From: Michael McCord <mmccord@fmshrc.gov>
Sent: Wednesday, December 03, 2014 2:18 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB72 Comments of Federal Mine Safety and Health Review Commission
Attachments: FMSHRC Comments on Part 100.pdf

The comments of the Commission are attached. Please refer any questions to me.

Michael A. McCord
General Counsel
202-434-9920

December 3, 2014

Sheila A. McConnell
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
U.S. Department of Labor
1100 Wilson Boulevard
Arlington, VA 22209

Re: RIN 1219-AB72

Dear Ms. McConnell:

The Federal Mine Safety and Health Review Commission submits the following comments on the proposed rule of the Mine Safety and Health Administration ("MSHA") that would amend 30 C.F.R. Part 100 in certain key respects. 79 Fed. Reg. 44494 (July 31, 2014). Part 100 sets forth MSHA's regulations governing its *proposing* of civil penalties for violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). Among other things, the proposed rule, for the first time, purports to extend Part 100 to govern the *final assessment* of penalties by the Commission in proceedings arising under the Mine Act.

The Commission is a wholly independent agency created by Congress in the Mine Act to adjudicate disputes arising under the Act. Section 110(i) of the Mine Act unambiguously provides in relevant part that "[t]he Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. § 820(i).

The Commission strongly opposes that portion of the proposed rule that would amend MSHA's Part 100 regulations to require that Commission Administrative Law Judges and the Commission itself apply Part 100 in assessing final penalties. The proposed rule would substantially and impermissibly restrict the authority of Commission Judges to carry out their independent statutory responsibility to assess final penalties in proceedings under the Mine Act. As discussed below, the proposed rule directly contravenes the Mine Act's clear statutory language, Congress' intent as demonstrated in the Act's legislative history, relevant Commission and appellate court precedent, basic principles of administrative law, and more than 36 years of interpretation and practice.

The paramount flaw in this rulemaking proceeding is that, as we explain below, the Department of Labor, acting through MSHA, does not have the statutory authority to make the proposed sweeping changes in how civil penalties are assessed under the Act. In the preamble to the proposed rule, MSHA, remarkably, does not even identify the statutory authority issue as a question to be addressed in public comments. Instead, MSHA states that it and the Commission have simply taken "different approaches" in determining how civil penalty amounts should be calculated. 79 Fed. Reg. at 44507. Indeed, nowhere in the preamble does MSHA even cite or

quote the controlling language of section 110(i) of the Act or refer to the Act's extensive legislative history regarding the assessment of penalties.

I. The Mine Act's Plain Language and Legislative History Establish that Congress Intended that the Commission Have Independent and Exclusive Authority to Assess Civil Penalties.

Section 110(i) authorizes the Commission "to assess all civil penalties" under the Act. The plain language of section 110(i) shows that Congress made a policy choice to do so by directing the Commission to consider specific criteria in carrying out this duty:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

By contrast, section 110(i) further states that the Secretary, in proposing penalties, is only required to make a "summary review" of available information and need not make any findings concerning the six criteria:

> In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Id. Thus, the statute makes clear that MSHA is to play a different role in considering and applying the statutory criteria.

The Mine Act's legislative history shows that Congress' decision in section 110(i) to grant the Commission "authority to assess all civil penalties provided in this Act" reflects a deliberate determination that an independent Commission – not MSHA – should assess all final penalties. The legislative history demonstrates that one of the principal reasons for creating the Commission was Congress' dissatisfaction with the way MSHA's predecessor agency had assessed penalties.

After discussing the adjudicatory scheme under the 1969 Coal Act, the Senate Report stated that "[t]he Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program." S. Rep. No. 95-181, at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 635 (1978) ("*Legis. Hist.*"). The Report recognized "that there are organizational and

administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments." *Id.*

In this regard, Congress intended that there be a clear separation between the proposal of penalties and the final assessment of penalties. It further intended that the independent Commission, rather than the Secretary, would have exclusive authority to assess final penalties once proposed penalties were contested. The Senate Report states:

> Section [110(i)] provides that the *civil penalties are to be assessed by the Mine Safety and Health Review Commission rather than by the Secretary* as prevails under the Coal Act (Sec. 109(a)(3)). . . . Where a penalty is contested the normal proceedings for the hearing of cases by the Commission controls.

S. Rep. No. 95-181, at 45-46, *Legis. Hist.* at 633-34 (emphasis added).

Similarly, the Conference Report on the Act explains that Congress expressly decided not to give the Secretary of Labor the authority to assess civil penalties but instead to grant that authority to the Commission:

> The Senate bill provided that the independent Mine Safety and Health Review Commission would have the authority to assess all civil penalties, based on proposals made by the Secretary. The Secretary, in making his proposals, would rely on a summary review of information available to him, and need not make findings of fact. . . . The House amendment . . . provided that the Secretary assess civil penalties, after the charged person is afforded the opportunity for a public hearing. . . . . The conference substitute conforms to the Senate bill . . . .

S. Conf. Rep. No. 95-461, at 58 (1977), *Legis. Hist.* at 1336.

The House debate on the Conference Report further emphasized the importance of the Commission's independence in assessing penalties:

> *The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties.* The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program.

123 Cong. Rec. 35411 (Oct. 27, 1977), *Legis. Hist.* at 1360 (emphasis added).

In short, Congress intentionally created a scheme providing a clear separation between the proposal of penalties and the final assessment of penalties and gave the wholly independent

Commission the ultimate authority to determine final penalty amounts. Congress could not have spoken more clearly.

The proposed rule would essentially obliterate the distinction between proposed penalties and final penalties. MSHA maintains for the first time that it can promulgate binding regulations which would severely constrain the ability of Commission Judges and the Commission to independently apply the six statutory criteria. The proposed rule completely ignores Congressional intent and directly conflicts with the penalty scheme established by Congress.

Contrary to MSHA's attempt to ignore the statutory language and legislative history, Congressional intent and legislative history do not have a "shelf life." They do not expire after a certain number of years so that an agency can make a "policy" decision that directly contradicts what Congress had already decided. The proposed rule is an impermissible attempt to undo the judgment of Congress regarding the statutory penalty scheme and the respective roles of the Commission and MSHA. Only Congress itself – not MSHA nor the Commission -- can change the penalty assessment scheme set forth in the Mine Act.

II. The Proposed Rule Would Conflict with the Commission's Procedural Rules and Contravene Executive Order No. 12866.

MSHA has no authority to promulgate a regulation that purports to trump the unquestionably valid rules of an independent federal agency. Promulgation of MSHA's proposed rule would be especially egregious because it would cause a clear conflict between Part 100 and the Commission's long-standing procedural rules. Notably, MSHA provides no explanation regarding how the inconsistent regulations could co-exist.

In particular, MSHA's proposed rule would directly conflict with Commission Procedural Rule 30, 29 C.F.R. § 2700.30. That rule was originally promulgated as Rule 27 in 1978 (43 Fed. Reg. 10320, 10324 (Mar. 10, 1978)) and has undergone only minor changes since that time. It has governed all Commission penalty proceedings in the intervening years.

Rule 30(a) provides in part that, "[i]n assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision." 29 C.F.R. § 2700.30(a). This language essentially just incorporates the relevant language of section 110(i) itself. However, MSHA's proposed rule would require that Commission Judges assess penalties based on Part 100 without independently considering the six statutory criteria. As a result, MSHA's proposed rule would conflict with Rule 30(a)'s requirement that a Judge independently apply the six statutory criteria in all instances.

Rule 30(b) provides that, "In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party." 29 C.F.R. § 2700.30(b). In contrast, MSHA's proposed rule would mandate that the Judge assess MSHA's proposed penalty amount, except where the Judge makes different

findings than those contained in the citation or in other very limited circumstances.[1] This requirement to assess the proposed penalty amount would thus directly conflict with Rule 30(b).

Because the proposed rule would directly conflict with the Commission's duly promulgated procedural rules, it would contravene Executive Order 12866, Regulatory Planning and Review. That executive order sets forth a statement of regulatory philosophy and principles that govern rulemaking by all federal agencies. One of those principles is that "[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations *or those of other Federal agencies*" (emphasis added). E.O. 12866, Section 1, paragraph 10. MSHA's proposed rule would unquestionably be "inconsistent" with the Commission's long-standing regulations. It should be withdrawn for this reason alone.

III. The Proposed Rule Is Inconsistent with Applicable Caselaw and 36 Years of Practice under the Mine Act.

MSHA's position in the proposed rule preamble regarding the assessment of penalties is directly inconsistent with applicable caselaw, with MSHA's own litigating positions, and with more than 36 years of administrative practice.

In 1978, the Commission promulgated what is now Commission Procedural Rule 30. As mentioned above, Rule 30 provides, among other things, that Commission Judges are to apply the six statutory criteria in section 110(i) in determining penalty amounts and that the Commission and its Judges are not bound by any proposed penalty issued by MSHA. In 1979, the Commission issued a decision re-affirming the principle that, pursuant to section 110(i), the Commission and its Judges are authorized to make de novo penalty assessments. *Shamrock Coal Co.*, 1 FMSHRC 469 (June 1979).

The leading decision addressing the Commission's independent authority to assess penalties is *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984).[2] The Seventh Circuit, citing the Mine Act's legislative history, held that "[i]t cannot be disputed that the Commission and its ALJs constitute an adjudicative body that is independent of the MSHA." 736 F.2d at 1152. The court further stated that "*neither the Act* nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals set forth [in Part 100]." *Id.* (emphasis added). The court also cited with approval the Commission's decision in *Shamrock Coal Co., supra.* Thus, *Sellersburg* makes clear that the Mine Act itself does not

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[1] Under the proposed rule's second alternative, a Judge could decide not to impose MSHA's proposed penalty only in situations where certain mitigating or aggravating circumstances exist. 79 Fed. Reg. at 44511. Even so, the Judge would be required to apply MSHA's Part 100 regulations in arriving at a different penalty amount.

[2] *See also W.S. Frey Co. v. Sec'y of Labor*, 57 F.3d 1068, 1995 WL 352494, *5 (4th Cir. 1995) (unpublished); *Wilmont Mining Co. v. Sec'y of Labor*, 848 F.2d 195, 1988 WL 48543, *5 n. 3 (6th Cir. 1988) (unpublished) (both citing *Sellersburg* and holding that Commission Judges are authorized to determine penalty amounts de novo).

require the independent Commission, in assessing penalties under the Act, to comply with MSHA's regulations governing proposed penalties.[3]

The Commission decision upheld by the Seventh Circuit also concluded that under the Mine Act itself the Commission cannot be bound in any way by MSHA's Part 100 regulations. *Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983). The Commission explained that once a proposed penalty is contested, Commission jurisdiction attaches and "[t]he Commission shall have authority to assess *all* civil penalties provided in this Act." 30 U.S.C. § 820(i). 5 FMSHRC at 291. The Commission further held:

> Thus, it is clear that *under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent.* The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a penalty based on record information developed in the course of an adjudicative proceeding.

Id. (emphasis added) (citing several provisions of the Act's legislative history). Therefore, while the Commission noted that the Secretary's Part 100 regulations expressly applied only to proposed penalties, the Commission's analysis emphasized the "separate and independent" roles of the two agencies under the Act and leaves no doubt that the Secretary could not alter those statutory roles through rulemaking or any other administrative action.

Until the recent publication of the proposed rule, MSHA had never challenged the bedrock principle that the Commission is authorized to assess penalties de novo and is not bound in any way by MSHA's regulations. Indeed, MSHA's litigation position before the Commission has consistently been that the Commission has exclusive authority to assess final penalties. *See, e.g., Hubb Corp.*, 22 FMSHRC 606, 608 (May 2000), where MSHA argued that a Commission Judge acted within his discretion in assessing a penalty because Part 100 is binding only on MSHA and not on Commission Judges. Moreover, MSHA has stated before the Commission that "neither MSHA's penalty regulations nor MSHA's penalty proposals are binding on Commission judges: the judges assess penalties de novo" (citing *Sellersburg, supra*).[4]

Similarly, MSHA itself has always drawn a clear distinction between proposing penalties and assessing penalties: "When an operator contests a violation and the Secretary petitions the Commission for assessment of a civil penalty, it is the Secretary's responsibility to propose penalties based on the information available to her, and it is the Commission's responsibility to assess penalties after determination of any contested issues . . . . [T]he Commission is the only

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[3] We note that although MSHA refers to the *Sellersburg* decision in the preamble, it does not mention that the court ruled that MSHA lacked statutory authority to issue regulations purporting to bind the Commission and its Judges in assessing penalties. 79 Fed. Reg. at 44508.

[4] Petition for Discretionary Review in *Secretary of Labor v. Big Ridge, Inc.*, Docket Nos. LAKE 2009-377, et al., p. 32 (Feb.11, 2011).

entity that can actually assess penalties . . . ."[5] In addition, MSHA has stated: "While the Secretary is delegated with the duty of *proposing* penalties for violations of the Mine Act . . ., pursuant to Section 110(i) . . . , '[t]he Commission shall have authority to *assess* all civil penalties provided in this Act' (emphasis added). 'The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established.' As such, Commission judges are not bound by the Secretary's proposed civil penalties."[6]

Finally, we note that in a case involving nearly identical statutory language,[7] the Eighth Circuit expressly rejected an argument by the Secretary of Labor that the independent Occupational Safety and Health Review Commission was not authorized to assess final penalties de novo. *Brennan v. OSHRC,* 487 F.2d 438, 441-42 (8th Cir. 1973). The Secretary argued that such discretion frustrated the Secretary's policymaking authority under the Occupational Safety and Health Act. The court strongly disagreed:

> The Secretary's argument, however, ignores the clear statutory language. His imposition of penalty is denominated a "proposed penalty." . . . Moreover, 29 U.S.C. § 666(i) provides . . . "The Commission shall have authority to assess all civil penalties provided in this section . . ." The Congressional intent is thus plainly manifested that the Commission shall be the final arbiter of penalties if the Secretary's proposals are contested and that, in such a case, the Secretary's proposals merely become advisory. We find no authority to the contrary.

In short, MSHA's position in the proposed rule preamble regarding the assessment of penalties is directly inconsistent with applicable caselaw, with MSHA's own litigating positions, and with more than 36 years of administrative practice.

The fundamental principle that the Commission and its Judges are authorized by the Mine Act to independently assess final penalties has been universally recognized and accepted by the courts, by MSHA, and by regulated parties. Not until publication of the proposed rule has MSHA publicly indicated that it disagrees with that principle. However, MSHA cannot establish any legal basis for its new position.

IV. The Mine Act's General Rulemaking Provision Cannot be Used to Override Specific Statutory Language and Congressional Intent.

MSHA states that it is considering making Part 100 a legislative rule so that it would govern the Commission's assessment of final penalties. 79 Fed. Reg. at 44510. MSHA

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[5] Petition for Discretionary Review in *Secretary of Labor v. Stansley Mineral Resources, Inc.*, Docket No. LAKE 2011-693-M, p. 5 (July 27, 2012) (emphasis in original).

[6] Petitioner's Response in Opposition to Motion to Compel Discovery in *Secretary of Labor v. Consolidation Coal Co.*, Docket No. WEVA 2011-2185, pp. 4-5 (Sept. 17, 2013) (citations omitted).

[7] This decision pre-dated the enactment of the Mine Act in 1977. Although the Occupational Safety and Health Act differs from the Mine Act in certain respects, the key statutory language governing penalty assessments is essentially identical.

apparently is seeking to rely on the general rulemaking provision in section 508 of the Act to justify the proposal to constrain the ability of Commission Judges to assess final penalties. That provision states: "The Secretary [of Labor], the Secretary of Health and Human Services, the Commissioner of Social Security, and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this chapter." 30 U.S.C. § 957. MSHA apparently believes that this authority to promulgate legislative rules somehow enables it to promulgate rules implementing and interpreting any provision of the Mine Act.

However, the boilerplate language in section 508 cannot trump specific statutory language within particular provisions of the Mine Act. It is well established that such general rulemaking provisions do not permit an agency to override a specific statutory directive of Congress. *National Mining Ass'n v. U.S. Department of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997). An agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [that agency] in a particular area." *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). Stated succinctly, general rulemaking provisions do not provide an agency with "carte blanche authority to promulgate any rules, on any matter." *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 523 (D.C. Cir. 1981) (en banc) (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979)). In direct contrast to MSHA's position, the courts have made clear that "the power to issue regulations is not the power to issue *any* regulations." *Id.* at 524 (emphasis in original).

Because Congress has granted specific authority to the Commission to administer and implement section 110(i), the Secretary cannot rely on the Act's general rulemaking provision to promulgate a rule that purports to limit in any way the Commission's independent authority under section 110(i). Accordingly, because MSHA's proposed draft rule attempts to override specific statutory directives, such an exercise of rulemaking authority would be unreasonable and *ultra vires*. *See, e.g., National Labor Relations Board v. FLRA*, 834 F.2d 191, 196-97 (D.C. Cir. 1987).

V. The Proposed Rule is Based on an Erroneous View of the Applicable Principles of Deference.

MSHA has in the past claimed that it possesses policymaking authority with regard to every provision of the Mine Act, including section 110(i), and that its policy choices are entitled to deference by the Commission under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, this position is based on oversimplified and erroneous notions of the principles governing the question of when an agency's statutory interpretation is entitled to deference.

An agency's statutory interpretation is entitled to *Chevron* deference only if Congress delegated to it the authority to administer the specific provision in question. 467 U.S. at 843-44. As stated in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." In *Adams Fruit*, the Supreme Court held that, although Congress had required the Secretary of Labor to promulgate standards implementing certain provisions of the statute in question and "agency determinations

within the scope of delegated authority are entitled to deference," the Secretary's interpretation of the specific statutory provisions involved in that case was not entitled to *Chevron* deference because "[n]o such delegation regarding [those specific] provisions is evident in the statute." *Id.* at 649-650.

That is precisely the situation here. Congress unquestionably delegated to the Commission the power to administer section 110(i) by granting the Commission the authority to assess "all penalties" under the Mine Act. Indeed, as discussed above, the Act's legislative history demonstrates that Congress deliberately chose to give the Commission, not MSHA, the independent authority to assess final penalties. Thus, it is the Commission, not MSHA, that is entitled to deference in administering section 110(i) and applying the six statutory criteria.

Moreover, MSHA may not somehow gain *Chevron* deference with regard to section 110(i) by attempting to use its general rulemaking authority and declaring that it has broad policymaking powers. The Supreme Court in *Adams Fruit* explained that, for purposes of *Chevron* deference, "[i]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Id.* at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). Under the Mine Act, once a proposed penalty is contested, a Commission Judge has jurisdiction over the matter and is solely authorized by section 110(i) to assess a final penalty based on the information presented in the subsequent hearing.

VI. MSHA Mischaracterizes the Split-Enforcement Scheme Contained in the Mine Act.

MSHA erroneously contends that under the split-enforcement scheme of the Mine Act, the Commission is essentially just an adjudicatory factfinder.[8] MSHA further wrongly maintains that all policymaking power resides with it so that it is empowered to promulgate regulations that govern how Commission Judges assess penalties in proceedings over which they preside. 79 Fed. Reg. at 44510.

MSHA has mischaracterized the functioning of the Mine Act's split-enforcement scheme. Congress gave the Commission specific authority to administer certain provisions of the Act. Among other things, Congress gave the Commission the authority to assess "all penalties" under the Act (section 110(i)); the authority to determine whether proposed penalty settlements should be approved (section 110(k)); the authority to promulgate procedural rules governing proceedings before it (section 113(d)(2)); and the authority to grant temporary relief from certain orders or modifications or termination of orders (section 105(b)(2)). *See* 30 U.S.C. §§ 820(i), 820(k), 823(d)(2), 815(b)(2). Moreover, Congress provided in section 113(d)(2)(A)(ii)(IV) that

[8] MSHA's reference (79 Fed. Reg. at 44510) to *Jeroski v. Sec'y of Labor*, 697 F.3d 651, 653 (7th Cir. 2012), which characterized the Commission as "the equivalent of a court," is completely irrelevant. That statement was made in a general background discussion, clearly constituted dicta, was based on a misunderstanding of the federal appellate rules, and involved an EAJA claim against MSHA where the Commission's authority was not at issue. Although the Commission is similar to a court in many respects, it also possesses the additional authority granted to it by Congress to administer certain provisions of the Act and to assess final penalties.

the Commission is authorized to grant review in cases where, among other things, "a substantial question of law, policy or discretion is involved." 30 U.S.C. § 823(d)(2)(A)(ii)(IV).

MSHA's previous reliance on *Martin v. OSHRC,* 499 U.S. 144 (1991), in characterizing the split-enforcement scheme under the Mine Act is misplaced. The Supreme Court in *Martin* expressly stated that its analysis was limited to the split-enforcement scheme contained in the Occupational Safety and Health Act:

> *We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act.* We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and *we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.*

499 U.S. at 157-58 (emphasis added). In other words, in analyzing how the split-enforcement scheme works in a particular statute, a reviewing court must carefully consider the specific language used by Congress and the legislative history of the statute.

In this regard, the Supreme Court explicitly recognized the Commission's role as an "independent-review body" in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). The Court relied on the Mine Act's legislative history in concluding that the Commission was to bring to bear its "expertise" in interpreting the Act's provisions dealing with the right of miners' representatives to accompany MSHA inspectors during inspections:

> Petitioner's statutory claims . . . arise under the Mine Act and fall squarely within the Commission's expertise. The Commission, which was established as an independent-review body to "develop a uniform and comprehensive interpretation" of the Mine Act, Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience interpreting the walk-around rights and recently addressed the precise NLRA claims presented here.

Id. at 214.

The legislative history passage cited with approval by the Supreme Court in *Thunder Basin* made clear that the Commission is to play a significant interpretative role:

> One of the essential reforms of the mine safety program is the creation of *an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or*

health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.

It is our hope that in fulfilling its responsibilities under the [A]ct, *the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct* and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res., 95th Cong., 2d Sess., 1 (Aug. 24, 1978) (emphasis added).

Accordingly, it is completely inaccurate to characterize the Commission as just an adjudicatory fact-finder. The Commission unquestionably not only is authorized to determine how the six statutory criteria in section 110(i) should be interpreted and applied when assessing civil penalties but, in fact, is required to do so.

VII. MSHA Has Not Established any Persuasive Policy Justification for Its Proposed Rule.

As shown above, MSHA lacks statutory authority to amend Part 100 to make it binding on the Commission and its Judges. Beyond that, MSHA has failed to provide any persuasive policy reasons for taking such an unprecedented, extraordinary step. It proposes solutions for a problem that does not exist. In addition, as discussed below, one of MSHA's alternatives would actually create additional legal and policy problems and significantly delay the litigation of some penalty cases.

In the preamble to the proposed rule, MSHA offers four "policy" reasons why it believes that the Commission and its Judges should be bound by MSHA's Part 100 regulations. None is convincing even if the statute allowed such a change.

First, MSHA claims that the existing approach does not provide sufficient "predictability and consistency." 79 Fed. Reg. at 44508. However, MSHA ignores the fact that some unpredictability can actually provide a disincentive to contesting penalties. Under the existing scheme, Commission Judges are free to assess higher penalties than those proposed by MSHA. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 724-725 (Aug. 2008) (affirming the Judge's decision to assess a penalty of $30,000 rather than the proposed penalty of $3,700). An operator may have second thoughts about contesting a particular penalty because it knows that the contest may result in a significantly higher penalty than proposed. But under MSHA's proposed rule, that Judge would be bound by the Part 100 regulations and could not assess a higher penalty except under very limited circumstances.

Furthermore, MSHA's Part 100 regulations themselves give rise to unpredictability and inconsistency. One example involves section 100.5 of Part 100, which currently provides for "special assessments" of proposed penalties. If MSHA chooses to "waive" a regular assessment of a proposed penalty and instead propose a penalty pursuant to section 100.5, the proposed penalty will not be based on the formulas and point systems set forth in Part 100. Instead, MSHA can elect to propose the penalty based on subjective factors not set forth in the regulations.

Second, MSHA argues that operators currently have an incentive to contest proposed penalties based on the perception that they can receive a lower penalty because Judges can assess a penalty lower than the proposed amount. 79 Fed. Reg. at 44509. However, MSHA does not support this assertion. For example, MSHA's Table 5 (*id.*) reveals that, for citations and orders that were not modified following a hearing, the Judge assessed a penalty that was greater than or equal to the proposed penalty in 67 percent of the instances involved. Thus, the fact that in the clear majority of cases the penalty amount will likely not be lowered provides no significant incentive for operators to contest penalties as claimed by MSHA.

The primary incentive for operators to contest proposed penalties appears to be that they may receive lower penalties by entering into settlements with MSHA. It is undisputed that approximately 90 percent of the cases brought by operators are settled prior to a hearing. For example, from 2006 to 2010, MSHA settled 88 percent of the cases that were decided and agreed to reduce the proposed penalties in those cases that it settled by almost $12 million *per year*. By comparison, it is clear that the possibility of a Judge lowering a penalty amount after a hearing is a relatively small incentive.

MSHA has not otherwise demonstrated any circumstances that would warrant a dramatic change in the way penalties are assessed under the Mine Act. We note that at the end of FY 2010, the Commission had a trial-level backlog of 18,190 cases due primarily to a large increase in citations issued by MSHA and amendments to MSHA's Part 100 regulations governing proposed penalties. However, as of the end of FY 2014, the Commission's inventory of trial-level cases had shrunk to 6,023 cases. This reduction in pending cases was accomplished using the existing method for assessing penalties – the same method that has been used for 36 years. In addition, MSHA concedes in the preamble that from 2010 to 2013 "the percentage of violations contested decreased by approximately 6 percent (from 26 percent in 2010 to 20 percent in 2013)." 79 Fed. Reg. at 44495. This trend of a decreasing percentage of violations being contested certainly undercuts any assertion by MSHA that the penalty scheme needs to be drastically altered because it encourages operators to contest penalties.

MSHA's two remaining related arguments are that there is a need for substantive rules to govern the assessment of civil penalties and that the existing system undermines MSHA's ability to establish a penalty assessment policy. 79 Fed. Reg. at 44510. These arguments are easily answered. As demonstrated above, Congress gave MSHA no authority to assess final penalties and gave it no policymaking or rulemaking role under section 110(i). Instead, it chose to grant the Commission exclusive authority to assess final penalties and to rely upon the Commission's adjudicatory powers and the discretion of Commission Judges.

VIII. MSHA's First Two Proposed Alternatives Are Severely Flawed.

MSHA sets forth three regulatory alternatives with regard to regular penalty assessments under Part 100.[9] The first two alternatives would significantly change the way in which final penalties are assessed. Under the third alternative, the relevant language of Part 100 would remain intact.[10]

Under the first alternative, MSHA's Part 100 regulations would strictly govern both MSHA's proposal of penalties and the Commission's assessment of final penalties. According to MSHA, this alternative would mandate that the Commission and its Judges rigidly apply MSHA's penalty formulas when assessing penalties. 70 Fed. Reg. at 44510. The Part 100 formulas consist of point systems that are used to calculate penalty amounts. The point systems reflect MSHA's judgments regarding how the statutory criteria are to be applied and how various factors and circumstances are to be weighed in arriving at a penalty amount. Under this alternative, the Commission and its Judges would be bound to apply MSHA's judgments in assessing final penalties and would have no discretion to weigh relevant factors and circumstances differently. Judges would be unable to make individualized determinations regarding penalty amounts based on the particular facts presented at the hearing.

As already discussed, MSHA has no authority whatsoever to bind the Commission or its Judges in their de novo assessment of final penalties. Thus, this alternative would be invalid and unenforceable.

MSHA's second alternative would likewise purport to bind the Commission and its Judges and is therefore unlawful. However, the second alternative would likely cause other serious problems. The second alternative would superimpose an entirely new legal standard and structure onto the existing scheme for assessing penalties. The proposed language provides that a Judge could assess a penalty that is higher or lower than the amount calculated by the Part 100 formula "if the judge finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Secretary when formulating the penalty regulations . . . ."[11] *Id.*

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[9] We note that the proposed rule only addresses the regular assessment of proposed penalties. It is silent with regard to the special assessment of proposed penalties under section 100.5 of Part 100.

[10] Although under the third alternative the relevant language of Part 100 would not be changed, MSHA states that it could pursue its penalty policy objectives through litigation before the Commission. For example, MSHA indicates that it could seek to persuade the Commission to defer to its interpretation of the penalty factors in Part 100. 79 Fed. Reg. at 44511. However, as already established in these comments, the Commission is authorized and required to assess penalties on a de novo basis. The only lawful alternative is one where the relevant language of Part 100 is unchanged and the system that has been in place for 36 years remains in place. See Sections III and V above.

[11] MSHA explains that it is basing the second alternative on Congress' inclusion of similar language in the Sentencing Reform Act of 1984. 79 Fed. Reg. at 44510. The key point is that Congress chose *not* to include such language in the Mine Act. Instead, it specified the criteria to

This alternative would likely lead to a host of additional problems. It is probable that numerous operators will argue that their situations fit within the new exception for mitigating circumstances. This will result in additional litigation to determine what the new language actually means and whether a particular operator's situation warrants a reduction in penalty amount. The Judge may need to conduct a separate investigation into the history of MSHA's Part 100 rulemaking proceedings as well as any arguably relevant policy statements. In addition, the alternative may well give rise to requests to conduct discovery of MSHA officials to determine what was considered in the rulemaking proceedings and/or the process of proposing the penalty -- a situation that will not arise when a Judge is assessing a penalty on a de novo basis. In short, this alternative would threaten to slow down the litigation process and place new, unnecessary burdens on Judges and litigants. It would be a major step in the wrong direction.

Conclusion

The language of the Act and its legislative history demonstrate that Congress made a deliberate decision to create a wholly independent Commission to adjudicate disputes under the Act and to grant the Commission exclusive authority to assess final civil penalties. MSHA cannot promulgate a rule that purports to trump specific statutory provisions and reverse the policy choices made by Congress in drafting the Act. MSHA can provide no legal or factual justification for such a drastic change in the regulatory scheme.

The Commission strongly opposes the proposed changes in MSHA's Part 100 regulations that would purport to bind the Commission and its Judges in assessing civil penalties under the Mine Act. Accordingly, the Commission requests that those portions of the proposed rule be withdrawn.

Sincerely,

Michael A. McCord

Michael A. McCord
General Counsel
Federal Mine Safety and Health Review Commission

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be considered and entrusted penalty assessment to the exercise of sound discretion by Commission Judges and the Commission itself. MSHA simply cannot amend the Mine Act.