

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 17, 2023

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 2022-0084
A.C. No. 36-05018-555460

v.

IRON CUMBERLAND, LLC,
Respondent

Mine: Cumberland Mine

DECISION APPROVING SETTLEMENT

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. Two section 104(d)(2) orders are involved, both of which were specially assessed. The Secretary has filed the Motion to Approve Settlement of the orders. As set forth in the table below, the Motion seeks to reduce the penalties, resulting in an overall reduction of **\$31,862.00** for this docket. The parties move to reduce the penalty assessed for the orders, as stated below.

Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to order
9257780	\$21,100.00	\$14,172.00	Penalty reduction of 33%
9257810	\$59,100.00	\$34,166.00	Penalty reduction of 42%
Total	\$80,200.00	\$48,338.00	Total penalty reduction of 40%

Both 104(d)(2) orders are associated with 104(d)(1) Order No. 9253174. That (d)(1) order was settled as part of the docket PENN 2022-0014. Decision Approving Settlement, PENN 2022-0014, May 26, 2022. The relevant underlying order was Order No. 9253174, for which the Motion sought a 62% reduction in the penalty.

Background

This following background is being presented to preserve the relevant historical record regarding the Cumberland Mine's recent violation history for violations of 30 C.F.R. §

75.400.

The June 2021 Violation of 30 C.F.R. § 75.400

As reflected in Docket No. PENN 2022-0014, Order No. **9253174** was issued on June 17, 2021 as a Section 104(d)(1) Order, for violation of 30 C.F.R. § 75.400. Titled “Accumulation of combustible materials,” this standard requires that “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. The citation was regularly assessed at \$6,494.00 and was not given the 10% good faith reduction. Via the Secretary’s Motion to Approve Settlement, at the end of the day, for this admitted violation, the Secretary agreed to modify the likelihood of injury from “reasonably likely” to “unlikely.” That change altered the violation to non-S&S, with the consequence that the operator paid the *minimum* penalty for a Section 104(d)(1) order from \$6,494.00 down to \$2,493.00, a sixty-two percent (**62 %**) reduction. **To the Court at least, it is noteworthy that as of June 17, 2021, the mine operator had been cited fifty-seven (57) times for violations of 30 C.F.R. § 75.400. Within just that docket, five (5) of the eleven (11) citations involved violations of that standard. All of the violations were (d) orders**

The order read:

The operator allowed accumulations of combustible materials to exist in the following locations and in various forms on the 75 Headgate development section (MMU 002) [Area or Equipment impacted: from the Tailpiece inby in all 3 entries].

1 - Accumulations of float coal dust, dark grey to black in color has been deposited on the mine roof and ribs from 22 1/2 block to 25 block in the number 3 entry, which is the Return. These accumulations were approximately 1/16 of an inch in depth.

2 - Accumulations of loose coal and coal fines were found in the number 2 entry at 25 3/4 block, along the left rib. These accumulations measured up to 40 feet in length, 25 inches in depth and 28 inches in width.

3 - Accumulations of loose coal and coal fines were found just inby the 26 block crosscut in the number 2 entry face area that measured 20 feet in width, 14 feet in length and up to 4 feet in depth.

4 - Accumulations of float coal dust, black in color were found to be deposited on both ribs in the number 1 entry from just inby the 24 block crosscut to 25 3/4 block.

5 - There was 21 cardboard boxes (roof bolt resin boxes) found to be piled up along the solid rib at the 26 block crosscut in the number 1 entry.

The [conditions] were obvious and extensive and should have been evident to even a casual observer, much less a certified person. If these conditions were left unnoticed, and therefore uncorrected, and normal mining operations were to continue, it would be reasonably likely that an accident would occur due to the exposure to the conditions. Also, a confluence of factors exists as there was also a citation issued for 24 cutting bits being excessively worn (completely missing carbide tips or more) and 4 cutting bits being completely missing on the company number 1022 Continuous Mining Machine.

Standard 75.400 was cited 57 times in two years at mine 3605018 (57 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for a Civil Penalty at 11-12.

The gravity of the violation was found to be “reasonably likely,” and could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* at 11. The violation was found to be significant and substantial. *Id.* Negligence was assessed as “high.” *Id.* The order was terminated on June 19, 2021 with the justification that “The operator has removed all accumulations from the cited areas and rockdusted the entire section with a scoop mounted flinger duster.” *Id.* at 13.

In support of the proposed modification, the Secretary offers the following:

Order No. 9253174 is a Section 104(d)(1) order for the accumulation of combustible materials in five locations on the 75 Headgate development section in violation of 30 C.F.R. § 75.400. MSHA determined that the violation was reasonably likely to cause an injury resulting in lost workdays and restricted duty, and was therefore significant and substantial, that it affected one person, and that the operator exhibited a high degree of negligence. MSHA assessed a penalty of \$6,494.00.

The inspector referenced worn cutting bits on the continuous mining machine as an ignition source for the cited materials. The Respondent contends that the material in the first area mentioned, which MSHA cited for accumulations of float coal dust on the mine roof and ribs in the No. 3 entry, was rather a mixture of coal and rock dust of unknown combustible content. The Respondent further contends that this affected area was located outby the last open crosscut approximately 200 feet from the working face and therefore removed from the referenced ignition source. The second area mentioned, which MSHA cited for accumulations of loose coal and coal fines in the No. 2 entry, the Respondent contends consisted of extremely wet material that resulted from rib sloughage, which was also located outby the last open crosscut away from the referenced ignition source. The Respondent contends that the material in the third area, which MSHA cited for coal accumulations inby

the last open crosscut at the working face of the No. 2 entry, were contained in a mud hole, fully saturated with water, and therefore would not contribute to an explosion or fire. The material in the fourth area, which MSHA cited for float coal dust in the No. 1 entry, was, argues the Respondent, in the intake air course and did not extend up to the working face and therefore was not near the referenced ignition source. Finally, the fifth area, which MSHA cited for the placement of cardboard boxes adjacent to the last open crosscut in the No. 1 entry, would not have been readily ignited by the referenced ignition source, and were awaiting immediate removal prior to the resumption of mining in the No. 1 entry. In consideration of this and the risks inherent in litigation, the Secretary agrees to modify the likelihood of injury from “reasonably likely” to “unlikely”, which changes the order to non-S&S, and reduces the penalty to \$2,493.00, the minimum for a Section 104(d)(1) order.

Motion to Approve Settlement at 3-5.

Per the Secretary’s custom the motion did not inform whether he consulted with the issuing inspector regarding the mine operator’s assertions for any of the five areas cited in the Order.

As the Court noted in its review of this citation:

At the outset it is important to note that the inspector identified five (5) distinct areas of accumulations of combustible materials in this highly gassy mine. Two of these involved accumulations of float coal dust, with one location describing them as dark grey to black and the other as black. Two other, separate, areas involved accumulations of loose coal and coal fines. The fifth area, also in a distinct location, involved 21 cardboard boxes. Cardboard is combustible material. As the inspector stated and the information in his Order reflects, the conditions were obvious and extensive and should have been evident to even a casual observer, much less a certified person.

The issuing inspector also applied the correct Commission test for these multiple accumulations, namely that assuming continuation of normal mining operations, he found that it would be reasonably likely that an accident would occur due to the exposure to the conditions.

Though not a requirement to support his evaluation, the inspector also stated that there was a confluence of factors existing as there was also a citation issued for 24 cutting bits being excessively worn (completely missing carbide tips or more) and 4 cutting bits being completely missing on the company number 1022 Continuous Mining Machine. This appears to be a reference to Citation No. 9253300, which describes such worn or missing bits on the 1022 Continuous Mining Machine. PENN 2021-0112 Pet. for a Civil Penalty at 12.

Further, the operator was no stranger to the accumulation of combustible materials standard, 30 C.F.R. § 75.400, with it being cited 57 (fifty-seven) times in two years at mine.

In the context of these five distinct areas of combustible accumulations and its very frequent occurrence, Respondent makes, as it must, various arguments in an attempt to show that the likelihood of an injury occurring was unlikely. These contentions have been set forth above and need not be repeated here. A tall task, the Respondent tries to diminish the seriousness of each of five distinct areas with various claims. They consist of various claims – that the combustible accumulations were some distances from the working face or were otherwise located so as to diminish the likelihood of occurrence or, an irrelevant consideration, the inspector didn't analyze the combustible content of the coal dust, which is not a requirement to establish a violation, or they were wet or, in the case of the 21 boxes, they were awaiting immediate removal before mining resumed. However, at some point, the array of accumulations and the operator's habitually being cited for such accumulations cannot be explained away. It is noteworthy, that per its motion, the Secretary recounts the claims without comment.

Some additional comments about the Respondent's claims that it is unlikely for an injury to occur are in order.

Several of these arguments, as detailed below, assert evidence not observed by the inspector in the initial inspection giving rise to the order and the Secretary does not inform whether it presented the Respondent's claims to the issuing inspector, who diligently detailed the conditions and extent of the five areas he identified in his order, areas, as noted above, that he remarked "were obvious and extensive and should have been evident to even a casual observer."

As to the first of the five identified areas, the inspector observed that the material was dark grey to black in color, indicative that it the accumulations were not some innocuous combination of coal dust and rock dust and the float coal dust accumulation was substantial, extending over the length of 2.5 blocks.

For the second area, Respondent contends that the accumulated material was extremely wet material from rib sloughage. Here again, the Motion does not inform if the Secretary made inquiry, in support of the inspector's detailed recounting of the conditions he found, if he inquired about this claim. What the Court does know, from the text of the order itself, is that the loose coal and coal fines accumulation was significant, 40 feet long, 25 inches deep, and 28 inches wide; and that the Respondent does not dispute this.

The same can be said for the third area, where Respondent contends the material was located in a mud hole, fully saturated with water, and therefore unlikely to ignite. One can only hope that, if the Secretary intends to encourage MSHA inspectors in their efforts to detail hazards, that the courtesy of presenting these claims to the issuing inspector was made. As with the first location, what the Court does know is that the accumulation of material was significant – 20 feet wide, 14 feet long, and up to 4 feet in depth.

For the first, second, fourth, and fifth areas, Respondent claims the identified combustible material in question – accumulated loose coal and coal fines, float coal dust, or cardboard boxes – was too far away from the working face. This contention ignores the plain language of the standard, which requires that combustible materials shall be cleaned up and not be permitted to accumulate in active workings. The accumulations cited by the inspector were all in active workings. Active workings” is defined in 30 C.F.R. § 75.2 as “[a]ny place in a coal mine where miners are normally required to work or travel.

Decision Approving Settlement May 26, 2022 at 6-8.

December 2021

The 104(d)(2) Orders *for this matter*, Docket No. PENN 2022-0084

Order No. 9257780 was issued on December 20, 2021, for a violation of 30 C.F.R. § 75.400. Titled “Accumulation of combustible materials,” the standard specifies that

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400.

The order read:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. On the 6 Mains West #1 Belt accumulations of combustible material in the form of coal, coal fines and float coal dust has been allowed to exist at the following locations:

- 1.) 11 Mains West transfer (11 block), coal accumulations in the form of coal and coal fines is present on the off side of the transfer measuring 12 inches wide by 12 foot long and 4 feet to 16 inches in depth. In addition there is coal fines present in the walkway measuring 3 feet wide by 15 feet long and 2 to 4 inches in depth.
- 2.) 12 ¼ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller creating frictional heat. Smoke was being imitted from the accumulations. The accumulations measured 40 inches long by 24 inches wide and 10 inches deep.
- 3.) 15 ¼ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 24 inches wide and 12 inches deep.
- 4.) 15 ½ block, coal accumulaions in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 22 inches wide and 8 inches deep.
- 5.) 15 ½ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 48 inches long by 26 inches wide and 10 inches deep.
- 6.) 15 ¾ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 24 inches wide and 10 inches deep.
- 7.) 15 ¾ block, coal accumulatiois in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 40 inches long by 20 inches wide and 10 inches deep.
- 8.) 16 ½ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 30 inches long by 20 inches wide and 8 inches deep.
- 9.) 11 to 17 block, coal accumulations in the form of coal float dust is present on mine floor, roof, ribs, structure and water pipe. The accumulations measured approximately 1200 feet and 16 feet wide.
- 10.) 11 to 17 block, coal accumulations in the form of loose coal and coal fines is present on the offside of the belt under every bottom roller.

Standard 75.400 was cited 71 times in two years at mine 3605018 (71 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for a Civil Penalty at 10-11.

For gravity, likelihood of injury was found to be “reasonably likely,” and injury could reasonably be expected to result in “lost workdays or restricted duty”¹ affecting one person.

¹ Originally assessed as “fatal,” a subsequent correction, made on February 9, 2022, changed the injury expected from “fatal” to “lost workdays,” with the explanation that

Id. at 10. The violation was found to be significant and substantial. *Id.* Negligence was found to be “high.” *Id.*

The order was terminated on December 20, 2021, when “Seven Hourly miners, two supervisors and three rock dusters worked to correct conditions for 3 hours for total of **36 man hours to remove[] all accumulations and rock dust the area.** All conditions have been corrected.” *Id.* at 10 (emphasis added).

Order No. 92457810

Order No. 92457810 was issued on January 19, 2022, for a violation of 30 C.F.R. § 75.400, “Accumulation of combustible materials,” *supra*.

The order read:

Accumulation of combustible materials. Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. On the 6 Mains West #1 belt there is accumulations present at the following locations on previous rock dusted surfaces:

- 1.) 6 Mains West #2 Transfer at 35 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 72 inches long by 32 inches wide and 14 inches deep.
- 2.) 34 to 28 block on the offside of belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 1500 feet long.

The injury-causing event that would most reasonably result from the cited condition was a mine fire caused by frictional heating of coal contacting the moving conveyor belt and rollers. Fires in isolated belt entries typically result in lost workday or restricted duty type injuries. Explosion of the coal dust in the affected area was unlikely due to the absence of methane accumulations or other conditions that would place a sufficient quantity of dust in suspension.

Id. at 12.

The justification given was that “[t]his subsequent action is issued as a result of a safety and health conference conducted January 6, 2022.” *Id.*

- 3.) 32 block, there is accumulations present in the form of loose coal, coal fines, and coal dust in contact with a bottom roller. The accumulations measured 2 foot long by 4 foot wide and 10 inches deep.
- 4.) 31 ½ block, there is accumulations present in the form of loose coal, coal fines, and coal dust in contact with a bottom roller. The accumulations measured 2 foot long by 3 foot wide and 10 inches deep.
- 5.) 26 to 23 block on the off side of the belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 750 feet long.
- 6.) 22 ½ to 20 ½ block on the off side of the belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 500 feet long.
- 7.) 20 ½ block, there is accumulations present on the offside of the belt in the form of loose coal, coal fines and coal dust. The accumulations measured 10 foot long by 32 inches wide and 16 inches deep.
- 8.) 19 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 2 foot wide and 12 inches deep.
- 9.) 19 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 2 foot wide and 10 inches deep.
- 10.) 18 ¾ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 4 foot long by 2 foot wide and 6 inches deep.
- 11.) 17 ¼ to 17 block, there is accumulations present in the form of loose coal and coal fines on mine floor. The accumulations measured 20 foot long by 16 foot wide and 1 to 2 inches deep. There is also coal dust accumulations present on the mine floor, roof, ribs, structure and water line.
- 12.) 15 ¼ there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 3 foot wide and 12 inches deep.
- 13.) 14 ¾ there is accumulations present in the form of loose coal and coal fines in contact with two bottom sets of rollers. The accumulations measured 9 inches long by 1 foot wide and 16 inches deep and 6 inches long by 12 inches wide and 12 inches deep respectively.
- 14.) 11 to 11 ½ bloc, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 16 foot wide by 125 feet long.
- 15.) 11 Mains transfer at 11 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 16 foot long by 72 inches wide and 16 inches deep. The

accumulations are in contact with the bottom belt of 6 Mains West #1 belt and a bottom roller.

- 16.) 10 $\frac{3}{4}$ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 24 inches long by 12 inches wide and 12 inches deep.
- 17.) 8 $\frac{1}{2}$ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 27 inches long by 30 inches wide and 8 inches deep.
- 18.) 8 $\frac{1}{2}$ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 48 inches long by 27 inches wide and 8 inches deep.
- 19.) 6 $\frac{3}{4}$ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 42 inches long by 30 inches wide and 12 inches deep.
- 20.) 6 $\frac{3}{4}$ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 6 foot long by 3 foot wide and 12 inches deep.
- 21.) 6 block Langley, there is accumulations present in the form of loose coal, coal fines and coal dust present. The accumulations measured 50 foot long by 16 foot wide and 2 to 3 inches deep.
- 22.) 6 Mains West #1 transfer, there is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact with the 79 North Mains belt. The accumulations measured 16 foot long by 8 foot wide and 12 inches deep.
- 23.) 79 North Mains tailpiece, There is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact with the 79 North Mains belt and tail roller. The accumulations measured 14 foot long by 24 inches wide and 14 to 16 inches deep.
- 24.) 79 North Mains tailpiece off side, There is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact with the 79 North Mains belt. The accumulations measured 6 foot long by 28 inches wide and 36 inches deep.
- 25.) 6 Mains West #1 belt transfer adjacent crosscut inline with 6 Mains West Belt, There is accumulations present in the form of loose coal, coal fines, and coal dust. The accumulations measured 9 foot long by 4 foot wide and 32 inches deep.
- 26.) 11 block to 6 Mains West #1 Transfer, there is accumulations of coal dust present on the offside of the belt. Accumulations are present on mine floor, roof, ribs, structure and water line on previous rock dusted surfaces. The accumulations measured 10 foot wide by 2750 feet long.

Standard 75.400 was cited 78 times in two years at mine 3605018 (78 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Petition at 13-15.

For gravity, likelihood of injury was found to be “reasonably likely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting eight persons. *Id.* at 13. The violation was found to be significant and substantial. *Id.* Negligence was found to be “high.” *Id.* The order was terminated on January 20, 2022, when

The cited accumulations have been removed and adequately rock dusted. The cited conditions took approximately 10 men per shift and 24 hours to correct for a total of 720 man hours.

Id. at 16.

Included with the Petition is a narrative supporting the special assessment. The narrative read:

000555460
Assessment Control Number

Narrative Findings for a Special Assessment

Civil monetary penalties for violations of the Federal Mine Safety and Health Act of 1977 (the Mine Act) and mine safety and health standards are determined using the six criteria set forth in 30 C.F.R. Part 100. The Mine Safety and Health Administration (MSHA) may elect to waive the regular assessment formula contained in § 100.3 if the conditions concerning the violation warrant a special assessment under § 100.5.

In December 2021 and January 2022, MSHA issued two § 104(d)(2) Orders to Iron Cumberland LLC for violations of 30 C.F.R. § 75.400 at the Cumberland Mine. MSHA inspectors observed extensive accumulations of combustible material on the 6 Mains West #1 Belt, including loose coal, coal fines, and float coal dust. The material was observed on the mine floor, roof, ribs and on equipment. In multiple places, the material was in contact with moving belt rollers, and in one location was warm to the touch and emitting smoke. These conditions provided fuel for a mine fire and could have resulted in serious injuries to multiple miners.

MSHA is proposing special assessments under § 100.5 for these Orders because they exhibited a high degree of negligence, presented significant risk of injury, and are part of an extensive history of accumulation violations at this mine. This indicates the need for greater deterrence than the regular assessment penalties would provide. Based on the six criteria set forth in § 100.3(a) and the information available to the Office of Assessments, it is proposed that Iron Cumberland LLC be assessed the following civil penalties:

§ 104(d)(2) Order No.	Condition or Practice	Proposed Penalty
9257780	Accumulations were observed in 10 locations, measuring up to 1,200 feet long. In seven locations, the material was in contact with bottom belt rollers, one of which was creating frictional heat and emitting visible smoke,	\$21,100
9257810	Accumulations were observed in 26 locations, on previously rock dusted surfaces, measuring up to 2,750 feet long. In 18 locations, belt rollers were turning in accumulations.	\$59,100

MSHA has carefully evaluated the conditions cited, relevant information, and the inspector's evaluation. The proposed penalty reflects MSHA's appraisal of all the facts presented. The attached proposed assessment includes the number of previously assessed violations and the size of the mine and the company. Under § 100.3(h), MSHA presumes that the operator's ability to continue in business will not be affected by the assessment of the civil penalties.

Petition at 7.

The Secretary's Monetary Concessions for the two Section 104(d)(2) orders

Order 9257780

The Secretary moves to reduce the assessed penalty for this citation, offering the following in support:

104(d)(2) Order 9257780 was issued for an alleged violation of §75.400. The Secretary has proposed a civil penalty of \$21,100.00 for this violation. Gravity was evaluated as: Reasonably Likely, Lost Workdays or Restricted Duty, 1 Person Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as high and amounted to an unwarrantable failure to adhere to the cited standard. Respondent argues that the specially assessed proposed penalty is excessive. As shown on the Special Assessment Narrative Form in Exhibit A of the penalty petition, the special assessment was derived by increasing the penalty points for likelihood, severity, and negligence (including three unwarrantable failure points). However, were the matter to go to hearing, **Respondent would argue that the facts and evidence would not support the high negligence or**

unwarrantable failure findings. Specifically, Respondent would argue that the conditions could have occurred or worsened over a short period of time due to the quantity and velocity of air on the belt and that the evidence would not prove that the conditions observed by the inspector were indicative of the conditions at the time of the most recent examination. In consideration of the facts, the available evidence, Respondent's arguments, the risks inherent in litigation and Respondent's agreement to accept the order as issued, the Secretary agrees to settle this matter by affirming the order as issued and agreeing to a reduced penalty of \$14,172.00. The regular assessment amount for the order as issued would have been \$5,293.00 and, had the violation been cited as a moderate negligence 104(a) citation, the Part 100 penalty would have been \$1,421.00. Thus, the agreed upon compromised amount of \$14,172.00 is a fair and reasonable amount.

Mot. to Approve Settlement at 3-4 (emphasis added).

Order No. 92457810

The Secretary moves to reduce the assessed penalty for this citation, offering the following in support:

104(d)(2) Order 9257810 was issued for an alleged violation of §75.400. The Secretary has proposed a civil penalty of \$59,100.00 for this violation. Gravity was evaluated as: Reasonably Likely, Lost Workdays or Restricted Duty, 8 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as high and amounted to an unwarrantable failure to adhere to the cited standard. Respondent argues that the specially assessed proposed penalty is excessive. As shown on the Special Assessment Narrative Form in Exhibit A of the penalty petition, the special assessment was derived by increasing the penalty points for likelihood, severity, and negligence (including three unwarrantable failure points). However, Respondent would argue at hearing that the high negligence and unwarrantable failure findings are not supported. **Specifically, Respondent argues that miners were working on the cited conditions when the order was issued and that the examination books show that corrective actions were being taken on an ongoing basis. Furthermore, because a large portion of the mine had recently been sealed, increased air velocity on the belt caused coal fines to be blown off the belt and the conditions would change significantly over a short period of time.** In consideration of the facts, the available evidence, Respondent's arguments, the risks inherent in litigation and Respondent's agreement to accept the order as issued, the Secretary agrees to settle this matter by affirming the order as issued and agreeing to a reduced penalty of \$34,166.00. The regular assessment amount for the order as issued would have been \$14,172.00 and, had the violation been cited as a moderate negligence 104(a) citation, the Part 100 penalty would have been \$4,268.00. Thus, the agreed upon compromised amount of \$34,166.00 is a fair and reasonable amount.

Motion at 4-5 (emphasis added).

Analysis

The Cumberland Mine has a compliance problem with 30 C.F.R. 75.400.

Titled “Accumulation of combustible materials,” this standard requires that “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

The 104(d)(2) Orders for this matter, Docket No. PENN 2022-0084

Order No. 9257780 was issued on December 20, 2021, for a violation of 30 C.F.R. § 75.400. Titled “Accumulation of combustible materials,” the standard specifies that

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

In what can be fairly described as a staggering number of individual violation instances, this Order, No. 9257780, identified 10 separate instances of 30 C.F.R § 75.400 violations, the details of which will be discussed. By the time this Order was issued the number of cited violations of this standard had risen to 71 (seventy-one). With the addition of yet another 30 C.F.R § 75.400 violation, by the issuance of Order No. 92457810, that number became 78 (seventy-eight) such violations. Recall that as of June 17, 2021, the number of cited violations was 57 (fifty-seven). Thus, in the six-month interval, the Cumberland Mine was cited at least another 15 times for violating this standard.

Notable aspects of Order No. 927780

The Respondent’s argument is that “the facts and evidence would not support the high negligence or unwarrantable failure findings. Specifically, Respondent would argue that the conditions could have occurred or worsened over a short period of time due to the quantity and velocity of air on the belt and that the evidence would not prove that the conditions observed by the inspector were indicative of the conditions at the time of the most recent examination.” Motion at 3-4.

This claim is hard to believe, and the Secretary apparently takes the same view, as he is unwilling to walk away from the issuing inspector’s negligence and unwarrantable failure designations. There are several reasons to look askance at the Respondent’s claim. **For starters, there is the inspector’s undisputed finding of ten separate instances of 75.400 violations for this Order alone.** Any one of the conditions would have justified issuance of a violation of the

standard. Then too, among the ten instances, seven (7) involved bottom rollers turning in loose coal and coal fines. These accumulations were not restricted to bottom rollers; the inspector noted that “[a]ccumulations [we]re present on mine floor, roof, ribs, structure and water line on previous rock dusted surfaces” at the 11 block to 6 Mains West #1 Transfer, and that those “**accumulations measured 10 foot wide by 2750 feet long.**” Petition at 13-15 (emphasis added).

And one can gain a true sense of the enormity of the violations for this order as it took “[s]even Hourly miners, two supervisors and three rock dusters work[ing] to correct [the violative] conditions for 3 hours for total of **36 man hours** to remove[] all accumulations and rock dust the area.” Petition for a Civil Penalty at 10-11 (emphasis added).

With the Order being issued on December 20, 2021, it is noteworthy that none of the excuses later raised by the Respondent’s attorney, were advanced when the inspector held a safety and health conference on January 6, 2022. Yet, one would have expected those later-raised claims to have been raised at the conference, because they were factually-based excuses which did not require an attorney’s expertise, the point being that, if they existed, the mine operator had amply opportunity post the Order’s issuance to learn of and assert the claim. With ten separate instances found, that number by itself, casts doubt on the claim that they all “could have occurred or worsened over a short period of time.”

With all of the foregoing, MSHA understandably reviewed the Order to determine whether a special assessment was appropriate. Cogently, that review led to the conclusion that it was warranted. MSHA noted that its inspector “observed extensive accumulations of combustible material on the 6 Mains West #1 Belt, including loose coal, coal fines, and float coal dust. The material was observed on the mine floor, roof, ribs and on equipment. In multiple places, the material was in contact with moving belt rollers, and in one location was warm to the touch and emitting smoke. These conditions provided fuel for a mine fire and could have resulted in serious injuries to multiple miners.” Petition at 7. On the basis of those findings, MSHA concluded that the multiple instances “exhibited a high degree of negligence, presented significant risk of injury, and [we]re part of an extensive history of accumulation violations at this mine. This indicates the need for greater deterrence than the regular assessment penalties would provide.” *Id.*

It must be asked whether in circumstances such as this do penalty reductions of this order faithfully carry out Congress’ express direction that penalties for violations are to be of such a magnitude that mine operators are sufficiently incentivized to comply with the safety and health standards or whether reduced penalties are a cheaper alternative to compliance.

Notable aspects of Order No. 92457810

Barely a month after the same MSHA inspector issued his Order, No. 927780, he issued another order for violations of the same safety standard, 30 C.F.R. § 75.400, addressing accumulations of combustible materials. This time the inspector found, **not 10, but 26 (twenty-six)** separate instances of the standard being violated. More dramatic than the effort required to abate the violative accumulations found for Order No. 9257780, it “took approximately 10 men

per shift and 24 hours to correct [the accumulations] **for a total of 720 man hours.**” Petition for a Civil Penalty at 16 (emphasis added).

As with Order No. 927780, the Respondent again contends that “the high negligence and unwarrantable failure findings are not supported. Specifically, Respondent argues that miners were working on the cited conditions when the order was issued and that the examination books show that corrective actions were being taken on an ongoing basis. Furthermore, because a large portion of the mine had recently been sealed, increased air velocity on the belt caused coal fines to be blown off the belt and the conditions would change significantly over a short period of time.” Motion at 4-5.

Given the staggering number of individual instances it is hard to take the Respondent’s claims seriously. Several observations cast doubt on those claims. To begin, it is noteworthy that both Order No. 927780 and Order No. 9257810, issued just a month apart, stem from accumulations on the same belt, the 6 Mains West #1 belt. While each of the 26 instances recorded for Order No. 9257810 make out violations, some are particularly noteworthy. For example, instance number 2 recorded accumulations 8 feet wide by 1500 feet long. Others were also extremely long: instance number 5 at 750 feet; instance no. 6 at 500 feet, instance no 14 at 125 feet. Eleven (11) of the violations involved loose coal and coal fines in contact with a bottom roller.

A disaster waiting to happen?²

On several occasions the Commission has spoken to the importance of this standard. In *San Juan Coal*, 29 FMSHRC 125, (March 2007), it noted:

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); see also *Consol*, 23 FMSHRC at 595 (“a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction.”) (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious accumulation problem.” *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994); see also *Consol*, 23 FMSHRC at 595. The Commission has also recognized that ‘past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.’” *Consol*, 23 FMSHRC at 595 (citations omitted).

Id. at 131.

² A mining disaster is defined as an incident with 5 or more fatalities.
<https://wwwn.cdc.gov/NIOSH-Mining/MMWC/MineDisasters/Count>

In *Mid-Continent Resources*, 16 FMSHRC 1218 (June 1994), again addressing 30 C.F.R. § 75.400, the Commission rejected the idea that where the coal in issue is of low combustibility, that does not prevent a significant and substantial finding as “coal is, by its nature, combustible.” *Id.* at 1222.

In another *Mid-Continent Resources* case, 16 FMSHRC 1226 (June 1994), the Commission noted that section 75.400 is violated “ ‘when an accumulation of combustible materials exists.’ Old Ben Coal Co., 1 FMSHRC 1954, 1956 (December 1979); see also Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). *Id.* at 1229. The Commission has further explained that a prohibited “accumulation” refers to a mass of combustible materials that could cause or propagate a fire or explosion. Old Ben, 2 FMSHRC at 2808.” Such combustible material includes float dust, coal fines, and lump coal.” *Id.*

That decision underscored the relevance of a significant history of 75.400 violations, noting that the mine “was cited for 170 alleged violations of [section 75.400](#), which should have engendered in the operator a heightened awareness of a continuing accumulation problem. S. Ex. M-3. Cf. Peabody Coal Co., 14 FMSHRC 1258, 1259, 1264 (August 1992); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007, 2011 (December 1987).” *Id.* at 1232.

If a tragedy occurs, this decision tells the tale of its avoidable origin. With the inspector diligently noting the many, many instances of accumulations, and with MSHA then taking those matters with the seriousness the conditions demanded, by issuing special assessments, the matter was then in the hands of the Secretary of Labor to evaluate the matters. The Secretary did so, but in a manner, at least to the Court, that was at odds with itself, as the Secretary stood by the inspector’s evaluations, while significantly reducing the special assessment penalties. Though the Secretary touts that, if regularly assessed, the penalties would have totaled \$19,465.00, that is the wrong comparison. MSHA did not apply a regular assessment to the Orders and understandably so, as the special assessment totaled \$80,200.00.

As noted by the Third Circuit Court of Appeals in its February 2008 decision regarding the Cumberland Mine: “[t]he mine has the unfortunate distinction of being “gassy,” which means that it typically liberates more than 1,000,000 cubic feet of methane in a twenty-four hour period and consequently requires spot inspection every five days by representatives of MSHA.” *Cumberland Coal Resources*, 515 F.3d 247, 249 (3d Cir. 2008).

Given the disquieting number of 30 C.F.R. § 75.400 violations issued over the past two years at this high methane producing mine, 78 times, not to mention that 26 of those occurred within a month of these two Orders, it is difficult to appreciate the justification for the 40% (forty percent) reduction in this instance.

Reasonable Inquiry is not Permitted

Despite the Court’s analysis and concerns, it is not permitted to make reasonable inquiry about the contentions advanced in settlement motions. This is because, under the Commission’s interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) need be considered under the Commission’s standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission’s decisions on the scope of a judge’s review authority of settlements, the “information” presented in this settlement motion is sufficient for approval.

The Commission has stated that the administrative law judges have “**front line oversight**” of the settlement process and as such that it is an adjudicative function **that “necessarily involves wide discretion.”** Despite those muscular words, the Commission has clearly set forth that the Secretary is not required to offer any comment at all as to the merits of the Respondent’s arguments.

Per the Commission’s decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. Meeting the first two requirements is automatic and perfunctory.

(1) The motion must state the penalty proposed by the Secretary.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

(2) The amount of the penalty agreed to in settlement.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

(3) “Facts,” as the Commission has employed that term, in support of the penalty agreed to by the parties.

In the context of settlement motions, “facts” have an atypical meaning.³ In discussing

³ In settlements, “facts” do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/fact> (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does

what constitute “facts” for settlements, the Commission stated “there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively.” *AmCoal* at 990. The only associated requirement with such “facts” is that “*there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*” *Id.* (emphasis added).

Accordingly, the Commission rejected the view that a respondent’s assertions of fact need to “present legitimate questions of fact,” and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that “[f]acts alleged in a proposed settlement need not demonstrate a ‘legitimate’ disagreement that can only be resolved by a hearing.” Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . .” *Id.*

It should not come as a surprise that, under the Commission’s *AmCoal* test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-*AmCoal*, those decisions have met with reversals by the Commission. *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020), *American Aggregates*, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

As the motion meets the Commission’s standard for approving settlement motions and as the Court is duty-bound to faithfully apply the Commission’s present decisional holdings regarding review of settlement motions according to the way the Commission has interpreted its review responsibilities under the unique review provision set forth in section 110(k) of the Mine Act and, applying those holdings, the Court determines that this settlement, *as with all settlement motions presented to this Court post-AmCoal*, also meets the Commission’s review criteria and therefore the motion is to be approved as appropriate.

Typically found in the Secretary’s motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties’ settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has “considered the representations and documentation submitted, f[ound] that the agreed-upon penalties are reasonable, and conclude[d] that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act.” Draft Order at 2. The Court cannot subscribe to such language.⁴ Rather, the Court’s review of settlement motions is confined to comparing the

not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

⁴ Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary’s motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary*. Neither does the Court endorse or agree with the Secretary’s claim that *the modifications to the*

parties' motion with the three criteria set forth by the Commission in its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it meets that decision's standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, the assessed penalties for the orders contained in this docket are **MODIFIED** as set forth above and Respondent Iron Cumberland, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **\$48,338.00** within 30 days of this decision.⁵

William B. Moran

William B. Moran
Administrative Law Judge

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citations are immaterial, nor with the accompanying claim that *the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions*. The Court has never been informed of any such value. Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

⁵ It is preferred that penalties be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to:

U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

It is important to include Docket and A.C. Numbers with the payment.