary's recommended penalties would remain a matter of record, and a Judge's assessment and explanation of any divergence readily apparent in the text of our decisions.

Our *Sellersburg* rule requiring explanation of divergence enables Congress, agency officials and the public to examine and evaluate the role of both parties to our bifurcated model. We have for decades required written explanations of substantial divergence in cases involving both regular and special assessment proposals, in part, because Congress recognized "that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S. Rep. No. 95-181, at 45 (1977) reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). Any reader of a civil penalty decision can easily ascertain the penalty amount proposed, and review a Judge's explanation of why the Commission arrives at a final assessment greater or less than the proposed amount. Just because such explanation may not be reducible to a mathematical expression does not mean it is without value. The transparency benefits of our rule are equally true in special assessment cases and it is difficult to understand how exempting a subset of our cases from the rule providing these benefits could be justified by transparency concerns.

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[3] The appropriate process for assessing penalties is set forth more fully in Section B, below, followed by a discussion of the proper standards by which the Commission reviews its Judges' assessments.

The majority states they will exempt special assessment cases from our *Sellersburg* rule requiring substantial divergence explanations because "the Commission must recognize the differences between regular and specially assessed MSHA penalty proposals." Slip op. at 14. But when we review penalties, any focus on the Secretary's internal process for proposing penalties is misplaced. Asking our Judges to distinguish between regular and special assessments to determine whether or not a substantial divergence explanation is needed is not consistent with the principle that "[w]hat internal remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point." *American Coal Co.*, 933 F.3d at 727; *see also Mach Mining LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016); *U.S. Steel Mining Co.*, 6 FMSHRC 1148, 1150 (May 1984) ("[I]t is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under [30 C.F.R. §] 100.3 [regular assessment regulation] . . . or [30 C.F.R. §] 100.5 [special assessment regulation.]").

B. We Do Not Review a Discretionary Penalty Assessment Decision for Evidentiary Support, Whether the Proposal is Regularly or Specially Assessed.

We have long held that the discretionary decision to assess a penalty amount "must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act." *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). And findings on each of the penalty criteria must be supported by substantial evidence. But never before the majority's decision in this case have we indicated that we will scrutinize the Judge's discretionary assessment decision itself for "substantial," "considerable," or any other type of evidentiary support. Never before the majority's decision have we attempted to apply *any* burden of proof to the assessment decision itself (in addition to the section 110(i) findings), let alone a burden that increases when the Secretary proposes a special rather than regularly assessed penalty.

The majority suggests we apply a seemingly demanding version of substantial evidence review to penalty assessment decisions we have long reviewed only for abuse of discretion, explaining that in the case of a specially assessed penalty, the Secretary bears a burden to explain and justify with substantial evidence that the facts of the case support the proposition that the particular violation "is exceptional and deserves an enhanced penalty." Slip op. at 17-18; *see also id.* at 17 ("[I]n seeking to sustain the litigating position regarding a special assessment—that is, an especially large penalty—the Secretary must present evidence to sustain, in the Judge's discretion, the need for a large penalty.").

In *The American Coal Co.*, 38 FMSHRC 1987, 1993 (Aug. 2016) ("*AmCoal I*"), we opined that the Secretary "bear[s] the burden before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed, that obligation may be considerable." In the case at hand, the majority seizes on the conditional phrase, "*may* be considerable," as support for a new proposition—the Commission will scrutinize a Judge's penalty assessment for heightened evidentiary support in cases in which the penalty that was originally proposed was specially assessed. In the majority's new standard, the word "may" is now absent. And gone

with that word "may" is the Judge's wide discretion to independently assess a penalty amount after considering the statute's section 110(i) factors and deterrent purpose.

The majority purports to make a Judge's penalty assessment of contested penalties reviewable for substantial, even "considerable" evidence. Yet nowhere in *AmCoal I* did we express anything close to an intention to so radically alter the foundational standards governing our review: substantial evidence for each of the findings and then abuse of discretion for the explanation as to how the penalty amount chosen is supported by the section 110(i) findings and the Act's deterrent purpose. Never before have we applied a substantial evidence, considerable evidence, or any other type of evidentiary review to the Judge's discretionary choice of penalty amount. Furthermore, never before has the Commission suggested that the Judge alter his or her approach to a penalty assessment depending on how the Secretary's originally proposed penalty was derived.

When the D.C. Circuit reviewed our decision in *The American Coal Co.*, 40 FMSHRC 1011 (Aug. 2018) ("*AmCoal II*"), it explicitly rejected the argument that we must "require the Secretary to prove the grounds for his proposed penalty by a preponderance of the evidence" explaining that approach "fundamentally misunderstands the ALJ's task." *American Coal*, 933 F.3d at 726. Similarly, no evidentiary burden—whether substantial, a preponderance, or considerable—can be required as justification for the decision to assess any particular penalty amount. Such a burden would be inconsistent with the wide discretion we expect our Judges to exercise when determining a suitable penalty amount at the conclusion of the independent penalty assessment process described in our precedents.

1. The Judge Makes Evidentiary Findings and then Assesses a Penalty Supported by those Findings.

That process begins with a Judge making a finding of fact on each of the section 110(i) penalty criteria by examining and weighing evidence material to each criterion. Each finding must be backed by substantial evidence. At that point, the Judge must consider the section 110(i) findings to assess a penalty amount. The Judge has wide discretion to assess any penalty amount within the statutory minimum and maximum. A Judge is "not required to weigh the criteria in assessing the penalty in the same manner that the criteria are weighed in the proposal of a penalty." *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014).[4] "Judges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Id.* at 1979 (quoting *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001)). And a single finding on only one or two of the six criteria could justify assessment of the statutory maximum even where findings entered on the other criteria would tend to mitigate a penalty, if rationally explained by reference to the section 110(i) findings or deterrence. *See Knight Hawk Coal, LLC*,

[4] Despite the protests of the majority, a Judge has the discretion to assess a high penalty, for reasons independent of or similar to the Secretary's original rationale. Accordingly, the Secretary's failure to substantiate a particular allegation in his penalty narrative does not abridge the Judge's discretion to assess a penalty. Similarly, the Judge's discretion cannot be diminished by the contents of or omissions in the Secretary's Program Policy Manual, specific calculations in MSHA Form 7000-32, or by the Secretary's penalty proposal for a different violation at a different mine.

38 FMSHRC 2361, 2373 (Sept. 2016). For instance, the Commission has held that Judges have not abused their discretion for more heavily weighing gravity and negligence than the other criteria. *See, e.g., Signal Peak Energy, LLC*, 37 FMSHRC 470, 485 (Mar. 2015).[5]

We have consistently held that the Judge must provide an "adequate explanation of how these findings contributed to his penalty assessments." *Cantera Green*, 22 FMSHRC at 622. "While the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the Judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." *Id.* at 621. Finally, where the amount that has been assessed is substantially more or less than the Secretary's proposed penalty, the Judge must also explain the divergence. *Sellersburg*, 5 FMSHRC at 293.

2. The Commission Reviews the Judge's Findings for Substantial Evidence and then Reviews the Judge's Assessment for an Abuse of Discretion.

Our review of a challenged penalty assessment is a two-step process. First, we review the findings of fact on each of the section 110(i) criteria under the substantial evidence standard, looking for "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). Then, we review the Judge's assessment decision for abuse of discretion, which must be "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Sellersburg*, 5 FMSHRC at 294.

We do not evaluate whether the facts underlying the findings are of the type or quantity sufficient to justify some burden that varies according to the penalty amount. Where any argument for subjecting discretionary penalty assessment decisions to an evidentiary standard "goes wrong is in trying to extend that burden of proof to the Secretary's suggested penalty amount." *American Coal*, 933 F.3d at 727. The assessment decision itself, unlike the section 110(i) findings, is not a factual finding and therefore not in need of *any* evidentiary support, let alone "considerable" evidence, whether it is proposed as regular or special. *Sellersburg*, 5 FMSHRC at 294 ("[D]etermination of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact."); *cf. Beall Const. Co. v. OSHRC*, 507 F.2d 1041, 1046 (8th Cir. 1974) ("The assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power. Our review of such penalties is whether there has been an abuse of discretion." (internal citation omitted)). Relatedly, the Secretary is not required to prove facts justifying his decision to propose a special rather than regular assessment, or facts justifying any divergence between the special assessment proposal and what the proposal would have been under the formula used to propose regular assessments.[6]

[5] The majority's call for the Commission to review penalty assessments that approach the statutory maximum to determine if substantial evidence supports a finding that the underlying violation was "exceptional" cannot be reconciled with such discretion.

[6] The majority here cannot square dicta in its opinion, including over five pages discussing the difference between a regular and specially assessed penalty proposal, with our

Indeed, the point system the Secretary uses to make regular penalty proposals should not in any way operate to limit or dictate the final amount assessed. And Judges deciding penalty amounts should decline to create in their minds an imitation of the point system to which they might subordinate their obligation to assess penalties that will deter violations of the Act.[7] The Mine Act sets the minimum and maximum penalties that can be assessed, and no "amount" or "type" of evidence is necessary to justify the assessment of a penalty anywhere along the spectrum ranging from this statutory minimum to maximum amount, as long as supported findings and deterrence are considered. Where along that spectrum a final assessment is located does not need to bear any relationship whatsoever to the point system's "regimented formula [that] mathematically converts findings regarding the six statutory factors into predetermined dollar values." *American Coal*, 933 F.3d at 725.

Penalty assessments are reviewed only for abuse of discretion. Requiring our Judges to justify their discretionary decision to assess any particular penalty amount by reference to some standard of proof would not be consistent with abuse of discretion review. Such a requirement would encroach on their discretion. Indeed, the D.C. Circuit has expressly held that no more than a limited set of things must be addressed in a Judge's explanation of his or her exercise of discretion, and that these things are sufficient, without more, to adequately explain an assessment decision:

> The ALJ rationally explained his penalty assessments with reference to each of the six statutory factors, and he expressly disclaimed any use of the Secretary's proposed specially assessed penalties as a baseline or starting point. Rather than discounting the proposed penalties, he arrived at an independent determination of a penalty amount that would respond to the seriousness of the Company's violations and would deter future violations. The ALJ also contrasted his judgment with that of the Secretary to the extent that there were any substantial deviations in his penalty amounts that would require an explanation. The **ALJ need drill no deeper.**

Id. at 728 (internal citations and punctuation omitted and emphasis added).

The D.C. Circuit in *American Coal* was not troubled by the "two directions" that have guided our penalty assessment process since our decision in *Sellersburg*. It affirmed them both. *Id.*

Accordingly, I strongly dissent from Parts C and D of the majority opinion, in which the majority asserts in dicta that Judges must exercise their discretionary assessment authority differently depending on whether the proposed penalty is regular or specially assessed. I also

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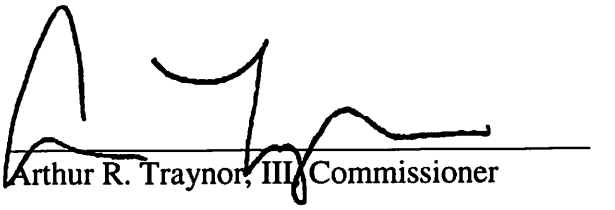
precedential holding that the Secretary's internal decision to make a regular or special assessment is "irrelevant to the Commission for penalty assessment purposes." *U.S. Steel Mining Co.*, 6 FMSHRC 1148, 1150 (May 1984).

[7] In the same way, a proposed special assessment should not be an "anchor" or "starting point" for an assessment.

disagree with the majority's characterization, also dicta, of our Judges' highly discretionary penalty assessment process and the standards we apply to review the same. However, I agree with the majority in result only as to Parts A and B of their opinion, that the case should be remanded for specific findings regarding the operator's history of violations and demonstrated good faith in achieving rapid compliance and for the Judge to assess a civil penalty.



Arthur R. Traynor, III, Commissioner

Commissioner Jordan, dissenting:

I. The Judge's Penalty Assessment Should be Affirmed

The Mine Safety and Health Administration ("MSHA") charged Solar Sources with violating a safety standard that requires berms at certain locations to prevent vehicles from overturning. The Judge found a violation and assessed a penalty of $68,300, the amount of the Secretary's specially assessed penalty proposal. On appeal, the operator challenges only this penalty. The majority remands the case, requiring the Judge to explain how the operator's history of violations and its good faith abatement of the violation affected his penalty determination. For the reasons stated below, I believe that remand is unnecessary, and would affirm the assessment.

The citation was issued after an accident occurred in which a dump truck broke through a berm and went over an embankment to a slurry pit approximately 47 feet below.[1] The truck landed upside down. The driver jumped from the truck before it went over the embankment and was seriously injured.

The Judge found the violation was a result of the operator's high negligence and unwarrantable failure[2] and significant and substantial ("S&S"),[3] rulings the operator did not appeal. The Judge noted the Secretary's contention that the condition existed for a period of time and that the operator had knowledge that berms were a constant problem requiring attention. 40 FMSHRC 462, 493 (Mar. 2018) (ALJ). In short, this was an extremely serious violation.

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).[4] As there is ample evidence supporting this assessment, I find that the Judge did not abuse his discretion.

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[1] The citation charged a violation of 30 C.F.R. § 77.1605(l), which provides: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

[2] Unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987).

[3] The term "significant and substantial" derives from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contributed to the cause and effect of a . . . mine safety or health hazard."

[4] An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *The American Coal Co.*, 38 FMSHRC 1972, 1984 (Aug. 2016).

Section 110(i) of the Mine Act requires that in assessing civil monetary penalties, the Commission consider six 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. 30 U.S.C. § 820(i).

The Judge's decision focused on two of these factors, gravity and negligence. In explaining his penalty assessment, the Judge stated:

> Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated and that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, the penalty proposed by the Secretary should be applied.

40 FMSHRC at 495. He stated that the other section 110(i) penalty factors "were duly considered," and he mentioned each of them in a footnote. *Id.* at 495 n.15. "To be clear," he noted, "the Court's penalty determination has been determined by evaluation of the six statutory criteria." *Id.* at 495.

Turning to the gravity factor, this violation created an extraordinarily dangerous—and potentially fatal—hazard. In his S&S discussion, the Judge concluded that the lack of berms contributed to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the incline. *Id.* at 494. He emphasized that "[t]here is no question that the haul truck went through the berm and ended up going over the embankment, landing at the bottom of the slurry pit and that the haul truck driver, though receiving significant injuries from the accident, was fortunate to escape from his vehicle." *Id.* at 492.

Regarding negligence, the Judge stated (in his discussion of the merits of the unwarrantable failure allegation):

> [T]he Secretary asserts that the duration of the inadequate berm was: "long enough for the hazard to have been identified and recorded in the onshift records;" of such extensiveness to cover the width of the slurry dumping area; without any efforts to address the hazardous berm's muddy consistency; and presented an obvious and dangerous hazard about which the Respondent should have known of its existence. *Id.* at 23-24. As stated before, and on the same bases, and as discussed further *infra*, the Court agrees that this was an unwarrantable failure.

Id. at 488. Thus, clearly the Judge determined that the negligence level of the operator was high.

The Commission has acknowledged that a Judge need not assign equal weight to each of the penalty assessment criteria and that it has previously held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *See Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373-74 (Sept. 2016); *Signal Peak Energy, LLC*, 37 FMSHRC 470, 484-85 (Mar. 2015); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Here, the Judge assessed a significant penalty in a case in which he found that a dangerous condition (that the operator admitted was a constant problem requiring attention) had existed for a period of time. This does not constitute an abuse of discretion.

Moreover, Commission precedent makes clear that remand is not required in this case. In *Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984), for example, the Judge's decision contained discussion and findings on only two of the six statutory penalty criteria (negligence and gravity). The decision was "devoid of specific facts and findings bearing on the remaining four criteria." 5 FMSHRC at 292. In that case there was a wide divergence between the proposed penalties and the Judge's assessments.

Nonetheless, the Commission stated that a remand for the entry of findings on the criteria was unnecessary and would needlessly prolong the proceedings. In the interest of judicial economy, it entered the required findings rather than remanding for the Judge to do so, noting that there was no controversy between the parties concerning the record evidence bearing on each of these criteria. *Id.* at 293-94. In fact, the Commission acknowledged that, as in the instant case, "[t]he uncontroverted nature of the evidence bearing on these criteria may explain why the Judge did not make express findings in his decision." *Id.* at 294 n.9.[5]

The Seventh Circuit affirmed this decision, explicitly holding that "the Commission's entering of undisputed record information as findings was proper under the [Mine] Act." 736 F.2d at 1153. The court relied on language in the Mine Act stating that "[t]he Commission . . . may . . . modify the decision or order of the administrative law judge in conformity with the record." *Id.* (citing 30 U.S.C. § 823(d)(2)(C)).

The majority's insistence on remand in this case is antithetical to the Seventh Circuit's conclusion in *Sellersburg*:

> The Commission must remand a case to the ALJ only if it "determines that further evidence is necessary on an issue of fact." Given the Commission's conclusion that uncontroverted evidence

[5] Regarding the operator's history of violations, in *Sellersburg*, the Secretary had entered an exhibit into evidence indicating the number of violations charged and penalties for violations paid during the relevant two-year period. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983). The Commission determined that therefore the operator had at least a moderate history of previous violations. *Id.* In this case, the Secretary entered a similar exhibit into evidence, Ex. P-2, to which the Judge referred when referencing the operator's violation history. Solar Sources has never challenged the accuracy of this information. Although my colleagues assert that the Commission cannot make its own findings on this factor, slip op. at 8, I conclude that, given that there remains no factual dispute regarding the violation history, the parties' disagreement as to the significance of the uncontroverted evidence is not a reason to remand the case.

> did not warrant further factual findings, such a remand was not required in this case.

Id. (citation and footnote omitted).

Similarly, in *Knight Hawk*, a unanimous Commission affirmed a $70,000 penalty assessed by the Judge. The Judge below had discussed her findings related to five of the penalty criteria but did not make express findings about history of violations (although she was aware of the history). The Commission, relying on *Sellersburg*, stated that findings may be entered by the Commission on review based on undisputed record evidence. In the interest of judicial economy, the Commission made the finding on history, ruling that the operator's safety record weighed in favor of a penalty less than $70,000. Nonetheless, it held that the Judge's determinations regarding the other criteria supported her penalty assessment, in particular because the gravity of the violation was S&S and undisputed. It noted that the Judge gave significant weight to the operator's negligence, the high degree of danger and the operator's failure to enforce the safety policy at issue. 38 FMSHRC at 2373-74.

The Commission's decision in *Signal Peak* also countenances against a remand here. In that case, the operator argued that the Judge did not provide adequate justification to account for the difference between the Secretary's proposed penalties ($51,400) and the penalties which the Judge independently assessed ($83,750). The Commission disagreed, and concluded that, except to the extent one of them exceeded the statutory maximum, the Judge did not abuse his discretion in raising the penalty amounts. 37 FMSHRC at 484-85.

In *Signal Peak*, the Judge's discussion regarding the history of violations mirrored the finding at issue here. The Judge stated only: "In terms of the mine's history of violations, the court has taken into account GX 21, the certified Assessed Violation and History Report." 34 FMSHRC 1346, 1382-83 (June 2012) (ALJ). Yet the Commission saw no need to remand the case for additional analysis of this factor.

In addition, in *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008), the operator argued that in raising the penalties from the amounts proposed by the Secretary, the Judge erred by failing to discuss the required penalty criteria under section 110(i). The Commission noted that the operator specifically took issue only with the two factors of negligence and gravity, and thus affirmed the Judge's general discussion of the other four penalty factors as adequate to support his penalty determinations. *Id.* at 723-24. Notably, the Judge's entire discussion of history of violations and abatement consisted of the following: "The history of violations and Spartan's abatement efforts are not a material factor in determining the appropriate penalty liability." 29 FMSHRC 465, 478 (June 2007) (ALJ). Again, no remand was required.

The majority also remands the case to the Judge to enter findings regarding whether the operator demonstrated good faith in attempting to achieve compliance after notification of the violation. Given that the sole evidence in the record regarding abatement confirms that all of the operator's efforts were mandated by MSHA, I am hard-pressed to see how this evidence could be used to change the amount of the penalty.

Moreover, the Judge discussed the operator's abatement efforts and their possible effect on his penalty determination in his discussion of the merits:

> [Solar Sources'] Counsel took the position that the remedial measures the mine took after the incident should factor in the Court's final penalty assessment as part of its good faith. Tr. 347-48. The Court does not agree . . . . [While Solar Sources] touted the efforts it made post the berm accident to make matters safer for dumping, Fields [Steven Fields, the operator's safety director] indicated that the mine *had* to do it per MSHA requiring it. Tr. 516-17.

40 FMSHRC at 487 (emphasis in original).[6]

I struggle to see how remanding the case to the Judge to enter a finding on whether the operator demonstrated good faith in attempting to achieve compliance will produce anything beyond this already sufficient analysis of the issue.

The majority's reliance on *Hubb Corporation*, 22 FMSHRC 606 (May 2000), and *Cantera Green*, 22 FMSHRC 616 (May 2000), is misplaced. In *Hubb*, in which the Judge made a significant reduction in the penalties assessed from the penalties proposed by the Secretary, the Commission's ruling was based in part on the Judge's failure to explain the substantial deviation between the Secretary's two proposed penalties and his assessment, which *Sellersburg* requires. *Hubb*, 22 FMSHRC at 612-13. Of course, that is not relevant here, where the Judge assessed the amount proposed by the Secretary. Furthermore, in *Hubb*, the Judge did not even allude to the operator's abatement efforts, size, or the effect of the penalty on the operator's ability to continue in business. For one of the penalties, the Judge failed to mention the history of violations factor at all. For the other, he said merely that he took the operator's history into account. 20 FMSHRC 615, 620, 622 (June 1998) (ALJ). Hence, there were a myriad of reasons why remand was necessary.

Cantera Green is also distinguishable. In that case, the Judge assessed significantly lower penalties for ten violations despite concluding that the record supported a finding of high negligence and high gravity for these violations. He found that the operator's negligence and gravity were as great or event greater than the Secretary alleged, but the amount he assessed for the ten violations only ranged from approximately 20 to 70% of the penalties proposed by the Secretary. For six of these violations, he offered no explanation for this divergence. *Cantera*, 22 FMSHRC at 618-19.

The Commission expressed concern that the lack of a clear explanation for the assessed penalties was particularly troublesome because the penalties deviated substantially from those proposed by the Secretary. Remand was also warranted in that case because the Judge erred in numerous respects (such as his inconsistent use of the operator's size factor and a lack of

[6] The citation indicates that after the plan was submitted to MSHA and approved, MSHA considered the violation to be abated. When asked why the operator revised its plan, Fields stated: "They [MSHA] made us do it." Tr. 517.

reasoning as to why he assessed a penalty of $400 for nine violations and $1,500 for the remaining disputed violation).[7] *Id.* at 622-26.

I do, however, agree with the majority in rejecting the operator's argument that the Secretary's special assessment narrative in his penalty proposal is inconsistent with the Judge's ultimate findings. Slip op. at 9. The narrative is no longer relevant once the case is before the Commission. As the D.C. Circuit recently stated in *American Coal Co. v. FMSHRC*, 933 F.3d 723, 727 (D.C. Cir. 2019), "[w]hat internal remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point."

When it passed the Mine Act, Congress was mindful of the need for an efficient penalty scheme, in order to induce operator compliance. The legislative history states that "civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency." S. Rep. No. 95-181, at 43 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 631 (1978). Remanding this case to the Judge is a needless exercise that will simply delay the collection of this penalty. Accordingly, I would affirm the Judge, and respectfully dissent.

II. The Majority's Refusal to Apply *Sellersburg* to Penalties Proposed by Special Assessment is Procedurally Improper and Substantively Incorrect

In a departure from longstanding Commission precedent, the majority instructs our Judges to treat penalties proposed in accordance with the Secretary's special assessment differently from the penalties the Secretary proposes via the regular assessment process. Reaching out to rule on an issue neither raised nor briefed by the parties, my colleagues conclude that Judges need no longer explain why their penalty assessments substantially deviate from a special assessment proposed by the Secretary. Their ruling contravenes recent court of appeals caselaw in this area.

A. The Majority's Ruling Exceeds the Scope of the Petition for Discretionary Review in Contravention of the Mine Act

The Mine Act is quite specific regarding the limitations imposed on Commission review. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), states that "[i]f granted, review shall be limited to the questions raised by the petition." Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), echoes this restriction. Moreover, Commissioners are not expected to consider or rule on issues that were not raised before the Judge below. Section 113(d)(2)(A)(iii) instructs parties that: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii),

The Commission has consistently rejected attempts by a party to raise issues beyond the scope of the petition for discretionary review. *See, e.g., Central Sand & Gravel Co.*, 23

[7] In both *Hubb* and *Cantera Green*, the Commission did direct the Judge to enter qualitative findings regarding the history of violations, but nothing in these opinions indicates that the failure to do so would have by itself warranted a remand.

FMSHRC 250, 260 (Mar. 2001) (declining to depart from precedent and consider a party's argument not raised in its petition); *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 n.7 (June 2014) (declining to reach the issue of fair notice and due process because it was not raised by the operator in its petition); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1544 n. 4 (Sept. 1996) (declining to review a fair notice argument because the operator did not raise it in its PDR).

My colleagues' disdain for the Secretary's special assessment process is such that it has prompted them to reach beyond these statutory boundaries circumscribing the Commission's review.[8] In an effort to limit the effect of a specially assessed violation in proceedings before the Commission, the majority would vary the scope of a Judge's opinion depending on which method the Secretary used to compute the proposed penalty. Notably, this issue was not raised before the Judge in the proceeding below. Nor was it addressed in the operator's petition for discretionary review or even discussed by the parties in their briefs to us. The majority chooses to opine extensively on the deficiencies it believes underlie the Secretary's decision to specially assess certain violations, and to find fault with the manner in which the Secretary computes such penalties, but it sees no need to hear from the parties on this issue, including the Secretary, whose actions are the subject of their ire.

Although the majority, in bringing up this issue, has exceeded the Commission's proper scope of review, I feel compelled to respond to some of my colleagues' most erroneous assertions.

B. The Requirement that a Judge Explain a Substantial Divergence from the Secretary's Proposed Penalty Should Apply to Both Regular and Special Assessments

Looking for additional support for their procedural overreach, my majority colleagues rely on the recent decision in *American Coal*, 933 F.3d 723, for support. Unfortunately, that opinion does not provide them with even a fig leaf's worth of cover.

The majority's effort to distinguish between a Judge's treatment of regular and special penalty proposals contravenes the central principle guiding the D.C. Circuit's opinion in *American Coal*: that for purposes of assessing a penalty, it is irrelevant whether the Secretary's proposal was calculated under the regular or special assessment regulations. Indeed, the court emphasized that:

> [T]he entire regulatory framework distinguishing between so-called "special" and "regular" assessments applies only to guide the Secretary. It "do[es] not extend to the independent

[8] In rationalizing this unprecedented departure from time-honored statutory mandates, the majority makes the unremarkable assertion that "it is obviously necessary for us to apply the correct legal standard in deciding cases on review." Slip op. at 19. This is undoubtedly true, but pertains only to the legal standards needed to decide cases before us. Here, because the proposed and assessed penalties were identical, any opinion on the legal issue of whether the *Sellersburg* "substantial deviation" explanation requirement should apply is not only unnecessary but also unauthorized by law.

> Commission," and it is "not binding in any way in Commission proceedings." . . . .
>
> . . . .
>
> . . . The only penalty calculation that matters is the Commission's, which is independent of the Secretary's.

Id. at 727 (citations omitted).

Moreover, in affirming the Judge's penalty assessment, the court noted that:

> [H]e arrived at an independent determination of a penalty amount that would respond to the seriousness of the Company's violations and would deter future violations. The ALJ also contrasted his judgment with that of the Secretary "[t]o the extent that there were any substantial deviations in [his] penalty amounts that would require a[n] . . . explanation." The ALJ need drill no deeper.

Id. at 728 (citations omitted). Thus, one of the grounds upon which the court in *American Coal* affirmed the Judge's penalty assessment was precisely because he explained why his penalty deviated from the Secretary's proposed special assessment.

Indeed, in special assessment cases my colleagues have essentially flipped *Sellersburg* on its head. An explanation will be required if the penalty has *not* diverged sufficiently from the special assessment. The Commission decisions in *AmCoal* illustrate this development.

In *The American Coal Co.*, 38 FMSHRC 1987 (Aug. 2016) ("*AmCoal I*"), cited by our colleagues, the Judge assessed a penalty of $43,200. The Secretary's special assessment penalty proposal was $69,600. The Commission majority, concerned that the Judge may have been unduly influenced by the Secretary's special assessment, vacated and remanded the Judge's decision with instructions to the Judge that he explain whether he relied on the special assessment as a baseline. *Id.* at 1997. On remand the Judge stated that he did not rely on the Secretary's proposed special assessment as a starting point, and he reaffirmed the penalties he assessed in his initial decision. 38 FMSHRC 2612 (Oct. 2016) (ALJ). A second appeal resulted in a 2-2 decision. *The American Coal Co.*, 40 FMSHRC 1011 (Aug. 2018) ("*AmCoal II*"). Despite the Judge's assurance, the two majority colleagues concluded that the special assessments undoubtedly create an "anchoring effect," *id.* at 1038, and that the Judge had still not provided a reasonable basis for what they considered to be unusually high penalties, especially as compared to the regular assessment MSHA could have proposed. *Id.* at 1036.

In contrast, a "regular" penalty proposal is considered by the majority to be inherently reasonable. I suspect no eyebrows would be raised by my majority colleagues should a Judge decide to impose an amount similar or equal to the amount computed under the Secretary's regular assessment formula. Indeed, if a Judge decides to substantially increase the penalty from

the amount proposed by the Secretary in a regular penalty proposal, our colleagues insist *Sellersburg* would require the Judge to explain that divergence.[9]

Because the higher penalties proposed under the special assessment process are viewed by the majority as inherently arbitrary, and based on "a secret theory of the case," slip op. at 9 n.13, a Judge who decides to impose a penalty anywhere close to the specially assessed amount proposed by the Secretary may find his or her opinion subjected to strict scrutiny. The Judge, as is the Judge in this case, may be accused of "failing to exercise his own responsibility to conduct an independent and reasoned analysis using *the record evidence. See AmCoal I.*" Slip op. at 9 (emphasis in original). Indeed the majority admits as much here, as it claims that requiring an explanation of divergences between MSHA's special assessment and the penalty assessed by the Judge "interject[s] a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, *whether or not the reason for the enhancement has been validated by the trial process.*" *Id.* at 20 (emphasis added). Apparently, therefore, even if the trial evidence would support an enhanced penalty, my colleagues will be reluctant to affirm it, having viewed the Judge as being biased towards MSHA's proposal.

Consequently, I fear our Judges may conclude the only way to avoid numerous remands, and demonstrate their independence from what my majority colleagues consider to be the Secretary's arbitrary special assessment, is to assess an amount significantly lower than the figure proposed by the Secretary. Moreover, according to my colleagues' instruction, the Judge would not even need to explain the divergence.[10]

C. Conclusion

For the foregoing reasons, I respectfully dissent from the opinion of the majority.

Mary Lu Jordan, Commissioner

[9] An explanation would also be required if his or her assessment was substantially lower than the Secretary's proposed regular assessment.

[10] I recognize that theoretically a Judge could independently decide to assess a penalty significantly higher than the special assessment proposed by the Secretary, and consistent with my colleagues approach, no explanation would be required in that event either.

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