FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 20 2018

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:	Docket Nos.	LAKE 2011-701
	:		LAKE 2011-881
v.	:		LAKE 2011-962
	:		LAKE 2012-58
THE AMERICAN COAL COMPANY	:		

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), comes before us on appeal for the second time to determine whether the Administrative Law Judge properly explained his assessed penalties in this matter, which involves "special assessments" by the Secretary of Labor,[1] and whether substantial evidence supports the penalties assessed by the Judge.

On remand from the Commission's first decision in this case, 38 FMSHRC 1987 (Aug. 2016), the Administrative Law Judge reaffirmed the five penalty assessments he had assessed for citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The American Coal Company ("AmCoal"). 38 FMSHRC 2612 (Oct. 2016) (ALJ).

AmCoal appeals the Judge's remand decision, alleging that the Judge's penalty assessments are arbitrary in part because he failed to explain how he set the penalty amounts, which, the operator argues, substantially deviated from the amounts that would have been assessed under the Secretary's regular assessment formula. AmCoal also argues that the Judge's penalty assessments are not supported by substantial evidence.

Commissioners Jordan and Cohen vote to affirm the Judge's decision, while Acting Chairman Althen and Commissioner Young vote to vacate and remand the Judge's decision. The effect of the split decision is to allow the Judge's decision to stand as if affirmed.

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[1] In this case, the Secretary proposed penalties using his procedures for "special assessment" rather than the "regular assessment" formula the Secretary commonly employs. *Compare* 30 C.F.R. § 100.5 ("Determination of penalty amount; special assessment") *with* 30 C.F.R. § 100.3 ("Determination of penalty amount; regular assessment").

Pennsylvania Elec. Co., 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Facts and Proceedings Below

A. Background[2]

In the Judge's initial decision, he affirmed all five violations at issue in this case and the associated significant and substantial ("S&S")[3] designations. 35 FMSHRC 3077, 3099-122 (Sept. 2013) (ALJ). For four of the five citations, the Judge reduced the level of negligence, and for one citation, he reduced the level of gravity alleged by the Secretary. The Judge assessed a total penalty of $43,200 for the five violations, compared to the specially assessed total penalty of $69,608, which MSHA proposed.[4]

The Judge declined to address AmCoal's broader arguments about the validity of MSHA's special assessments[5] and the appropriate standard for reviewing the Secretary's proposed penalties. He explained that because the Commission alone is responsible for assessing

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[2] This case involves four roof control violations of 30 C.F.R. § 75.202(a) and one violation of a transportation safeguard, 30 C.F.R. § 75.1403. The factual background concerning the five violations at issue in this case has been fully set forth in both the Judge's and Commission's initial decisions.

[3] 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."

[4] The penalties for the five violations proposed by the Secretary and as assessed by the Judge are as follows:

Citation No.	Regulation	Sec'y Proposal	ALJ assessment
8428508	75.202(a)	$40,308	$20,000
8432118	75.202(a)	$9,100	$7,200
8432126	75.202(a)	$7,700	$6,100
8432129	75.202(a)	$7,700	$6,100
8432052	75.1403	$4,800	$3,800

[5] MSHA may specially assess penalties pursuant to 30 C.F.R. § 100.5, which states that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.3(a). 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 § 100.3(a). All findings shall be in narrative form."

final penalties, the Secretary's decision to propose a regular or a special assessment is not relevant to the Commission's determination of a penalty amount.

AmCoal appealed the Judge's first decision, arguing that MSHA's special assessments were arbitrary because the Secretary failed to meet his burden of substantiating enhanced special assessments. It contended that as a result, the Judge erred by using the Secretary's proposed special assessments as a baseline. AmCoal further argued that the Judge should have relied instead on MSHA's regular assessment formula when determining the penalty amounts in this case.

In its first decision, the Commission reaffirmed its independent authority to assess penalties de novo based on the penalty criteria contained in section 110(i) of the Mine Act, 30 U.S.C. § 820(i),[6] and stated that the Secretary's proposal is not a baseline for the Judge's independent assessment. 38 FMSHRC at 1995. Noting the Secretary's unilateral discretion to issue a special assessment, the Commission majority explained that the Secretary is not required to explain the reasons for his decision to specially assess a violation. *Id.* at 1993.

The Commission majority concluded that the Judge did consider the section 110(i) criteria, but could not determine whether he relied on the Secretary's special assessments as a baseline and thus could not determine whether he independently assessed the penalties in this case. The majority vacated the penalties and remanded the case to the Judge to explain whether he relied on the Secretary's special assessments and to provide an adequate explanation of the bases for his assessments. The majority also instructed the Judge to address the history of violations criteria pertaining to the safeguard violation because he failed to address the evidence and explain its impact on his assessment.[7] *Id.* at 1997-98.

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[6] Section 110(i) of the Mine Act provides that the Commission is authorized to assess all penalties under the Act and that the penalties must reflect consideration of six statutory 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 [operator] charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[7] Then Commissioner Nakamura, concurring in part and dissenting in part, would have affirmed the Judge's penalty assessments regarding the four roof violations and joined the majority in remanding only the penalty for the safeguard violation. *Id.* at 1999-2003. Commissioner Jordan, dissenting, would have affirmed all five penalty assessments. *Id.* at 2004-05.

B. The Judge's Decision

On remand, the Judge stated that he did not rely on the Secretary's proposed special assessments as a starting point, nor did he make an across-the-board reduction of the proposed assessments in determining his final assessments. 38 FMSHRC at 2617. The Judge further explained that, in general, any "substantial deviations" from the Secretary's proposed assessments were due to his disagreement with the Secretary's negligence determinations and that he gave "great weight to the facts that the operator was large in size and able to continue in business despite the penalties imposed." *Id.* The Judge asserted that he "imposed penalties that [he] felt were large enough to serve as an effective enforcement tool and discourage further violations." *Id.* Specifically refuting the operator's arguments to the contrary, the Judge concluded that "this mine operator inarguably had a significant history of violations." *Id.* at 2618.

In discussing the relevant facts pertaining to the section 110(i) criteria for each of the five violations, the Judge repeatedly noted the mine's large size, the operator's ability to continue in business, and its excessive violation history for the four roof violations. Pertaining to the safeguard violation, the Judge specifically considered the evidence related to the operator's history of such violations. The Judge also noted the operator's good faith abatement and explained that any deviation from the Secretary's proposed assessments was due to the reduced negligence and/or gravity findings for each violation. The Judge reaffirmed the penalties he proposed in his initial decision.

II.

Disposition

In its second appeal, AmCoal continues to argue that the Judge's assessments are arbitrary and excessive because he failed to provide any explanation of how he arrived at the particular assessment amounts or to provide an adequate explanation for the bases of his assessments. It contends that the Judge on remand "failed to fully discuss the evidence bearing upon the appropriate penalties, failed to explain how he set his assessment amounts, and thus failed to adequately explain the bases of his assessments and their substantial deviations from the assessments proposed by the Secretary and those that would have resulted under the regular assessment mechanism." PDR at 10. AmCoal also argues that the Judge erred in justifying his assessments based solely on the mine's large size and violation history when the Secretary's special assessments did not rely on such factors. AmCoal asks the Commission to require a Judge who does not rely on the Secretary's proposed special assessment to explain a substantial deviation from what would have been proposed under the regular assessment mechanism under 30 C.F.R. § 100.3. Finally, AmCoal contends that substantial evidence does not support the Judge's penalty assessments based on the mine's size and excessive violation history.

The separate opinions of the Commissioners follow.

Commissioners Jordan and Cohen, writing in favor of affirming the Judge's decision:

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i), as well as the deterrent purpose of the penalty. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)); *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012).

Commission judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100, including those utilized to compute a special assessment. *E.g.*, *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties"). The Judge's duty is to make a de novo assessment based upon his or her review of the record. The Commission has required an explanation of any substantial divergence from the penalty proposal of the Secretary. *Sellersburg*, 5 FMSHRC at 290-94. As a general matter, a judge's penalty assessment is an exercise of discretion which we review under an abuse of discretion standard. *Id.*

In this case, the Commission's remand was for a very limited purpose: "On remand, the Judge should explain whether he relied on the Secretary's specially assessed proposed penalties [as a benchmark or starting point] and provide an adequate explanation for the bases of his assessments, in light of the record evidence and his section 110(i) findings[;] . . . the Judge must also make a finding as to the history of violations pertaining to the safeguard violation, . . ." 38 FMSHRC at 1997-98. The Judge did exactly what we required of him. He clearly stated that he had not used the Secretary's specially proposed assessments as a baseline or starting point for his assessments, and he explained how he had determined the five assessments. 38 FMSHRC at 2615.

AmCoal argues that the Judge abused his discretion by failing to adequately explain the bases for his penalty assessments. In particular, AmCoal contends that the Judge erred by not using the amount that would have been imposed under MSHA's regular assessment formula as a reference point in making his own penalty determinations. AmCoal also mounts a substantial evidence challenge to the Judge's application of the section 110(i) penalty criteria. As we find neither argument persuasive, we would affirm the Judge's penalty assessments.

A. The Judge Committed No Legal Error.

AmCoal argues that any judge who does not adopt the Secretary's underlying rationale for specially assessing a penalty must consider the amount that would have been proposed under the Secretary's regular assessment formula at 30 C.F.R. § 100.3 as a reference point, and must justify any departure from that amount. In this case, the operator considers the Judge's disagreement with the Secretary's negligence and gravity determinations to constitute a rejection of the Secretary's bases for a special assessment. Not only does AmCoal consider the negligence and gravity findings to provide inadequate support for the penalty the Judge imposed, AmCoal also maintains that the remaining penalty criteria – such as the mine size, ability to continue in

business, and violation history – do not support the imposition of what AmCoal claims are the "elevated" assessments imposed by the Judge.[1]

The Commission has already rejected the line of reasoning offered by AmCoal. When this case was previously before us, the operator contended that Judges must utilize the dollar amounts that would have resulted from the regular assessment process as the baseline for determining their penalty, and must explain any substantial divergence from that figure. 38 FMSHRC at 1990. Ultimately, however, the majority's remand instructions only required the Judge to: (1) explain whether he relied on the Secretary's specially assessed proposed penalties (which he did, answering in the negative) and (2) provide an adequate explanation for the bases of his assessments (which he did, *see* 38 FMSHRC at 2618-2622). 38 FMSHRC at 1997. Thus, the discussion in the operator's brief comparing the Judge's penalty assessments with what would have been imposed under the regular assessment mechanism is misplaced and irrelevant.

We again decline to require Commission Judges to rely upon MSHA's regular assessment formula as a reference point in assessing penalties where a Judge chooses not to adopt the Secretary's special assessment proposal. Such a practice would compel the Commission's Judges to use the Secretary's penalty regulations and point system, contrary to Commission and federal court precedent, thereby undermining the independence of the Judges in assessing penalties.

As we emphasized in *U.S. Steel Mining Co.*:

> The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement *his* statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under § 100.3 [the regular penalty assessment regulation] . . . or § 100.5 [the special assessment regulation].

6 FMSHRC 1148, 1150 (May 1984); *see also Sellersburg*, 736 F.2d at 1151-52; *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) ("'[U]nder both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.'") (citations omitted).

In making his or her de novo assessment, a judge may assign different weights to the section 110(i) penalty criteria according to the circumstances of the case. *Knight Hawk Coal,*

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[1] If the Commission were to accept AmCoal's argument that the Judge erred in relying on the mine's large size and violation history after reducing some of the negligence and gravity findings, we would effectively be binding and limiting the authority of Commission judges to consider some of the section 110(i) factors.

LLC, 38 FMSHRC 2361, 2373-74 (Sept. 2016); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Moreover, the Judge is "not required to weigh the criteria 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). As long as the Judge's findings and independent weighing of the penalty factors are supported by substantial evidence, and his or her assessment is not infected by plain error or an abuse of discretion, the Commission will affirm the Judge's assessment.

Here, the Judge emphasized the record evidence pertaining to the operator's large size, its ability to continue in business, its violation history, and the need to provide an effective deterrent. With regard to several violations, the judge considered the negligence and gravity to be less severe than the determinations reached by the Secretary.[2] The Judge weighed all of these factors in determining a penalty.

Our colleagues consider any special assessments by the Secretary to be inherently arbitrary and subjective "by their very nature." Slip op. at 28. Embracing a cognitive bias theory they describe as "anchoring," they contend that a Commission judge cannot avoid becoming mentally attached ("anchored") to whatever proposed dollar amount the Secretary's special assessment process has produced. In other words, in their view, any specially-assessed proposed penalty effectively prevents a Commission judge from independently applying the statutory penalty criteria and assessing a penalty de novo.[3] Using our colleagues' logic, we should consider any penalty imposed by a judge for a violation that was specially assessed by the Secretary, to be basically the fruit of the poisonous tree, and therefore inherently suspect.[4]

Despite our colleagues' skepticism regarding a judge's ability to independently determine an appropriate penalty once the Secretary proposes a special assessment, our colleagues nevertheless conclude they should remand this matter once again, in order for the Judge to make another attempt at an independent penalty determination. However, it would appear that our colleagues would accept the Judge's penalty assessment only if it is tethered to the regular assessment system. *See* slip op. at 30 n.17 ("The reader may find an implication that regular assessments, in fact, should constitute a form of anchor whereas special assessments may not. That is true in a general sense.").

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[2] We note, however, that he affirmed the S&S designations for all five violations.

[3] Thus, our colleagues implicitly reject as untrue the Judge's emphatic statement – answering the critical question on remand – that he "*did not use and has not used the Secretary's proposed specially assessed penalties as a baseline or starting point.*" 38 FMSHRC at 2615 (emphasis in original). The Commission should not treat the statements of its Judges in such a cavalier manner.

[4] We note that the percentage of violations actually subjected to special assessment is very small. In response to a request from the Commission during oral argument in this case the Secretary reported that in fiscal year 2015, 1,069 (or less than 1%) of 115,483 assessments were special assessments. Letter from W. Christian Schumann, Counsel, Appellate Litigation, Office of the Solicitor, to Lisa M. Boyd, Executive Director, FMSHRC (May 2, 2016).

In this case, the special assessments resulted in large part from the Secretary's frustration with AmCoal's repeated history of noncompliance, particularly with regard to roof and rib violations. This would appear to be a justifiable rationale. Notably, an operator's history of previous violations is the first penalty criteria mentioned in section 110(i), and the legislative history of the Mine Act supports the significance Congress' attached to it:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation.

S. Rep. No. 181, at 43, *reprinted in* Senate Subcomm. on Labor, Comm. on Hum. Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978).[5]

Our colleagues attempt to downplay the concern of MSHA (and Congress) by claiming that AmCoal's violation history is not significant when considered in relation to the violation history of other large coal operators in the mining industry. Even assuming that to be the case, we do not believe MSHA's penalty proposal must be based on an assessment of an operator's behavior solely in the context of industry-wide statistics. Here the inspector who recommended that four of the citations be specially assessed, Edward Law, explained what prompted his action:

> [Ninety-seven violations of section 75.202(a)[6]] in two years, that's almost 50 a year, that's a big number. To me, that's something they should be taking care of and they should be making changes to take care of that. And the people should be

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[5] The Secretary was also provided with a serious enforcement tool to address operators who demonstrated a "pattern of violations." 30 U.S.C. § 814(e). In subsequent amendments, Congress provided that certain violations be deemed "flagrant" thereby subjecting them to penalties significantly higher than the maximum typically allowed under the Act. The "flagrant" designation applied to violations indicating a "reckless or *repeated* failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2) (emphasis added).

[6] Section 75.202(a) requires that the "roof, face and ribs of areas where persons work or travel should be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

> trained so that they're taking care of it on their own; and it would eliminate a lot of those.

Tr. at 243.[7]

Moreover, Inspector Law further testified that in the period prior to his issuance of the citations for violations of section 75.202(a), he had repeatedly talked with AmCoal officials about the need to "do something about these areas that are being found to be inadequately supported." Tr. at 295. In the context of unwarrantable failure cases, the Commission has held that repeated warnings about an unsafe practice by MSHA inspectors constitute grounds for finding that an operator is on notice that its safety program is inadequate. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1699-1700 (Aug. 2015) (citing *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007)). The same principle applies to enhancing penalties based on the section 110(i) factor of the operator's history of previous violations.

Our colleagues acknowledge that under their theory, a Commission judge cannot avoid becoming mentally "anchored" to whatever amount the Secretary has proposed, even those computed under the regular formula. In an attempt to reconcile this "anchoring" with their steadfast support of the Commission's independent authority to assess penalties de novo, based on the penalty criteria contained in section 110(i) of the Mine Act, they suggest that the regular penalty proposed by MSHA be considered "an authorized anchoring" because in their view it reflects application of a uniform and regularized system. They consider special assessments, on the other hand, to "flow from formalized calculations largely, and sometimes wholly, unrelated to the violation." Slip op. at 28.

Our colleagues' concern is not born out in the instant case, nor do we believe they have made a persuasive argument that special assessments generally are based on irrelevant factors. The Secretary has implemented a scheme which allows the Secretary to propose a special assessment when he deems it appropriate, and we recognize that "the Secretary has very broad discretion to devise a scheme implementing the Act's civil penalty guidelines." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1129 (D.C. Cir. 1989).[8]

If an operator wishes to challenge a penalty determination, the operator is afforded the opportunity for a hearing and a de novo assessment by a Commission judge, based on an independent application of the statutory criteria. We disagree with our colleagues that the

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[7] The number of prior violations of section 202(c) issued in the two years prior to the ones at issue here varied from 97 to 109. This is due to the fact that the four citations were each issued on different dates within a five-month period. Thus, the two year time period differed slightly for each violation.

[8] That case involved a challenge to the validity of a single penalty assessment provision the Secretary had implemented. Because the Court could not determine if the single penalty would be adequately reflected in the operator's history of violations, it remanded the case so that the Secretary could amend or establish regulations as necessary. 889 F.2d at 1136-39.

relevant question before the Judge should be: on what basis does the Secretary justify a substantial heightening of penalties from regular penalties? Slip op. at 29. This approach is inconsistent with our longstanding jurisprudence when reviewing a judge's penalty assessment, in which we focus on the penalty criteria in section 110(i) and determine whether the judge's decision reflects a reasonable application of those factors.

Our colleagues, citing no legal precedent, would announce a new standard for Commission review of penalty determinations: a judge's penalty assessment must be consistent with other assessments. Slip op. at 20. This assertion begs the question "consistency with what?" Is it consistency with penalties other Commission judges have assessed in allegedly similar circumstances? Or is it consistency with the particular Judge's prior decisions, as our colleagues suggest in section III.B of their opinion, slip op. at 33. The only "consistency" which seems to satisfy our colleagues is consistency with the Secretary's regular assessment system. *See* slip op. at 20 & 29-30 n.17. This position is irreconcilable with both the existence of the Secretary's special assessment system as well as the independence of Commission Judges. In short, besides having no legal foundation, this approach is unworkable and inconsistent with the bedrock concept of a judge's obligation to assess a de novo penalty based on the section 110(i) criteria.

Accordingly, we conclude that the Judge committed no legal error in assessing the penalties herein on remand.

B. Substantial Evidence Supports the Judge's Penalty Assessments.

AmCoal's remaining arguments involve the sufficiency of the evidence substantiating the Judge's penalty assessments. On remand, in specific response to the question posed to him in the Commission's first decision, the Judge clarified that he did not rely upon nor utilize the Secretary's proposed special assessments as a benchmark for his assessments and instead relied on the record evidence pertaining to the section 110(i) penalty criteria to explain his penalty assessments. 38 FMSHRC at 2615. AmCoal contends that the only statutory criteria mentioned or relied upon by the Judge to warrant increasing penalties beyond the regular assessment mechanism are the "great weight" given to the fact "that the operator was large in size and able to continue in business despite the penalties imposed," 38 FMSHRC at 2617, and the Judge's finding that "as a general matter, regardless of possible inconsistencies in the record, this mine operator inarguably had a significant history of violations." *Id.* at 2618. However, AmCoal fails to recognize that the Judge, relying on *Black Beauty Coal Co.*, also appropriately took into consideration the deterrent effect of his penalty assessments, by imposing penalties "large enough to serve as an effective enforcement tool and discourage further violations." *Id.* at 2617. Hence, deterrence provided another ground for his penalty determinations.[9]

[9] We also note that the Judge found all five penalties to be S&S, a finding requiring the violations to be more serious than an ordinary violation. *See* 30 U.S.C. § 814(d)(1) (S&S designates a violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard"). Thus, although the Judge did not specifically rely

AmCoal further contends that the findings related to the operator's size and history of violations are not supported by substantial evidence. In particular, it maintains that because the mine is indeed so large, it necessarily will have a greater number of violations and that this would give the impression that AmCoal has a worse history of violations than it actually does. We reject AmCoal's arguments.

The Judge provided an extensive explanation for his penalty determinations, including his consideration of the section 110(i) criteria. 38 FMSHRC at 2617-22. That the operator takes issue with the relevance or import of these factors in ultimately determining the penalty amount does not establish that the Judge abused his discretion. As discussed below, the Judge explained that a significant part of his consideration in determining the penalty amount was the large size of this mine, the fact that the penalties would not affect the operator's ability to continue in business, and the need to assess penalties that would deter the operator from continuing to violate the cited standards. *Id.* at 2617. All these are relevant factors for the Judge to consider in assessing the penalty pursuant to section 110(i). Moreover, deterrence is a relevant factor that Judges may consider in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC at 1864-69 (in approving or rejecting a proposed settlement, a Commission ALJ may take into account the deterrent effect of the penalty).

1. Size of the Mine

The Judge considered the amount of coal produced by this mine and determined that the mine was large and that size was a significant factor to consider when determining the penalty amounts. 38 FMSHRC at 2618. He noted that the mine tonnage exceeded six million tons and the production of its controlling entity exceeded twenty-nine million tons. The Judge did not err in assigning great weight to the fact that the operator was large in size. As noted above, the Judge, in conducting an independent assessment, may assign varying weights to the penalty criteria based on the record.

2. Violations History

AmCoal contends that the finding that its violations history is excessive is not qualitatively or quantitatively substantiated by the record. It argues that the Judge simply relied on the record evidence of the number of past violations and made a conclusory determination that the operator's history was excessive.

However, the record contains evidence of the operator's repeated history of noncompliance, particularly with regard to the roof and rib violations, and the inspector testified as to his opinion that the operator's history was excessive.

With respect to Citation No. 8432118, Inspector Law "recommended the citation for special assessment because the operator had a 'lot of issues with ribs' and roofs and had been cited a 'pretty high' number of times for 202(a) violations." 35 FMSHRC at 3089. Citation No.

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on the S&S findings to support his assessed penalties, we disagree with our colleagues' statement that the Judge did not find any "aggravation" in these cases. Slip op. at 35.

8428508 stated that "Standard 75.202(a) was cited 109 times in two years at [the] mine." *Id.* at 3106. The inspector acknowledged consideration of AmCoal's excessive history as influencing the decision to propose special assessments. As the Judge noted in his initial decision, "Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment." *Id.* at 3090.

Regarding Citation Nos. 8432126 and 8432129, the inspector again testified that he recommended special assessments due to the operator's history of violations. *Id.* at 3092 ("Law had again recommended a special assessment because . . . of Respondent's past violation history."); 3096 ("Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations that existed for the other citations testified to.").

The Judge may evaluate the evidence in the record and make credibility determinations. Here, the Judge found that, based on the MSHA inspector's testimony, the operator's history was significant. AmCoal presents no basis for overturning the Judge's credibility determinations.[10]

As to the safeguard violation, the Commission majority instructed the Judge on remand to consider the evidence and make a finding as to the history of violations pertaining to the safeguard violation. 38 FMSHRC at 1997-98.[11] On remand, the Judge found that AmCoal had 19 previous violations in the preceding 15 months involving the general safeguard standard (30 C.F.R. § 75.1403). As previously discussed, the Judge determined that the mine's overall history of violations was significant. 38 FMSHRC at 2620 & n.10.[12]

AmCoal contends that the Judge failed to make a finding as to the history of violations pertaining to the specific safeguard notice at issue in this case. First, "[t]he Commission has previously held that the references in section 110(i) to an 'operator's history of previous violations' refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 995 (Dec. 2006). Hence, we conclude that the Judge appropriately considered the operator's history of 19 safeguard violations here.

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[10] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

[11] In the Commission's initial decision in this case, Commissioner Jordan affirmed the $3,800 penalty for the safeguard violation, stating that the Judge's single omission in not making a finding on the history of violations criterion did not constitute an abuse of discretion. 38 FMSHRC at 2004.

[12] Our colleagues insist that a mine operator's history of violations must be considered against the histories of other coal operators in the mining industry. Slip op. at 32. We find no support for such a proposition in the text of the Mine Act, in the legislative history of the law, or in Commission precedent.

Even if the Judge failed to explicitly make a quantitative finding on AmCoal's history of this type of safeguard violation, any error was harmless. The violation involved a ram car striking a miner standing on the back side of a curtain. 38 FMSHRC at 2621. The Judge otherwise affirmed the Secretary's proposed findings, particularly moderate negligence and serious gravity, and assigned greater weight to the high level of gravity in his penalty determination. *Id.* at 2622. He further noted that this safeguard notice violation involved one of the ten "rules to live by" and was S&S. *Id.* at 2621. Thus, based on the record evidence and his findings on the other penalty criteria, we conclude that the Judge adequately substantiated his penalty assessment for the safeguard violation and hence did not abuse his discretion in assessing a penalty of $3,800.

III.

Conclusion

The Judge did not abuse his discretion in assessing the penalties for these five S&S violations. He made no legal error, and his determinations regarding the section 110(i) penalty criteria are supported by substantial evidence. For the foregoing reasons, we would affirm the Judge's penalty assessments.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen and Commissioner Young, in favor of vacating and remanding:

For the reasons set forth below, the penalties issued by the Judge in this case are arbitrary, capricious, and excessive. We would therefore vacate and remand.

The Mine Act identifies six specific penalty criteria for use by both the Mine Safety and Health Administration ("MSHA") in proposing and the Commission in assessing penalties. The Act does not identify guidelines for setting penalties or require either agency to adopt a formulaic system for the application and weighing of the criteria. However, it was inevitable that one or both agencies would do so to avoid the appearance of arbitrary assessments. Significantly disparate penalties for similarly situated operators charged with similar violations would be all but inevitable without some uniform framework.

Faced with this dilemma, MSHA developed a point system to apply to its penalty assessments in most cases ("regular" assessments). That regular assessment system provides a reasonable measure of uniformity and predictability to assessments.

MSHA has also promulgated a regulation pursuant to which it issues significantly higher assessments to deter certain types of violative activity. These are "special" assessments.

The difference between the procedures for making and the reasons for imposing regular versus special assessments may, in some cases (including this one) result in the adoption of arbitrarily enhanced penalties.

BACKGROUND

I. Assessments

This case involves five citations. One of the citations, Citation No. 8432052, was for a safeguard violation. The other four citations alleged violations of 30 C.F.R. § 75.202(a). For convenience, the discussion in this opinion deals exclusively with the four violations of section 75.202(a) and does not consider the separate safeguard violation, a relatively low-dollar violation.

A. Regular Assessments

Recognizing the need for systematic guidance for proposing penalties to provide for relative uniformity in penalty assessments, MSHA acted. Through notice and comment rulemaking, MSHA implemented a formula for penalizing typical citations[1] through the

[1] Use of the phrase "typical citations" does not suggest acceptance of any violation of a mandatory safety standard. It reflects only that all involved in the mining industry know that the rigorous and frequent inspection of mines by hundreds of inspectors for violations of detailed and complex mandatory safety standards in a constantly changing mining environment results in yearly issuance of tens of thousands of citations. For example, in calendar year 2017, MSHA

"regular" point system, which assigns points for the penalty criteria related to the size of the operator, frequency of violations, negligence, and gravity depending upon where an operator and the violation fall along continuums of the frequency of violations, negligence, and gravity. The points are added and converted into a penalty assessment according to a penalty point conversion table. 30 C.F.R. § 100.3(g) Table XIV.

The Commission has never sought to impose a regular or uniform system to guide Judges toward fair and consistent assessment of penalties. Instead, the Commission has long recognized the utility of MSHA's regular point system to a fair and systematic application of the penalty criteria. It is therefore now axiomatic that if a Judge imposes penalties that substantially diverge from the penalties proposed by MSHA using the regular point system, the Judge must explain the reason for such divergence based on the penalty criteria. *See, e.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In *Sellersburg*, the Commission stated that when a Judge imposes a penalty that substantially diverges from the originally proposed penalty, the Judge must explain the bases for such penalty to ensure credibility and avoid the appearance of arbitrariness.

The Commission has repeatedly reaffirmed the Sellersburg instruction. *See, e.g.*, *Unique Electric,* 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 622-623 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000); *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008); *Performance Coal Co.*, 35 FMSHRC 2321 (Aug. 2013); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014); *Newmont USA Limited*, 37 FMSHRC 499, 506 n.8 (Mar. 2015).[2]

The Commission requires such explanations even when the Judge has considered and made findings on all penalty criteria:

> Here, the Judge considered and made findings on all six section 110(i) factors and assessed a penalty that was 23% below that proposed by the Secretary. However, the Judge did not offer any explanation for the divergence, for instance, by explaining whether

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issued 104,792 citations. https://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance.

[2] In enacting the Mine Act, Congress recognized the benefit of the regular point system implemented under the Coal Act by MSHA's predecessor, the Mine Enforcement Safety Administration ("MESA"), describing MESA as having "adopted a schedule or gradation of violations to provide consistency in imposing penalties under the Coal Act. The committee recognizes that such a schedule will be equally applicable to situations in noncoal mining and should allay unwarranted misapprehensions by operators of excessively heavy fines." H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 20, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 357, 376 (1978).

> he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission. . . . Accordingly, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

Hidden Splendor, 36 FMSHRC at 3104 (citation omitted).

A Judge need not explain insubstantial variances due to the Judge's evaluation of the case or adjustments in penalty criteria findings such as minor adjustment of a violation on the continuums of negligence and gravity. However, if the Judge imposes a penalty that is substantially higher or lower than the penalty assessed under the regular point system, the Judge must provide a sufficient justification based upon his/her findings of fact related to penalty criteria. The Commission has never defined "substantially," but it has consistently explained the reason for the *Sellersburg* requirement, stating the first time this case was before us that "[t]he Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process." *American Coal Co.*, 38 FMSHRC 1987, 1994 (Aug. 2016).[3]

Of course, penalty assessments still will vary and two Judges are unlikely to assign an identical penalty even when cases involve similarly situated operators found liable for violations of the same standard and with similar gravity, negligence, and other penalty criteria. However, a decent respect for fairness and regularity in a penalty system suggests that the penalties not be grossly disparate. The *Sellersburg* principle seeks that objective.

B. Special Assessments

Separately from the regular point system, MSHA reserved a discretionary right to propose substantially higher penalties in individual cases through a "special assessment" process. 30 C.F.R. § 100.5. MSHA did not propose or adopt through rulemaking any formula for computing special assessments and does not have published guidelines for when it would make special assessments.[4]

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[3] The requirement for an explanation of a substantial divergence from a penalty assessed under the regular point system at section 100.3 is not an incursion into the Judge's authority or a grant of deference to MSHA. It is recognition of the importance of the regular point system for essentially uniform initial assessments based upon standard criteria, thereby advancing fair and uniform penalty assessments across the tens of thousands of assessments made annually. The regular point system constitutes a reasonable effort to normalize penalties across operators and violations. A regularly assessed penalty is not a "baseline" to be adjusted upwards or downwards but it does provide a vital reference point to assist the Commission in achieving consistent, non-arbitrary assessments.

[4] MSHA does not specially assess only those violations that are especially egregious due to negligence or gravity. Recently, the Secretary settled five citations in Docket No. LAKE 2011-12. MSHA specially assessed the citations because they were violations of "Rules to Live

On the face of 30 C.F.R. 100.5, a special assessment is entirely discretionary and arbitrary. Originally, MSHA put some meat on the bones of special assessments through a list of eight specific categories of violations reviewed for possible special assessments.[5] In 2007, MSHA scraped the meat from the bones revising the regulation to simply say that it "may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5. The regulation provides that "MSHA may elect to waive the regular assessment under §100.3 it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5. The regulation further provides that all findings will be in a narrative form. 30 C.F.R. § 100.5(b). It does not define or describe violations that warrant a special assessment.

Typically, the narrative findings for special assessments are brief and conclusory. The hearing record will also include a "Special Assessment Narrative Form," which reflects a calculation of both a regular assessment and the special assessment. The regulation does require MSHA to base the proposed penalty upon the six penalty criteria. *Id.*

Although section 100.5 does not describe a methodology or system for special assessments, MSHA informally and without public notice and comment adopted internal

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By" rather than for necessarily indicating a high level of negligence. Although specially assessed, three of the citations were for moderate negligence. The Secretary agreed to settle based on the negligence found by the inspector. The settlement reduced the total penalties from $87,300 to $28,500. A special assessment, therefore, does not necessarily arise from an allegation of a high level of misconduct on the part of the operator, and the Secretary in a prior similar case agreed to a substantially reduced penalty based upon findings of moderate negligence. This stands in sharp contrast to the Judge's arbitrary determination in this case to assess penalties doubling or quadrupling a special assessment for the violation as found by him.

[5] Prior to April 2007, MSHA's regulations listed eight specific categories of violations reviewed for possible special assessments. The specific types of violations were:

> (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(a) (2006); 72 Fed. Reg. 13,592, 13,621-22 (Mar. 22, 2007).

"MSHA Special Assessment Procedures."[6] Regardless of the reason for a special assessment, the process for determining the amount of the assessment follows the internally prescribed MSHA formula.

The system does not vary according to the standard violated. The starting point for a special assessment is the regularly assessed point value. Then, MSHA adds a specified number of penalty points to negligence and gravity based upon identified conditions of the violation including, e.g., whether the violation contributed to an accident, involved reckless disregard, or was the result of an unwarrantable failure. The Special Assessment procedures do not adjust the penalty for the size of the business, the frequency of violations, or the frequency of repeat violations. MSHA continues to assign points for those criteria on the regular point formula.

Of course, therefore, the reason for which an inspector may recommend a special assessment might not relate in any way to the actual special assessment. For example, in this case, the inspector testified he recommended the violations for special assessment based upon the operator's history of violations. Tr. 243. However, history of violations was not an additive component to the special penalty assessment; thus, the operator's history of violations played no role in the calculation of the "special" or "higher than regular" assessment. Instead, MSHA added a substantial number of points for gravity and negligence even though it did not change the gravity or negligence evaluations.[7]

Having added penalty points to the violations, MSHA computes the special (higher) assessment through reference to the regular Penalty Conversion Table at section 100.3(g). Under the internal procedures, MSHA may then add or subtract up to 25% from the table result in assessing a final penalty. A special assessment, therefore, results from a decision to increase an assessment substantially through the addition of penalty points, principally for gravity and negligence, according to a fixed formula, followed by a discretionary decision whether to raise or to lower the calculated assessment by up to 25%.

A decision by MSHA to assess specially may be viewed as somewhat analogous to a decision by a Judge to diverge substantially from a proposed regularly assessed penalty. In making a special assessment, the Secretary asserts a need for a substantially higher penalty. When MSHA issues a special assessment, MSHA must support its request with substantial evidence relating the need for the proposed penalty to the penalty criteria. Indeed, when this very case was previously before us, the Commission held 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." 38 FMSHRC at 1993.

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[6] The procedures are Attachment A to this opinion. MSHA's website (https://www.msha.gov) also sets out the procedures.

[7] Ironically, given that MSHA based the greatly increased assessment upon the addition of penalty points to negligence and gravity, the Judge actually reduced the negligence on all of the violations and the gravity on one of the violations.

In light of the entirely subjective, discretionary decision to assess specially in the first place and the special assessment procedures themselves, special assessments do not seek to assess similar operators a relatively similar penalty for similar violations. A special assessment instead constitutes a determination by MSHA to impose a penalty substantially higher than the regular penalty in a specific case. It is an especially punitive exaction for purposes of deterrence.

Unlike a regular assessment, the special assessment process, applied through informal procedures upon which MSHA has not allowed public comment, does not assure the integrity of administrative processes. Indeed, the special assessment system may result in the very danger feared in *Sellersburg* — namely, "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 293. The danger of a special assessment against which Judges must guard, therefore, is that the penalty assessed by MSHA, already diverging from the system designed to avoid arbitrariness, may not reflect proper consideration of the penalty criteria.

In turn, a Judge may not simply pick a penalty amount out of the air but must exercise prudence to assess a penalty that, based upon the evidence, is consistent with a fair penalty assessment program. Therefore, when MSHA asserts the need for a special assessment, Judges must demand the presentation of the "considerable evidence" necessary for an assessment that does not track with the consistent penalization of violations based upon the penalty criteria as furthered by the regular penalty system.

C. Commission Review of Assessments

In *Sellersburg*, the Commission recognized that a Judge's discretion in assessing penalties is wide but not unbounded. The assessed penalty must reflect proper consideration of the statutory penalty criteria. 5 FMSHRC at 290-294. Substantial evidence must support the assessment, and the assessment must be consistent with the statutory penalty criteria. *Pyro Mining Co.*, 6 FMSHRC 2089, 2091 (Sept. 1984). Although all the penalty criteria are important, emphasis ordinarily rests with the negligence and gravity criteria. *Spartan Mining*, 30 FMSHRC at 724-25. When a Judge fails to give proper weight to penalty criteria or fails to reflect proper consideration of the criteria, the Commission may set aside the assessed penalty and make the final assessment. *Westmoreland Coal Co.*, 4 FMSHRC 491, 492 (Apr. 1986).

An additional principle bears upon the consideration of this case. Courts of Appeals have rebuked the Commission for an absence of consistency in decision-making. In *Noranda Alumina, L.L.C. v. Perez*, 841 F.3d 661 (5th Cir. 2016), and *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161(D.C. Cir. 2013), federal circuit courts found that inconsistency in the Commission's application of principles for evaluation of motions to reopen required vacature of the Commissions' denial of such motions.

Although there are obvious differences between motions to reopen and penalty assessments, the Commission expects Judges to exercise consistency in their penalty assessments. Otherwise, Judges are just picking numbers out of the air. Indeed, such consistency is the raison d'être for the Commission's *Sellersburg* principle. The Commission's

recognition of the regular point system as providing a measure of consistency across different operators is a good but not final assurance of the regularity and predictability inherent in a fair penalty system. If, on the face of an assessment, a Judge has applied one or more penalty criteria in a particularly different or inconsistent fashion from other cases, the deviation is a matter of concern and may dictate vacature of the inconsistent penalty as arbitrary and capricious.

In reviewing a penalty assessment, the Commission determines whether substantial evidence justifies the penalty and whether the penalty is consistent with the statutory penalty criteria. *Pyro*, 6 FMSHRC at 2091. When the Commission, using this standard, concludes that the penalties assessed do not properly reflect the penalty criteria, it may reassess penalties as warranted by the record. *See, e.g.*, *United States Steel Corp.*, 6 FMSHRC 1423, 1431-32, 1434 (June 1984).

II. The Special Assessments in This Case

This case demonstrates MSHA's application of its procedures for special assessments. Using the largest monetary penalty (Citation No. 8428508) as an example, and recalling that the inspector cited frequency of violations rather than negligence or gravity as the reason for the special assessment, the following table sets forth MSHA's addition of points to the regular point assessment for gravity and negligence in order to arrive at the 2011 special assessment under the Part 100 regular and the MSHA Special Assessment Procedures.

Penalty Factor	Calculation of what MSHA regular assessment would have been	MSHA special assessment
Adversely Affect Staying in Business	No affect	No affect
Mine Size	15	15
Controller Size	10	10
Frequency	10	10
Repeat Frequency	8	8
Gravity (Likelihood)	30	35 (added 5)
Gravity (Severity)	10	20 (added 10)
Gravity (# Persons Affected)	1	2 (added 1)
Negligence	35	40 (added 5)
Imminent Danger	0	0
Unwarrantable Failure	0	0
Defiance of Order	0	0
Abatement	0	-2 (subtracted 2)
Additional penalty points		**19**
Total Points	119	138
Resultant Penalty from Table XIV	$12,563	$53,858
Good Faith Abatement	$1,256	—
Discretionary increase/reduction		**-25% for this violation**
Final Penalty	$11,307	$40,300

As demonstrated, MSHA used its regular point system and then added 16 points to gravity and 5 points to negligence pursuant to its special assessment procedures. MSHA subtracted 2 penalty points for abatement and granted a discretionary 25% reduction in the calculated penalty. In another case, it might have increased the penalty by 25% to a total of $67,322.

After the hearing, the Judge reduced the levels of gravity to an injury resulting in lost work days or restricted duty and negligence to "moderate." Such lower levels would have reduced the points accorded those factors in an MSHA regular assessment. Thus, MSHA's special assessment of the penalty turns out to have added 20 negligence points to the level of negligence over the regular point schedule and added 16 points for gravity over the regular point schedule — a total of 36 points. Therefore, subtracting the 2 points for abatement, MSHA's calculation of the special assessment applied 34 penalty points above the regular section 100.3-point schedule for the violation as eventually determined by the Judge. As a result, MSHA assessed an amount of $40,300 for a violation of a nature as found by the Judge that it would have regularly assessed at $2,282. This $38,000 increase amounts to about a 1,750 percent higher penalty assessment than regular assessment. Indeed, as shown a few pages below, an MSHA special assessment for the violation as found by the Judge would have been $5,831.

The penalties for the other three citations reflect similar increases. Of course, MSHA based all additions of penalty points unrelated to the history of violations.

Citation No.	Penalty under regular assessment	Special Assessment
8432118	$2,678	$9,100
8432126	$2,282	$7,700[8]
8432129	$2,282	$7,700[8]

As with Citation No. 8428508, the Judge's findings, had they been reflected in an MSHA regular assessment, would have resulted in markedly different assessments for these citations. For Citation Nos. 8432126 and 8432129, the regular penalty for the violations as found by the Judge would have been $1,026 and a special assessment would have been $3,493. For Citation No. 8432118, the regular penalty for the violations as found by the Judge would have been $1,023 and the special assessment would have been $3,074.[9]

[8] MSHA did not reduce these penalties by 25%.

[9] The lower dollar amount results from giving the 25% reduction that MSHA gave for Citation 8432118 but not for the other citations.

III. The Judge's Decisions

A. The Initial Decision

The Judge affirmed all the violations and all S&S findings. 35 FMSHRC 3077, 3099-3122 (Sept. 2013) (ALJ). The Judge reduced the level of negligence alleged by the Secretary for all four violations. He reduced the level of gravity for one citation. *Id.* at 3108-09, 3114-15, 3118-19, 3122. Specifically, he made the following changes:

1. Citation No. 8428508 – The Judge reduced the gravity from an expectation of a permanently disabling injury to lost or reduced workdays. He reduced negligence from high to moderate.

2. Citation No. 8432118 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

3. Citation No. 8432126 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

4. Citation No. 8432129 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

The Judge discussed negligence and gravity for each violation in the decision.

Before assessing penalties for specific citations, the Judge considered the arguments of the parties regarding the imposition of penalties. *Id.* at 3109-10. According to the Judge, the Secretary's argument for specially assessed penalties was that the Judge should take into account a violation's level of negligence, possible S&S character, and the history of violations. In turn, the Judge stated that the operator's argument was that the changes to section 100.5 in 2007 made the regulation vague, ambiguous, and undeserving of deference, and that the Secretary had failed to prove "particularly serious and egregious violations" or "other aggravating circumstances" justifying enhanced penalties. *Id.* Although the Judge identified the penalty criteria, he did not make any findings related to the ability of the operator to stay in business. Further, he never mentioned the size of the operator.

In the next section of his penalty discussion, the Judge imposed specific penalties for each citation. He started with Citation No. 8428508. In a brief discussion, he cited the Commission case law requiring a Judge to explain a substantial deviation from a proposed assessment, demonstrating an awareness of the limits of his discretion. He then found that he would deviate substantially from the proposed assessment of $40,308 because he reduced gravity to lost workdays or restricted duty and reduced negligence from high negligence to moderate negligence. He imposed a penalty of $20,000.

The discussions of the penalties for the other three citations are identical except for amount:

> For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.
>
> However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate negligence but only low negligence.
>
> Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should [be] reduced from $[proposed amount] to $[assessed amount].[10]

Id. at 3115, 3119, 3122. Consequently, for each penalty, the Judge stated that the reasons are the same as the reasons for Citation No. 8428508 and explicitly noted a duty to explain a substantial variation from the MSHA assessed penalty.

B. The Decision on Remand

On remand, the Judge affirmed his prior penalty assessments. 38 FMSHRC 2612 (Oct. 2016) (ALJ). In a general discussion, he stated that the statutory penalty criteria guided his penalty determinations and that he "emphasizes and clarifies" that he did not use MSHA's special assessments as a baseline for his assessments. Separately, the Judge stated that he imposed the penalties "with no feelings of constraint imposed by the proposed special assessments." *Id.* He found a $20,000 penalty appropriate for Citation No. 8428508.

Apparently thinking that the *Sellersburg* requirement for an explanation of a substantial variance applies with equal vigor and identical reasons to special assessments, the Judge explained his divergence in accordance with the *Sellersburg* requirement.[11] Although the Judge stated he did not use the initial special assessment as a baseline, it is not logically possible that

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[10] For Citation No. 8432118, the reduction was from $9,100 to $7,200. For Citation No. 8432126, the reduction was from $7,700 to $6,100. For Citation No. 8432129, the reduction was from $7,700 to $6,100.

[11] The Judge stated that "[t]o the extent that there were any substantial deviations in this Court's penalty amounts that would require a Sellersburg explanation, this Court notes that, on the one hand, it frequently disagreed with the Secretary's negligence assessments." *Id.* at 2617.

the initial penalty assessment did not strongly influence his assessment. Indeed, the Judge explicitly stated that in lowering the penalty based on lowered gravity and negligence, "this Court was persuaded that the penalty should be *reduced* (emphasis added)." *Id.* at 2619. Therefore, the Judge expressly characterized his assessment as a "reduction" of MSHA's special assessment thereby contradicting his own assertion of independence.

After the general discussion, the Judge explained his assessment for each violation. The Judge cited three reasons for his assessments in these discussions.[12]

First, for two of the citations — Citation Nos. 8432118 and 8432126 — the Judge found that the penalties would not affect the operator's ability to continue in business. Therefore, he seemed to link the amount of the assessment to a finding that it would not drive the operator out of business. *Id.* at 2619.

Second, for Citation Nos. 8428508, 8432118, and 8432126, the Judge cited the size of the operator. In discussing Citation No. 8428508, the Judge specifically noted that the operator's production exceeded 6,000,000 tons and the controlling tonnage exceeded 29,000,000 tons. He found that "[t]he size of Am Coal's operation would call for more than a minimal fine as to all the citations at issue." *Id.* at 2618.

The Judge did not mention either of these factors in his initial decision. The Judge did not identify the operator's ability to continue in business in his initial decision other than to include it in a list of penalty criteria. In addition, the Judge did not mention the operator's size in his initial decision other than to include size in a list of penalty criteria. Nonetheless, in his remand decision, the Judge asserted that he gave those two factors "great weight." *Id.* at 2617.

Third, as in his initial decision, the Judge cited the history of violations as a factor in his penalty determination. He expressly rejected any argument that the operator's violations history was "not extraordinary or extreme" thereby warranting lesser penalties. *Id.* at 2618

The Judge did not opine upon whether he viewed the history of violations factor in an absolute sense — that is, the raw number of violations regardless of total production, or took into account the frequency of violations relative to the size of the mine and the tons of coal produced. Importantly, in applying the history of violations factor, the Judge did not correlate his weighing of that factor with MSHA's exhibit showing the operator was below the midpoints for assignment of penalty points regarding both frequency of violations (10 points out of a possible 25) and frequency of repeat violations (6 points out of a possible 20).

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[12] Not every reason appears in every specific discussion. However, we agree with the Secretary that because the citations were all for violations of the same standard, were assessed with the same gravity determination, and three of the four were assessed as low negligence, the Judge meant to apply the same reasons to all citations.

DISCUSSION

For the reasons set forth below, we would find the penalties imposed by the Judge arbitrary and capricious. This case presents a remarkably clear opportunity to discuss a well-documented phenomenon of which Commission Judges must be aware and against which they must gird themselves — an "anchoring" bias.[13] "Anchoring" is the term used for the common human bias — a cognitive bias — in which a person making a decision relies too heavily on the first piece of information of which he/she becomes aware.

Cognitive scientists and behavioral economists have long understood and described the anchoring effect. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases,* 185 Science 1124-31 (Sept. 1974). However, this is not the province only of scientists and specialists. Common sense teaches that the starting, guidelines-departure point matters. When people are given an initial numerical reference, even if it is random, they tend to "anchor" their subsequent judgments — as to someone's age, a house's worth, how many cans of soup to buy, or even what sentence a defendant deserves — to the initial number given. When the number is not random but arises from a supposed "special formula," the propensity for swaying a decision must be significantly greater.

Secondly, this Judge's decision demonstrates a misunderstanding that the *Sellersburg* principle applies rigorously to special assessments. Such misunderstanding undoubtedly influenced the Judge's penalty decision and, in turn, worsened cognitive bias arising from MSHA's initial special assessment.

Separately from these important considerations, the penalties assessed by the Judge are arbitrary and capricious based upon other errors and inconsistencies in his decision. Upon remand, the Judge relied upon a penalty criterion irrelevant to the establishing the amount of a penalty — a criterion not mentioned at all by the Judge in the initial decision and which does not support his remand decision, and an overemphasis upon one penalty criterion without weighing its importance to the specific operator before him. Moreover, his penalty assessment is dramatically inconsistent with his assessment in a very similar (in fact, virtually identical) case. These errors, along with self-evident cognitive bias and misapplication of the *Sellersburg* principle, led the Judge to impose penalties in excess of reasonable amounts.

The following table demonstrates the effect of anchoring, the undue application of the *Sellersburg* principle in the context of a special assessment, and the excessiveness of the penalties flowing from the Judge's erroneous application of the penalty criteria.[14] The table is a strong indicator of excess. Even if, standing alone, it does not ***prove*** arbitrariness, it serves to illustrate tellingly the discussion that follows.

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[13] *See* generally Section I, *infra.*

[14] The data for the table are set forth in Appendices Attachment B to this opinion.

Citation No.	Penalty that would have been assessed in 2011 under the regular point system for violations as found by the ALJ	Penalty that would have been assessed in 2011 under the MSHA special assessment system for violations as found by the ALJ	ALJ's Final Assessment
8428508	$2,282	$5,831	$20,000
8432118	$1,003	$3,074	$7,200
8432126	$1,026	$3,493	$6,100
8432129	$1,026	$3,493	$6,100
Safeguard	$1,412	$1,412	$3,800
Total	$6,769	$18,328	$43,200

The table illustrates that the Judge imposed a penalty of $20,000 for the moderate negligence, lost workdays/restricted duty violation he found in Citation No. 8128508. The regular assessment for the violation would have been $2,282. Using MSHA's special assessment procedures the penalty would have been $5,831. This means the Judge's assessment was nearly 10 times higher than the ordinary regular assessment and nearly four times higher than the special assessment MSHA would have sought for the violation as found by the Judge. Similar changes apply to the assessments of the other violations. Therefore, recognizing that the regular and special assessments are not outcome determinative, we nonetheless do not find any sufficient explanation warranting penalties exceeding a regular assessment by approximately 900% and a special assessment by 350%.

I. The Anchoring Effect of Special Assessments

Clearly, the recognized anchoring phenomenon is relevant to special assessments. If MSHA proposes an assessment of $50,000 based upon a "system" developed by it for special assessments, it is virtually inevitable that such assessment exercises an effect, at least a "tug" in the words of one court, upon the final assessment.

Courts have long recognized this intuitive cognitive behavior. Circuit courts often refer to the anchoring effect in considering sentencing guidelines. *See, e.g.*, *United States v. Rushton*, 738 F.3d 854, 861 (7th Cir. 2013). In *Rushton*, the court held that:

> The calculation [of the sentencing range] is complicated, mandatory, and done first; thus it is likely to exert a not wholly conscious tug on the judge when, after having determined the guidelines range, he is deciding what sentence to give, guided by the sentencing factors in 18 U.S.C. § 3553(a). See, e.g., Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 117 *Harv. L.Rev.* 2463, 2515–19 (2004); Birte Englich & Thomas

> Mussweiler, "Sentencing Under Uncertainty: Anchoring Effects in the Courtroom," 31 *J. Applied Soc. Psychol.* 1535 (2001)

Id.

The Fourth Circuit also set forth the effect of anchoring through a listing of references:

> Hon. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw,* 104 J.Crim. L. & Criminology 489, 492 (2014) ("[I]t is critically important for sentencing judges, probation officers who prepare presentence reports, and practicing lawyers to understand the potential robust and powerful anchoring effect of advisory Guidelines and the effect of the 'bias blind spot' in determining just sentences."); Hon. Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should be Scrapped,* 26 Fed. Sent'g Rep. 6, 2013 WL 8171733, at *8 (Oct. 1, 2013) ("[T]he very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, and that creates a kind of psychological presumption from which most judges are hesitant to deviate too far.").

United States v. Parral-Dominguez, 794 F.3d 440, 448 n.9 (4th Cir. 2015). A Judge on the Eleventh Circuit explained anchoring as follows:

> Not only have district courts now become used to relying on them, but the Guidelines inevitably have a considerable anchoring effect on a district court's analysis:
>
> > Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.
>
> Nancy Gertner, *What Yogi Berra Teaches About Post–Booker Sentencing,* 115 Yale L.J. Pocket Part 127 (2006), http://www.thepocketpart. org/2006/07/gertner.html (quotations omitted).

United States v. Docampo, 573 F.3d 1091, 1105 n.5 (11th Cir. 2009) (Barkett, J., concurring, in part and dissenting, in part).[15]

Of course, the anchoring phenomenon is not itself a sufficient reason for reversal lest all penalty assessments become subject to reversal based on a cognitive bias challenge. However, it would be foolish to suggest Commission Judges are somehow immune to the anchoring phenomenon. Research suggests otherwise. An experiment conducted on 167 federal magistrate judges demonstrated that experienced court officers may be affected. Emily L. Forster, *Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?*, 77 Tenn. L. Rev. 623, 635 (2010).

In a sense, the Commission has recognized a regular penalty assessment by MSHA as an authorized "anchoring" assessment because a regular assessment reflects application of a uniform and regularized system to an assessment. It is not binding, but a substantial change requires an explanation in order to assure the integrity of the penalty process. On the other hand, special assessments issued by MSHA flow from formulized calculations largely, and sometimes wholly, unrelated to the violation and the untethered discretion to move the assessment within a range for 25 percent higher or lower. Nonetheless, special assessments undoubtedly create an anchoring effect resulting in psychological resistance to a great deviation from the special assessment. Next, we turn to the impact of *Sellersburg* when applied to special assessments in general and in this case in particular.

II. *Sellersburg* in the Context of Special Assessments

MSHA, and MESA before it, developed the regular point system to avoid the arbitrariness of penalties likely to arise from assessing penalties without any system providing for some level of uniformity. Application of the *Sellersburg* principle to regularly assessed penalties works to avoid an appearance of arbitrariness in penalty assessments. Because regular assessments serve the purpose of consistency and uniformity, it is important for the parties and the Commission to know the reasons for a substantial variance from a regular assessment.

Special assessments, on the other hand, do not serve a purpose of avoiding arbitrariness. They are arbitrary by their very nature because they are not moored to predictive norms and values, as regular assessments are. MSHA has not promulgated any

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[15] The Journal piece quoted by Judge Barkett is one of many articles confirming the importance of anchoring in judicial proceedings. *See, e.g.,* Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. Miami L. Rev. 947, 962 (2010); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 Cath. U.L. Rev. 115, 125 (2008); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 787–94 (2001); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1496 (2008).

rules defining when it will make a special assessment.[16] In turn, the calculation of the proposed special penalty by MSHA is based largely on arbitrary increases in points and then a wholly subjective decision to increase or reduce the total calculated penalty. Further, as here, the points may be added for penalty criteria (negligence and gravity) when the ostensible reason for the special assessment was frequency of violation. Such a calculation does not have a rational foundation. A special assessment provides no benefit for assurance uniformity or integrity of the penalty system. Consequently, when MSHA makes a special assessment, it is uniquely the task for the Judge to make an independent judgment based upon the record. The Judge may not pull the penalty out of the air as a perceived compromise between a regular point assessment and an overstated special assessment. The Judge must explain the penalty based on the penalty criteria in a manner that shows thoughtful consistency of the penalty amount with the criteria and a proper penalty under those criteria.

Thus, the Secretary must produce the considerable evidence necessary to justify an assessment substantially above a normal, regular assessment based on a claim of special circumstances by MSHA. The Judge's duty does not diminish the right of MSHA to make special assessments and does not diminish the right and obligation of the Judge to assess a final penalty. It simply recognizes that regularity of results is not a goal of special assessments and, as MSHA itself recognizes, special assessments arise from factors MSHA believes warrant a discretionary penalty that is inconsistent with the regular assessment process.

When MSHA decides to issue a special assessment the relevant issue is whether the Secretary introduces a sufficient quality and quantity of evidence to justify the penalty he seeks. Stated simply, on what basis does the Secretary justify a substantial heightening of penalties from regular penalties promulgated after notice and comment rulemaking to bring relative consistency to penalties? This is nothing more than requiring the Secretary to bear the burden of establishing that the penalty is appropriate, as the Mine Act requires.

This does not mean that the Judge must use the regular point schedule as a starting point when the Secretary makes a special assessment. It means the fundamental elements of a fair assessment are critical. The Judge must apply all penalty criteria and must explain fully the basis for a fair and reasoned penalty based as much as possible upon an objective application of the penalty criteria.

In prior decisions, the Commission has not expressed clearly enough the distinction between regular penalty assessments and special assessments. This case presents the opportunity to clarify the distinction between applying *Sellersburg* to regular assessments versus special assessments. Regular assessments follow a system intended to assure the integrity and fairness

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[16] MSHA has issued various forms of informal guidance. None of these guides has been subject to public comment, and none actually establishes any duties for MSHA. Indeed, the guides themselves provide complete flexibility for MSHA to apply or not apply them in its discretion. Some of the circumstances most likely to draw special assessments such as a fatality, are predictable but not uniformly applied. Further, other special assessments, such as the assessment in this case, are wholly unpredictable.

of the penalty system. Special assessments result from a series of subjective decisions and thereby give rise to the risk of an arbitrary system. While the special assessment process may be designed to impose a heightened penalty to deter a particular type of conduct, there is no methodology for the Commission to evaluate the quality of that determination against firm criteria. Judges need not and should not view the decision to assess specially or the special assessment itself as the product of a system developed for uniform assessment of fair assessments. In the case of a special assessment, the Judge must weigh the evidence holistically taking care to avoid any anchoring influence by the special assessment.[17]

III. Errors in the Administrative Law Judge's Assessment

From the foregoing discussion, it is obvious the Judge, in this case, faced a double whammy. The special assessment had an anchoring effect upon his evaluation of the penalty. In turn, his stated belief that the *Sellersburg* principle applied to the special assessment could only intensify a predisposition not to stray too far from the special assessment. The penalty imposed by the Judge undoubtedly is arbitrary and capricious.

A. The reasons cited by the Judge for the penalties do not support the size of the penalties.

The Judge does not provide a reasonable basis for the unusually high penalties for three low negligence violations and one moderate negligence violation. As set forth above and as pointed out in our earlier decision in this case, when a Judge assesses a penalty at an amount ten times above the regular assessment and even four times above what a special assessment would have been, the Judge faces a considerable burden in supporting the penalty. On remand, the Judge supported his original assessment through reference to three penalty criteria: the penalties would not affect the operator's ability to stay in business, the size of the operator, and the frequency of violations. These findings do not support his assessment.

1. Affect upon Continuation in Business

It is not entirely clear that the Judge actually meant to "support" the assessment by mentioning, for the first time on remand, the criterion that the penalty would not interfere with the continuation of the operator's business. Regardless, the criterion that a penalty not put an operator out of business with consequent job losses is not a criterion for enhancing a penalty substantially. It is a governing or limiting factor — a potential limitation upon a

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[17] The reader may find an implication in this opinion that regular assessments, in fact, should constitute a form of anchor whereas special assessments may not. That is true in a general sense. Regular assessments further an institutional and legal purpose of fairness and uniformity. For that reason, a reason different from cognitive bias, a regular assessment should have weight with Judges. However, a regular assessment is not outcome determinative. Obviously, changes in findings on penalty criteria will cause changes and even when the Judge's finding matches the allegations of the claim, Judges must decide independently on a fair and appropriate penalty.

penalty assessment. The Judge must consider whether a penalty would affect an operator's continuation in business with the resultant loss of jobs and community investment. The fact that a given penalty will not crush an operator's mining venture is not a basis for increasing a penalty assessment without a direct relationship to the subtantive penalty criteria. Certainly, for example, if a Judge agreed with every aspect of MSHA's charge related to a regular assessment, such agreement would not provide a basis for doubling or tripling a penalty based on the premise that such extreme action would not drive the operator out of business.

2. Size of the Operator

The Judge did not even mention the operator's size as a factor in his initial penalty assessment. Upon remand, however, the Judge suddenly gave size and the ability to stay in business "great weight." 38 FMSHRC at 2617. In inserting this previously unmentioned criterion into his assessment, the Judge does not deal with the fact that MSHA's assessment already factored into the assessment calculation the maximum number of penalty points for size. Of course, size is size, so that by parity of reasoning if the size of this operator was a reason for such abnormally high penalties, we must assume that the Judge would apply similar reasoning to all large operators and assess grossly outsized penalties. Such a position simply is not sustainable and, in any event, we will see below is not consistent with the Judge's actions elsewhere.

3. History of Violations

In this case, the inspector cited the operator's violation frequency as the reason for a special assessment. However, MSHA calculated the special assessment by instead arbitrarily adding penalty points for negligence and gravity. There is no rational connection between the decision to assess specially a violation due to the frequency of violations and an arbitrary increase in the penalty based upon negligence and gravity. Here, MSHA simply applied the arbitrary calculation of its formalized Special Assessment Procedures to a violation even though MSHA did not assert any need for a special assessment based upon negligence or gravity.

However, even then, the Judge's use of the history criterion is clearly erroneous. Notably, under the regular point system, MSHA assigns 10 and 8 points respectively to the history of violations and history of repeat violations categories. The maximum points in those penalty categories are 25 and 20, respectively. Assessments of 10 and 8 points fall below the midpoint for each range used in assessing repeat violations.

Therefore, in assessing the penalties, the Secretary did not place, nor would have placed, any significant weight either under the regular or special assessment formula on frequency of violations. The Secretary simply did not base the computation of the large special assessment on the frequency of violations. At the hearing stage, the Secretary cited the raw number of violations as a reason for special assessment. The Secretary argued and Judge accepted that the simple raw numbers of violations, although below the midpoint for frequency, required a much higher than expected penalty.

The Judge's decision did not include any analysis of the actual meaning of the raw numbers of violations to the application of frequency to the appropriate penalty and the Secretary does not supply one on appeal. The Secretary states in his brief that the operator's production in 2010 was approximately 6,000,000 tons, accounting for approximately 2% of the total of 337,594,564 tons of production from all underground coal mines in the United States in 2010. S. Br. at 11-12. According to MSHA statistics, MSHA cited 2,901 violations of section 75.202(a) at underground coal mines in calendar year 2010. Most Frequently Cited Standards for 2010, https://arlweb.msha.gov/stats/top20viols/top20viols.asp. Two percent of 2,901 citations is 58 citations. Therefore, if an expected frequency were calculated without further evidence or information, operator(s) producing 2 percent of the coal would be expected to have 58 citations per year under section 75.202(a).

The Secretary states that in the two years before issuance of the contested citations, MSHA cited the mine 97 times for violating section 75.202(a). S. Br. at 4. The brief does not breakdown the citations by year. Using just rough math, 97 divided by two would mean 48.5 citations per year. Using MSHA's database of operator violations, we find only 33 citations at the mine for violations of section 75.202(a) during calendar year 2010. In any event, it is clear that the frequency of violations at this mine for violations of section 75.202(a), evaluated on a per-ton basis, actually was better than the average mine's occurrences of such violations.

Of course, the parties could perhaps have argued before the Judge regarding the advantages and/or disadvantages of a large mine regarding violations of section 75.202(a). Perhaps factors such as efficiency of scale, length of beltlines, speed of beltlines, monitoring equipment, or other factors should result in markedly better numbers for a large operator. On the other hand, perhaps such factors as lengthy beltlines, multiple junction points, and other factors make it more difficult to control accumulations. Judges and Commissioners certainly do not have the expertise to make such evaluations. Moreover, no such analysis appears in the Judge's decision.

As a result, in this case, all we have is a number of violations that is below the average frequency on a per-ton basis. Here, the Judge considered only the raw number as a simple, discrete number without considering it in relation to the size of the operator or the performance by coal operators throughout the mining industry. Further, in both his decisions, he totally ignored that MSHA's penalty assessment placed the operator below the midpoint for frequency rates. These failures to consider MSHA's finding that the history of violations fell below the midpoint for both history categories are inexplicable. MSHA's calculation accurately reflects the seriousness of the frequency number on a ton-for-ton basis across the coal industry. We find no basis to ignore those findings that MSHA submitted to the Judge.

The Secretary never made any effort to explain why frequency numbers falling below its midline under section 100.3 warranted a quadrupled penalty. More importantly, the Judge did consider this conundrum in either of his decisions.

In summary, the fact that a penalty will not put an operator out of business is not a basis for imposing an assessment very substantially above an expected or reasonable penalty. The Judge did not even mention the size of the operator in imposing his original high assessment and, thus, reference to it upon remand as having "great weight," indicates a post-hoc rationale in defense of an unexplained initial decision. Moreover, as we see below, the Judge elsewhere has not applied size in the manner he applied it in this case, thereby undercutting the significance of the reference in this remand decision.

Finally, the frequency of the operator's violations falls below a midpoint for frequency of violations on MSHA's table. It is irrational for such a below-midpoint finding to serve as a basis for assessing penalties many times higher than they would have been under MSHA's regular and special assessment point system. Clearly, the Judge initially picked numbers out of the air most likely based upon a misunderstood application of the *Sellersburg* principle to the special assessment and a cognitive bias created by the anchoring assessment by MSHA. Regardless of the reason, there is no reasonable basis for his final assessments.

B. The Judge's assessment is substantially inconsistent with other assessments made by him.

The Judge issued his remand decision on October 18, 2016. Just several months earlier, the same Judge imposed a penalty for a violation of 30 C.F.R § 400 upon The Ohio Valley Coal Company ("TOVCC"), a similar-sized sister company to AmCoal. *Ohio Valley Coal Co.*, 38 FMSHRC 1084 (May 2016) (ALJ Lewis). Identically to AmCoal, the penalty did not threaten the continuation of TOVCC's business and TOVCC received the maximum 25 penalty points for size. The total points for frequency were 17 (one less than AmCoal). However, there were two distinct differences from the present case. First, the Judge found TOVCC had engaged in a high degree of negligence and an unwarrantable failure. Second, the Secretary proposed a regular penalty assessment of $8,421. The Judge accepted and assessed MSHA's regular penalty assessment. Therefore, in a case in the same time frame in which a sister company of virtually indistinguishable size committed an unwarrantable failure with high negligence, the Judge assessed a penalty less than half of the amount he assessed here for Citation No. 8428508 — a moderate negligence violation. Further, his penalty of $8,421 in that case is very similar to the assessments he made in this case for three low negligence violations.

Clearly, these penalties are wildly divergent in ways that are inconsistent with the progressive discipline imposed by the Act and *Sellersburg*'s command to avoid arbitrary penalty determinations.[18] Standing alone, such inconsistency requires reworking the penalties in the case

[18] We recognize that the comparison of these two cases, which involve the same Judge and similar facts, is a sui generis situation. We do not suggest that Judges must keep a register of their penalty assessments over time attempting to achieve some sort of illusory mathematical consistency. We raise this point in this case because to us it demonstrates the outsized effect the special assessment had on the final penalty assessment. In the TOVCC case, the Judge apparently anchored himself to the regular point schedule assessment whereas in the present case the Judge apparently anchored himself to the special assessment. In light of the TOVCC

before us. The duty to re-evaluate the assessment is even more apparent when coupled with the previously identified errors.

We have compared the penalty here to alternative outcomes because we find it necessary to thoroughly analyze the essence of the Judge's decision and the bases he has provided. Our colleagues suggest that no further analysis is necessary, because the Judge has stated that he complied with our mandate on remand. Slip op. at 10. Their reason for voting to affirm the penalty is that simple. But rather than resting on that determination, or providing an evidence-based counterpoint to our analysis, they attack our opinion with a series of non-sequiturs and erroneous and pejorative misinterpretations.

First, our colleagues elide the true nature of the Judge's reasoning here by claiming that the Judge "emphasized the record evidence pertaining to the operator's large size, its ability to continue in business, its violation history, and the need to provide an effective deterrent."[19] Slip op. at 7. In fact, most of these are static criteria that will bear the same weight in any penalty determination for a given operator. And as we point out above, the Judge did not even mention mine size in his initial decision, other than in a listing of the six penalty criteria. There is no indication that it played any significant role in his original assessment. Having already reduced the charged negligence and downgraded an important gravity finding, when required to explain his outsized penalty, he bolstered his assessment by rote recitation of the remaining possible penalty criteria. Amplifying factors on remand that were unremarkable upon the first assessment is not an "adequate explanation" for the penalty. *See* 38 FMSHRC at 1997. It is grasping at straws. We do not criticize a Judge for being human, but we need not be foolishly naive either.

Second, our colleagues erroneously claim that we have said that "any specially-assessed proposed penalty effectively prevents a Commission Judge from independently applying the statutory penalty criteria and assessing a penalty de novo." Slip op. at 7. They charge that our logic compels the conclusion that any assessment made after a special assessment has been proposed is "fruit of the poisonous tree." *Id.* In fact, we make no such contention. It is the

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decision, it is simply impossible for us to believe the Judge would have assessed AmCoal the penalties assessed in this case for reasons other than the cognitive tug of the special assessment and his concern with explaining a substantial divergence from the MSHA special assessment.

[19] Regarding deterrence, we again disagree with any suggestion that it may be considered as a separate factor. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012) (Commissioners Duffy and Young, dissenting); *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 299 (Apr. 2018) (Commissioner Althen, dissenting). The inconsistency with the statute and the potential problems arising from this misapprehension were noted at the time in the *Black Beauty* dissent. *Black Beauty*, 34 FMSHRC at 1864-69. That *Black Beauty* has not fomented chaos is a tribute to our Judges and their opinions since that decision, which have reflected a principled approach bounded by the statutory criteria. We of course recognize deterrence as the animating purpose behind any effective penalty regime and have no quarrel with a Judge emphasizing statutory factors that reflect a need for a larger punitive sanction to encourage corrective action and deter further serious violations of safety standards.

record that shows that *this* Judge impermissibly relied on the Secretary's special assessment *in this* case and that his assessment *here* is impermissibly grounded on a special assessment whose asserted justifications were found lacking *by this Judge in this specific case.* We have simply provided an explanation for the inescapable correlation between an unwarranted special assessment and the Judge's own assessment, grounded on a known, established, judicially-recognized fact of the occurrence of cognitive bias.

To acknowledge this reality is not to claim that a Judge may not independently assess a penalty using the statutory criteria. It only serves, in this case, to explain a penalty grossly outside the norm and to advise Judges and ourselves to guard against psychological tugs common to the human experience.

Our colleagues also erroneously claim we "downplay" the operator's history of violations, and the significance Congress attached to this factor. *Id.* at 8. We do not. We simply note that the Judge himself did not find this to be a factor of such aggravation, in his initial assessment, as to warrant an extraordinarily large penalty. On remand, it cannot therefore stand unchallenged, and virtually alone among the section 110(i) criteria, as a basis for penalties that are, by any measure, extraordinary.[20]

The facts of this case are wholly unsupportive. There is no special finding of unwarrantable failure, recklessness, or high negligence here, as one would expect with a history of profligate and repeated indifference or ineffectiveness. But our colleagues would hold that the operator should nonetheless be punished as a serious, serial malefactor. Our colleagues' suggestion that statements of an inspector are enough, on their own, to justify an increase in a penalty because the operator has been repeatedly warned about unsafe practices (slip op. at 9), carries no weight at all — not because such warnings are not important, but because the Judge chose not to agree with the inspector that the failure to heed the warnings amounted to a serious lack of reasonable care.

Our colleagues further suggest that we would impose a "new standard" that requires consistency with other assessments by the Judge. Slip op. at 10. They say we would beg the question, "consisten[t] with *what?*" *Id.* (emphasis added). This is not so, either. All we are demanding is factual validation of the necessary assumption upon which our colleagues rely: that this operator's history is so *excessive* that it must be damned as a scofflaw with an excessive violations history. This is virtually the only mutable factor that might support a huge penalty, but the Judge did not find extraordinary negligence, gravity, an unwarrantable failure, or any other aggravation here. Thus, it is entirely fair to ask – yes – "excessive *compared to what?*"

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[20] As we have noted, *supra*, at 26, the penalties here not only greatly exceeded those that would have been assessed under the regular assessment schedule, they were significantly higher than penalties that would have been imposed under the special assessment guidelines, had the negligence, gravity, and other criteria been calculated in accord with the Judge's own findings on those factors.

All we have done is point out that the entirety of the record refutes the Judge's conclusion, and that a further analysis of the operator's relative safety performance and the Judge's own perceptions of this very factor foreclose the determinative effect our colleagues have assigned to it. In assessing the penalty, the Judge failed to recognize that the frequency of penalties for an operator the size of this respondent was below the midpoint for the industry Further, this same Judge imposed lesser penalties upon a same-sized corporate relative in a case that was similar in time and circumstances, but with findings of higher negligence, including an unwarrantable failure. This is not a "new standard" – it is impeachment by inconvenient facts. Logical inconsistencies and disparate treatment by the same Judge evince the very sort of arbitrariness *Sellersburg* stands against. Our colleagues see no difficulty with a draconian penalty far outside the bounds of normality for violations as found by the Judge. The penalty does not square with his own factual findings, and it cannot be reconciled with how he has treated another operator in virtually identical circumstances. The only correlation that may be drawn – as the Judge himself repeatedly has done by reference to "reductions" from the proposed assessment – is to the Secretary's Special Assessment.

The irony here is that our colleagues claim we treat the statements of the Judge in a "cavalier manner." Slip op. at 7 n.3. It is they, though, who uncritically accept the Judge's statements without subjecting them to the intellectual rigor the circumstances demand of us on review. We respect every Commission Judge, but the compelling evidence of bias – evinced by his own repeated assertion in the original decision that he was "reducing" the penalty based on mitigating findings – belies the unsupported assertion that he did not use the special assessment here as a baseline.

We appreciate our colleagues crediting "our view" that regular penalties reflect application of a uniform and regularized penalty system helping to ensure credibility and avoid the appearance of arbitrariness. Slip op. at 9. This is not merely "our" view, however. It is the true core of the *Sellersburg* decision and has been the view of every Commission and every Commissioner since the *Sellersburg* decision in 1983.[21] Our colleagues' opinion ignores the

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[21] We repeat from *Sellersburg*:

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

5 FMSHRC at 293.

obvious tension between this essential and central principle and the potential for a result like the one reached in this case.

Here, the Judge reached findings and conclusions that could not be reconciled with the Secretary's proposed assessment grounded on that system's justifications. In seeking to nonetheless defend the penalty he calculated, the Judge attempted to rely on factors that do not distinguish the operator as deserving special punishment here and that cannot support the extraordinary penalty imposed. This is not a "sufficient explanation of the bas[is] underlying the penalties assessed by the Commission." *Sellersburg*, 5 FMSHRC at 293. At best, it represents post-hoc rationalization. At worst, it reflects, as we have noted above, the potential for the purely arbitrary assessments we have proscribed for 35 years.

CONCLUSION

For the reasons set forth above, we would reject the Judge's assessments. We would again remand the penalty determination to the Judge for assessment of a penalty in a manner consistent with this opinion and with our precedent in *Sellersburg*.[22]

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

[22] We recognize that we could simply suggest a proper penalty here, but we respect the proper application of judicial discretion to what is inherently a Judge's responsibility. We are confident that the Judge, on remand, would assess an appropriate penalty free of improper influence from the unfounded special assessment, using the statutory criteria in a manner consistent with *Sellersburg* and the record in this case.

GENERAL PROCEDURES

1. Special Assessment Penalty Targets

Penalty points for a violation correspond to a dollar value. MSHA converts the total number of special assessment penalty points to a target penalty between $200 and $70,000. The table below summarizes the penalty point and dollar assessment ranges for non-flagrant special assessments.

Total Number of Special Assessment Penalty Points	*Proposed Target Penalty*
<61 points	$200
61 – 143 points	Penalty Conversion Table from Table XIV 30 CFR 100.3(g)
144 or more points	$70,000

(Also see Table XIV—Penalty Conversion Table, in 30 CFR § 100.3 http://www.msha.gov/30cfr/100.3.htm.)

For violations that are designated as flagrant, the target penalty increases by $1,387 per penalty point up to 263 points, then by $1,388 per point up to a maximum of $242,000 for 275 points. A flagrant violation is defined as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially or proximately causes, or reasonably could have been expected to cause, death or serious bodily injury. The following table shows the penalty conversion schedule for flagrant violations.

Special Assessment Penalty Conversion Table for Flagrant Violations

Penalty Points	Dollar Amount	Penalty Points	Dollar Amount	Penalty Points	Dollar Amount	Penalty Points	Dollar Amount
<=152	$71,387	183	$114,384	214	$157,381	245	$200,378
153	$72,774	184	$115,771	215	$158,768	246	$201,765
154	$74,161	185	$117,158	216	$160,155	247	$203,152
155	$75,548	186	$118,545	217	$161,542	248	$204,539
156	$76,935	187	$119,932	218	$162,929	249	$205,926
157	$78,322	188	$121,319	219	$164,316	250	$207,313
158	$79,709	189	$122,706	220	$165,703	251	$208,700
159	$81,096	190	$124,093	221	$167,090	252	$210,087
160	$82,483	191	$125,480	222	$168,477	253	$211,474
161	$83,870	192	$126,867	223	$169,864	254	$212,861
162	$85,257	193	$128,254	224	$171,251	255	$214,248
163	$86,644	194	$129,641	225	$172,638	256	$215,635
164	$88,031	195	$131,028	226	$174,025	257	$217,022
165	$89,418	196	$132,415	227	$175,412	258	$218,409

166	$90,805	197	$133,802	228	$176,799	259	$219,796
167	$92,192	198	$135,189	229	$178,186	260	$221,183
168	$93,579	199	$136,576	230	$179,573	261	$222,570
169	$94,966	200	$137,963	231	$180,960	262	$223,957
170	$96,353	201	$139,350	232	$182,347	263	$225,344
171	$97,740	202	$140,737	233	$183,734	264	$226,732
172	$99,127	203	$142,124	234	$185,121	265	$228,120
173	$100,514	204	$143,511	235	$186,508	266	$229,508
174	$101,901	205	$144,898	236	$187,895	267	$230,896
175	$103,288	206	$146,285	237	$189,282	268	$232,284
176	$104,675	207	$147,672	238	$190,669	269	$233,672
177	$106,062	208	$149,059	239	$192,056	270	$235,060
178	$107,449	209	$150,446	240	$193,443	271	$236,448
179	$108,836	210	$151,833	241	$194,830	272	$237,836
180	$110,223	211	$153,220	242	$196,217	273	$239,224
181	$111,610	212	$154,607	243	$197,604	274	$240,612
182	$112,997	213	$155,994	244	$198,991	275	$242,000

2. Special Assessment Penalty Adjustments

The assessor may adjust the computed target penalty amount by ±25% or ±$200, whichever is greater, within the penalty range of $200 minimum and $70,000 maximum ($242,000 maximum for flagrant violations). This flexibility is necessary to account for the unique facts and circumstances surrounding a violation. The assessor must base the adjustment on specific information provided by enforcement personnel in the citation/order, in the special assessment review form, or in other documents or phone conversations.

In rare cases, the assessor may propose penalties outside the ±25% range. In these cases, the assessor must document the facts and circumstances supporting a penalty outside the normal range in the "Narrative Findings for a Special Assessment" provided to the operator.

ASSIGNMENT OF SPECIAL ASSESSMENT PENALTY POINTS

MSHA assigns special assessment penalty points to most violations for the five statutory criteria as described below. Other procedures are used for computing special assessments of training violations not contributing to an accident or injury, miner smoking violations, discrimination violations issued under section 105 (c) of the Act, and agent violations issued under section 110 (c) of the Act.

1. Size of Business

MSHA assigns assessment penalty points for Size of Business based on mine size and controller size during the previous calendar year. A coal mine operator's size is based on the tons produced at the mine and the tons produced at all mines under the controlling entity. A metal/nonmetal mine operator's size is based on the number of hours worked at the mine and the hours worked at all mines under the controlling entity. An independent contractor's size is based on annual hours worked at all mines. MSHA does not consider the controlling entity for independent contractors.

- **Special Assessment Penalty Points for Size**

For most special assessments, MSHA assigns the regular assessment penalty points for size derived from § 100.3(b), Tables I through V.

- **Added Special Assessment Penalty Points for Violations Contributing to a Fatal or Permanently Disabling Injury Accident and Flagrant Violations**

For mine operators, when the violation contributes to a fatal or permanently disabling injury or is a flagrant violation, MSHA doubles the controller size points. However, the total controller and mine size points for these serious accidents and flagrant violations will not exceed 25 points. For independent contractors no additional points are added.

2. Violation History

Mine operators are assigned penalty points from Tables VI and VIII in §100.3(c) based on the number of violations per inspection day and on the number of repeat violations of the same standard per inspection day at the mine during the previous 15-month violation history period. Independent contractors are assigned penalty points from §100.3(c), Tables VII and IX, based on the total number of violations and on the total number of repeat violations of the same standard at all mines. Assessed violations that became final orders of the Commission during the 15-month violation history period are used in determining violation history.

The violation histories for all mines and independent contractors are available on MSHA's web site at http://www.msha.gov/drs/drshome.htm.

For all special assessments, MSHA assigns the regular assessment penalty points for Violation History from Tables VI and VII. For special assessments MSHA assigns the regular assessment penalty points for Repeat Violation History from Tables VIII and IX, except for flagrant violations. For flagrant violations, MSHA assigns special assessment points for Repeat Violation History as follows:

Number of Repeat Violations	***Points***	***Number of Repeat Violations***	***Points***
None	0	11	16
2	7	12	17
3	8	13	18
4	9	14	19
5	10	15	20
6	11	16	21
7	12	17	22
8	13	18	23
9	14	19	24
10	15	>=20	25

3. Negligence

For Negligence, MSHA adds the following special assessment penalty points to the regular assessment points in Table X, § 100.3(d):

- 5 points for a violation not contributing to an accident;
- 7 points for Low or Moderate negligence for a violation contributing to a non-injury accident;
- 8 points for High or Reckless Disregard (RD) negligence for a violation contributing to a non-injury accident;
- 10 points for a violation contributing to a lost workdays, restricted duty, permanently disabling or fatal accident.

MSHA assigns a total 50 negligence points for a flagrant violation with high negligence and a total of 60 negligence points for a flagrant violation with reckless disregard negligence.

4. Unwarrantable Failure

Citations and orders issued under section 104(d) of the Mine Act are issued for violations caused by an "unwarrantable failure" to comply.

- MSHA adds 3 special assessment penalty points for a 104(d) violation not contributing to an accident

- MSHA adds 5 special assessment penalty points for a 104(d) violation contributing to an accident or designated as flagrant

The minimum penalty for any citation or order issued under Section 104(d)(1) of the Mine Act is $2,000 and the minimum for any order issued under Section 104(d)(2) of the Mine Act is $4,000.

5. Gravity

Gravity is measured through a combination of the likelihood of an occurrence of an event against which a standard is directed, the severity of the illness or injury if the event occurred or was to occur, and the number of persons potentially affected by the event.

(a) Special Assessment Penalty Points for Likelihood of Occurrence of Event

MSHA assigns the following special assessment penalty points for a violation not contributing to an accident:

Gravity - Likelihood of Occurrence	***Special Assessment Penalty Points***
No Likelihood	0
Unlikely	15
Reasonably Likely	35
Highly Likely	45
Occurred	53

MSHA assigns the following special assessment penalty points for a violation contributing to a non-injury accident:

Gravity - Likelihood of Occurrence	***Non-Injury, No Lost Workdays Accident***
No Likelihood	0
Unlikely	17
Reasonably Likely	37
Highly Likely	47
Occurred	55

MSHA assigns the following special assessment penalty points for a violation contributing to an accident with injury or a flagrant violation:

Gravity - Likelihood of Occurrence	***Special Assessment Penalty Points***
No Likelihood	0
Unlikely	20
Reasonably Likely	40
Highly Likely	50
Occurred	60

(b) Special Assessment Penalty Points for Severity of EXPECTED Injury or Illness

MSHA assigns the following special assessment penalty points for severity of expected injury or illness for violations not contributing to an accident:

Gravity - Severity of injury or Illness	***Special Assessment Penalty Points***
No Lost Workdays	0
Lost Workdays	10
Permanently Disabling	20
Fatal	25

MSHA assigns the following special assessment penalty points for a violation contributing to a non-injury accident:

Gravity - Severity of injury or Illness	***Non-Injury, No Lost Workdays Accident***
No Lost Workdays	0
Lost Workdays	13
Permanently Disabling	23
Fatal	27

MSHA assigns the following special assessment penalty points for a violation contributing to an accident with injury:

Gravity - Severity of injury or Illness	***Special Assessment Penalty Points***
No Lost Workdays	0
Lost Workdays	15
Permanently Disabling	25
Fatal	35

MSHA assigns the following special assessment penalty points for all flagrant violations:

Gravity - Severity of injury or Illness	***Special Assessment Penalty Points***
No Lost Workdays	N/A
Lost Workdays	N/A
Permanently Disabling	40
Fatal	50

When a serious injury accident has occurred, MSHA adds up to 20 special assessment penalty points to account for the severity of the actual injury. See Table below for the number of special assessment points added for actual injuries or illnesses.

Severity of ACTUAL Injury or Illness				
	Permanently Disabling			
Lost Workdays or Restricted Duty	Partial - to one limb or organ	Full - to one limb or organ	Full or Partial – to multiple limbs or organs, or to torso, neck, or head	Fatal
5	10	12	15	20

(c) Additional Special Assessment Penalty Points for Number of Persons POTENTIALLY Affected

MSHA adds 2 special assessment penalty points to the regular assessment penalty points in Table XIII in 100.3(e) for violations not contributing to an accident.

MSHA assigns the following special assessment penalty points for a violation contributing to an accident with injury or a flagrant violation:

Gravity - Persons Potentially Affected Flagrant, Fatal or Serious Injury	***Special Assessment Points***
0	0
1	10
2	11
3	12
4	13
5	14
6	15
7	16
8	17
9	18
>=10	25

6. Imminent Danger

MSHA adds 2 special assessment penalty points for violations contributing to an imminent danger situation.

7. Abatement & Good Faith

In general, if an operator abates a citation within a reasonable period of time, as prescribed by the citation, the total number of special assessment penalty points is reduced by 2 points. There is no penalty point reduction for an order of withdrawal, citations issued in conjunction with orders, flagrant violations, any citation contributing to an accident or any violation of the Mine Act.

When a citation is not abated within the time allotted, MSHA may assess a daily penalty of up to $7,500 for each day the citation remains unabated.

8. Citations for Working in Defiance of an Order

MSHA adds 3 penalty points for a citation issued for working in defiance of a withdrawal order. MSHA adds another 5 points (for a total of 8) if the violation contributed to an accident.

9. Citations for Immediate Notification Violations

The minimum penalty for any citation issued for failure to provide timely notification to the Secretary under Section 103(j) of the Mine Act (30 CFR 50.10) is $5,000, the maximum is $65,000.

ATTACHMENT B

Citation 8428508*

	Regular Assessment Calculated on Basis of Citation	MSHA Special Assessment	Regular Assessment Calculated on Basis of ALJ decision	Special Assessment Calculated on Basis of ALJ decision	Judge's Decision
Affect Business	No affect	No affect	No affect	No affect	
Controller Size	10**	10**	10**	10**	
Mine Size	15**	15**	15**	15**	
Frequency	10***	10***	10***	10***	
Repeat Frequency	8****	8****	8****	8****	
Gravity (Likelihood)	30	35	30	35	
Gravity (Severity)	10	20	5	10	
Gravity (# Affected)	1	2	1	2	
Negligence	35	40	20	25	
Imminent Danger	0	0	0	0	
Unwarrantable Failure	0	0	0	0	
Defiance of Order	0	0	0	0	
Abatement	0	-2	0	-2	
Total Points	119	138	99	113	
Resultant Penalty	$12,563	$53,858	$2,536	$7,774	
Good Faith abatement	$1,256	*****	$254	*****	
Final Penalty	$11,307	$40,300	$2,282	$5,831	$20,000

* The Judge reduced negligence from high to moderate and reduced gravity from permanent disability to lost workdays.

** Maximum Points on Schedule

*** Penalty points for frequency run from 0 to 25; 10 points places operator below midpoint for frequency points

**** Penalty points for repeat violations run from 0 to 20; 8 points places operator below midpoint for repeat violation points

***** Twenty-Five percent reduction; no explanation but pursuant to right to increase or decrease by 25%

Citation 8432118*

	Regular Assessment Calculated on Basis of Citation	MSHA Special Assessment	Regular Assessment Calculated on Basis of ALJ decision	Special Assessment Calculated on Basis of ALJ decision	Judge's Decision
Affect Business	No affect	No affect	No affect	No affect	
Mine Size	15**	15**	15**	15**	
Controller Size	10**	10**	10**	10**	
Frequency	12***	12***	12***	12***	
Repeat Frequency	8****	8****	8****	8****	
Gravity (Likelihood)	30	35	30	35	
Gravity (Severity)	5	10	5	10	
Gravity (# Affected)	1	2	1	2	
Negligence	20	25	10	15	
Imminent Danger	0	0	0	0	
Unwarrantable Failure	0	0	0	0	
Defiance of Order	0	0	0	0	
Abatement	0	-2	0	-2	
Total Points	101	115	91	105	
Resultant Penalty	$2,976	$9,122	$1,337	$4,099	
Good Faith abatement	$298	*****	$134	*****	
Final Penalty	$2,678	$9,100	$1,003	$3,074	$7,200

* The Judge reduced negligence for moderate to law

** Maximum Points on Schedule

*** Penalty points for frequency run from 0 to 25; 12 points places operator below midpoint for frequency points

**** Penalty points for repeat violations run from 0 to 20; 8 points places operator below midpoint for repeat violation points

***** Twenty-Five percent reduction; no explanation but pursuant to right to increase or decrease by 25%

Citation 8432126*

	Regular Assessment Calculated on Basis of Citation	MSHA Special Assessment	Regular Assessment Calculated on Basis of ALJ decision	Special Assessment Calculated on Basis of ALJ decision	Judge's Decision
Affect Business	No affect	No affect	No affect	No affect	
Controller Size	10**	10**	10**	10**	
Mine Size	15**	15**	15**	15**	
Frequency	10***	10***	10***	10***	
Repeat Freq.	8****	8****	8****	8****	
Gravity (Likelihood)	30	35	30	35	
Gravity (Severity)	5	10	5	10	
Gravity (# Affected)	1	2	1	2	
Negligence	20	25	10	15	
Imminent Danger	0	0	0	0	
Unwarrantable Failure	0	0	0	0	
Defiance of Order	0	0	0	0	
Abatement	0	-2	0	-2	
Total Points	99	113	89	103	
Resultant Penalty	$2,536	$7,774	$1,140	$3,493	
Good Faith abatement	$254	None	$114	None	
Final Penalty	$2,282	$7,700	$1,026	$3,493	$6,100

* The Judge reduced negligence from moderate to low

** Maximum Points on Schedule

*** Penalty points for frequency run from 0 to 25; 10 points places operator below midpoint for frequency points

**** Penalty points for repeat violations run from 0 to 20; 8 points places operator below midpoint for repeat violation points

Citation 8432129*

	Regular Assessment Calculated on Basis of Citation	MSHA Special Assessment	Regular Assessment Calculated on Basis of ALJ decision	Special Assessment Calculated on Basis of ALJ decision	Judge's Decision
Affect Business	No affect	No affect	No affect	No affect	
Controller Size	10**	10**	10**	10**	
Mine Size	15**	15**	15**	15**	
Frequency	10***	10***	10***	10***	
Repeat Frequency	8****	8****	8****	8****	
Gravity (Likelihood)	30	35	30	35	
Gravity (Severity)	5	10	5	10	
Gravity (# Affected)	1	2	1	2	
Negligence	20	25	10	15	
Imminent Danger	0	0	0	0	
Unwarrantable Failure	0	0	0	0	
Defiance of Order	0	0	0	0	
Abatement	0	-2	0	-2	
Total Points	99	113	89	103	
Resultant Penalty	$2,536	$7,774	$1,140	$3,493	
Good Faith abatement	$254	None	$114	None	
Final Penalty	$2,282	$7,700	$1,026	$3,493	$6,100

* The Judge reduced negligence from moderate to low

** Maximum Points on Schedule

*** Penalty points for frequency run from 0 to 25; 10 points places operator below midpoint for frequency points

**** Penalty points for repeat violations run from 0 to 20; 8 points places operator below midpoint for repeat violation points

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