

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

AUG 05 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

S&S DREDGING COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2007-0447-M
A.C. No. 09-00023-125618 E027

Mine: Lithona Mine Site

DECISION ON REMAND

Appearances: Robin Rosenbluth, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Petitioner
W. Christian Schumann, Esq. Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Petitioner
Melanie Garris, MSHA, U.S. Department of Labor, Arlington, VA
Terry Schildt, S&S Dredging, 405 Pope Trail, Covington, GA, 30014, for the Respondent

Before: Judge L. Zane Gill

This case is before me upon remand by the Commission to determine an appropriate civil penalty for Citation No. 7794620. This case was originally decided by Administrative Law Judge Avram Weisberger who retired prior to the issuance of the Commission's remand.

Citation No. 7794620 charges a violation of 30 C.F.R. § 56.14100(b), which provides that: "Defects on any equipment, machinery and tools that affect safety shall be corrected in a timely fashion to prevent the creation of a hazard to persons." The citation was issued by the Secretary of Labor ("Secretary") under 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1). 33 FMSHRC 1324 (May 2011) (ALJ). The Respondent contested the Secretary's allegation that the violation was significant and substantial ("S&S") and was the result of its unwarrantable failure to comply with a mandatory safety standard. *Id.* at 1325-1327. After a hearing, Judge Weisberger vacated both the S&S and unwarrantable failure designations. *Id.* at 1327.

The Secretary filed a petition for discretionary review, which was granted by the Commission. 35 FMSHRC 1979, 1980 (July 2013). The Secretary contended that the judge erred in overturning the S&S determination, and the Commission agreed. *Id.* The Secretary did not, however, petition for review of the judge's decision regarding the operator's unwarrantable

failure. *Id.* at n2. The Commission found that “[t]he judge erred by limiting S&S violations to those that are reasonably likely to result in injuries that require hospitalization, surgery, or require a long period of recuperation.” *Id.* at 1981. The Commission reversed the decision regarding whether Citation No. 7794620 should be designated as S&S, and affirmed the S&S designation. *Id.* at 1983. The proceeding was remanded to this court so that the appropriate penalty could be assessed. *Id.*

According to Section 110(a)(3)(A), the minimum penalty for any citation or order issued under Section 104(d)(1) shall be \$2,000. 30 U.S.C. § 820(a)(3)(A). However, under Section 104(d)(1), the Secretary has the burden of proving that there was a violation of a mandatory health or safety standard, that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and that such violation was caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. 30 U.S.C. § 814(d)(1). In this case, the judge found that a health and safety standard, namely Section 56.14100(b), was violated. 33 FMSHRC at 1325. Additionally, the Commission affirmed that Citation No. 7794620 should be designated as significant and substantial. 35 FMSHRC at 1983. The judge also determined that the unwarrantable failure standard was not met, and this determination was not included in the petitioned for review. *Id.* at n2. Therefore, because the Secretary did not meet his burden to prove the existence of an unwarrantable failure, the Section 104(d)(1) order must be amended to a citation under Section 104(a). *See VA Crews Coal Co.*, 15 FMSHRC 2103, 2105-2106 (October 1993). Thus, there is no statutory \$2,000 minimum in this case.

The assessment of the penalty then turns to Section 110(i) of the Mine Act. Under Section 110(i) the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C. § 820(i). The Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has continuously found that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination “substantially diverge[s] from those originally proposed, it behooves the . . . judge to provide a sufficient explanation of the bases underlying the penalties assessed.” *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, 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 Stone Co.*, 5 FMSHRC 287, 293 (March 1983). As Senior Judge Zielinski recently expounded in *American Coal Co.*, 35

FMSHRC ____, slip op at 54-55, No. LAKE 2008-666 (May 19, 2014), the purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg*, 5 FMSHRC at 293.

The Secretary's regulations for the determination of a penalty amount by a regular assessment take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act.¹ 30 C.F.R. § 100.3. The product of that regular assessment formula provides a useful reference point, which promotes consistency in the imposition of penalties by Commission judges. *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ).

The stipulations agreed to by the parties and filed at the hearing were numerous and many speak to the 110(i) factors that are used to assess a penalty. It was stipulated that Respondent had six violations of a mandatory health and safety standard in the 15 months preceding the citation at issue, and that Respondent had one repeat violation of the mandatory safety standard cited in the citation at issue in the 15 months preceding the issuance of the citation. At the trial, Robert Knight, the site inspector who issued the citation at issue stated that S&S Dredging had received citations in the last two years, which showed other issues with mobile equipment that were not taken care of in a timely manner. (Tr. 42:14-19).

As to the size of the business, there was uncontradicted testimony that only two persons worked at the mine. 33 FMSHRC at 1327.

The judge determined that the operator was negligent to a high degree. *Id.* The parties stipulated that: 1) the L160 Michigan loader ("Loader") at issue had been used extensively with a broken bottom step and a bent and partially caved in second step, sometimes on a daily basis; 2) the Loader at issue had been used in the violative condition for approximately two years prior to the citation at issue; 3) the Loader operators mounted and dismounted the Loader several times during a work day; 4) the second step on the Loader from the ground, which was the first usable step due to the condition of the broken bottom step, was three feet from the ground; 5) the second step on the Loader from the ground was bent, and partially caved in; 6) the operator's owner, Patty Schildt, was aware of the damaged condition of the Loader steps for approximately two years prior to the issuance of the citation; 7) the violative condition was obvious; and 8) Ms.

¹ Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A penalty amount is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies penalties ranging from \$112 for 60 or fewer points, up to the statutory/regulatory maximum of \$70,000 for 144 or more points. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. § 100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. § 100.3(h).

Schildt and another employee of Respondent regularly operated the Loader and climbed the steps of the Loader while in the violative condition. Additionally, Robert Knight testified that the negligence is high because management was aware of the condition and allowed it to exist for two years. (Tr. 39:18-22).

The parties stipulated that the Respondent was out of business at the time of the hearing.

As to the gravity of the violation, the Commission found that there was an S&S violation due to the factors stipulated above and the trial testimony. Robert Knight testified that a potential injury from the broken Loader step could cause a lost workday or lost time injury (Tr. 29:13-14); there are no other means to access the cab besides the broken steps (Tr. 35-36: 24-2); and the likelihood of injury was reasonably likely to occur since the Loader was used in that condition for the last two years (Tr. 39:15-18). Additionally, Ms. Schildt testified that she possibly suspected that the condition of the Loader steps violated MSHA standards (Tr. 61:5-8); she did not do anything to find out whether the condition of the loader steps was a violation of MSHA standards (Tr. 61:9-12); and she did not correct the condition of the loader step (Tr. 61:13-15).

Finally, the parties stipulated that Respondent made no effort to abate the condition cited prior to May 3, 2007.

Considering all of these factors, I find that a penalty of \$350.00 is appropriate.

WHEREFORE, it is **ORDERED** that Citation No. 7794620 be changed from a 104(d)(1) citation to a 104(a) citation, and it is **ORDERED** that S&S Dredging pay a penalty of **\$350.00** within thirty (30) days of the filing of this decision.



L. Zane Gill
Administrative Law Judge

Distribution (*Via Certified Mail Return Receipt Requested*):

Terry Schildt, S & S Dredging, 405 Pope Trail, Covington, GA 30014

Robin Rosenbluth, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Melanie Garris, Office of Civil Penalty Compliance, MSHA, U.S. Dept. of Labor, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939