

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 4, 2023

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

v.

APPALACHIAN RESOURCE WEST
VIRGINIA, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2022-0555
A.C. No. 46-08930-560351

Mine: Grapevine South Surface Mine

DECISION NOW APPROVING SECRETARY’S MOTION FOR SETTLEMENT

Before: Judge William Moran

This matter remains 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. On March 1, 2023, the Court denied the Secretary’s Motion for Approval of settlement for this docket. Thereafter, the Commission’s recent decision in *Perry Cnty. Res., LLC*, KENT No. 2022-0024 (FMSHRC July 20, 2023), (“*Perry Cnty*”) changed the landscape when a judge is faced with settlement motions for which the Secretary refuses to provide a section 104(b) order issued in connection with a section 104(a) citation. As described below, the Commission held that the Secretary, at least in circumstances presented there, need not supply the record of the 104(b) order to the Court.

Procedural Background

On March 1, 2023, the Court denied the Secretary’s Motion for approval of settlement. The denial was based upon the Secretary’s refusal to provide two section 104(b) orders as those orders, while the fact of their issuance was listed in Exhibit A for the docket, were missing from the record. The Court noted that the missing orders were part of the paper issued in connection with Citation Nos. 9567103, and 9567108 for that docket. Though the circumstances for this docket are not identical to *Perry Cnty*, the Court extrapolates that the Commission would not require the Secretary to provide the (b) orders in this case either. Therefore, the Court now approves the settlement.

The Commission’s decision in *Perry Cnty. Res., LLC*, KENT No. 2022-0024, (FMSHRC July 20, 2023) (“*Perry Cnty*”).

The Commission’s decision in *Perry Cnty* held that this Court erred in requiring that the section 104(b) order, issued in connection with a section 104(a) citation in that docket, needed to be supplied to the Court in the settlement motion for that docket. At its core, the Commission based its decision on two factors: the Secretary’s motion provided sufficient information to satisfy the *AmCoal*¹ standard; and the Court’s concern that the record did not reveal if the Secretary met his obligation to notify the miners’ representatives that the operator failed to abate a violation within the specified abatement period was irrelevant to that settlement motion proceeding.

With regard to the first factor, the Commission noted that in *AmCoal* it held “that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors.” *Perry Cnty at 5, citing AmCoal*, at 1982. Applying that standard, the Commission concluded that the Court “erred by denying the settlement on the basis that [the judge] was not provided the section 104(b) failure to abate order associated with Citation No. 9282162.² The operator agreed to accept Citation No. 9282162 as written and pay the proposed penalty in full. The Judge failed to identify relevant facts that would be provided by the order that had not already been made a part of the record.” *Perry Cnty, Id.*

As to the second factor, the Commission, pertaining to whether “the Secretary met his obligation to notify the miners’ representatives that the operator failed to abate a violation within the specified abatement period” determined that information was “irrelevant to the subject proceeding.” *Id.* at 6. In that regard, it stated “Section 105(b)(1)(A) requires the Secretary to provide notice to an operator and to the miners’ representative that the operator has failed to timely abate a violation and that a penalty will be proposed under section 110(b) of the Mine Act, 30 U.S.C. § 820(b). Here, the Secretary provided factual information that she did not propose a penalty in connection with the section 104(b) order. Therefore, the provisions of section 105(b)(1)(A) do not apply to this proceeding.” *Id.*

¹ *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016)

² The Commission did *not* reach “the question of whether a section 104(b) order issued for a failure to abate a contested citation may ever appropriately be sought by a Judge to further the Judge’s *AmCoal I* analysis or whether it constitutes prohibited evidentiary documentation, we find the Judge’s request was inappropriate in this case. The Judge failed to identify a rationale for requiring the order, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full.” *Perry Cnty* at n.3. Accordingly, identification of a rationale, if deemed sufficient, would be considered by the Commission.

About 104(b) Orders³

The Mine Act speaks to (b) orders in *two* locations: section 104 and section 105. Those sections are independent of one another, but related. First, **under the topic of “Citations and Orders,”** section 104(b) provides:

Section 104(b) orders are issued when “upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b)

Second, **under the distinct topic of “Procedure for Enforcement,”** section 105(b) provides:

[i]f the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary’s notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees.

³ Withdrawal orders have been a safety tool as far back as 1952, with the House Report on the Prevention of Major Disasters in Coal Mines H.R. Rep. No. 82-2368 at Legis History at 62, 72. (1952). The Federal Coal Mine Health and Safety Act of 1969 followed suit. S. Rep. No. 91-411, at 90 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 216 (1975). So too, in a Senate Report regarding the 1977 Mine Act, it noted that “Inspectors are also authorized to issue similar closure or withdrawal orders where the violation previously “noted” has not been abated within the time prescribed for such abatement. S. Rep. No. 95-181, at 5 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 593 (1978). Thus, withdrawal orders have a life of their own; they are not inextricably tied to a penalty under section 105.

30 U.S.C. § 815 (b)(1)(A).

The Commission itself has recognized that section 104(b) orders are not joined at the hip to section 105(b) orders. In *Hopkins County Coal* 38 FMSHRC 1317, (June 2016), it upheld a section 104(b) order *without a single reference to* a section 105(b) order. The importance of a section 104(b) order in its own right was emphasized by the Commission, stating:

The purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. A “no area affected” order provides an important *1336 deterrent to operators who fail to abate violations in a timely fashion. ... The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply.

Id. at 1335-1336.

So too, in *Hibbing Taconite*, 38 FMSHRC 393 (March 2016) the Commission spoke to the importance of section 104(b) orders with *no reference* to the other section invoking citations or orders per Section 104, namely Sections 105(a) and (b).

While the inspector's concern with exacting immediate corrective action from the operator in order to keep miners safe is a laudable and important concern, the Mine Act sets forth a scheme in sections 104(a) and (b) by which to achieve that end. The inspector must take enforcement action consistent with those provisions. For instance, the inspector must set an abatement time based upon the amount of time necessary to fully abate a violation. Thereafter, if the operator does not fully abate within that time, the inspector must determine whether an extension in abatement time is warranted or whether **he should issue a section 104(b) order**. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition.

Id. at 399.

The federal courts of appeals have also discussed section 104(b) orders, independent of, and without any reference to, section 105(b) enforcement orders. *See, for e.g., Energy West Mining*, 111 F.3d 900, 901-903 (D.C. Cir. 1997).

Analysis

The underlying reasoning for this Court's denial of the settlement motion in *Perry Cnty*, while, in retrospect, insufficiently stated,⁴ was that the Court, miners, and the public, should be privy to the circumstances which led the MSHA inspector to issue the (b) order. However, in light of the Commission's decision in that case, as applied to this case, *Appalachian Resource, WV, LLC*, Docket No. WEVA 2022-0555, extrapolating from the Commission's *Perry Cnty* decision, the Court reaches the conclusion that the Secretary need not supply the (b) order in this instance either. The Court does so, even though this case is potentially distinguishable⁵ from *Perry Cnty*, because in this instance *there was a civil penalty discount in spite of the issuance of a (b) order*. In fact, as described below, the penalty discount was a hefty one, at more than a 50% discount in the penalty. The Commission has the availability to invoke *sua sponte* review when it wishes.

While concluding that the settlement motion now must be approved, some additional thoughts are in order, given that the Commission's decision in *Perry Cnty* left the door open to a potentially adequate rationale being presented by a court. (*See* n.3). The Court makes such an attempted rationale here.

In this matter, as in *Perry Cnty*, Section 104(b) orders were issued; in this instance for two of the citations in the docket. Those Orders did not occur in a vacuum. The inspector determined, pursuant to the Citations and Orders provisions in section 104 of the Act that, in connection with those section 104(a) citations he issued, that the time was up, so to speak. The Orders were issued because he determined that the violation had not been totally abated within the period of time as originally fixed therein or as subsequently extended, and that the period of time for the abatement should not be further extended. That is a fact.

Given that, it cannot be disputed that the 104(a) citations and the ensuing 104(b) orders in this matter were inextricably related. The 104(b) orders did come out of the blue. The orders arose *solely* in connection with the section 104(a) citations. Their creation and their viability did not depend upon taking any enforcement actions under section 105. The (b) orders *were therefore part of the official record for the two 104(a) citations* in this matter.

This Court, since disabused of the relevance of the (b) order in connection with the settlement motion, per the Commission's *Perry Cnty* decision, had thought that as an official document issued in connection with the 104(a) citation, it should be disclosed. The Court thought of the 104(b) order as the last chapter of the violation, akin to a book, without which inclusion the story would be missing the final chapter. The life of a 104(a) citation for which a 104(b) order is then issued cannot be told without that last chapter revealed and the Court

⁴ As noted, in *Perry Cnty*, the Commission held that "*the Judge failed to identify a rationale for requiring the order*, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full." *Perry Cnty* at 5-6, n..3 (emphasis added).

⁵ See note 3, above, as the proposed regularly assessed penalty *was not paid in full* here.

believed, simply to complete that story, the Court, affected miners and the public should be able to finish the book, so to speak, without filing a FOIA request.⁶ The Commission's *Perry Cnty* decision determined that this Court was wrong about that.⁷ They held that, as the penalty was paid in full for Citation No. 9282162, there was no basis for the Court to learn of the content or circumstances of the (b) order.

Resolution of the Settlement Motion in this matter

The (b) orders in this case were derived from Citation Nos. 9567103 and 9567108

On June 13, 2022, MSHA Inspector Melvin Keith Wolford issued a section 104(a) citation, **Citation No. 9567103**. 30 C.F.R. §77.1606(c) was cited. Titled "Loading and haulage equipment; inspection and maintenance," that standard provides in subsection (c) that **"Equipment defects affecting safety shall be corrected before the equipment is used."** The settlement notes that the violation has been admitted.

In the Condition or Practice section of his citation, the Inspector listed the following **eleven (11) defects** on the cited loader:

DEFECTS AFFECTING SAFETY ARE NOT BEING CORRECTED ON THE CAT 992G LOADER, CO. NO. 001, PRIOR TO PLACIING IT INTO SERVICE. WHEN CHECKED, THE FOLLOWING DEFECTS WERE OBSERVED.

- 1. THE TOP CENTER PIN PLATE HAS 2 OF 6 RETAINING BOLTS BROKE OUT.**
- 2. THE CENTER SECTION IS OIL SOAKED FROM HYDRAULIC OIL LEAKS.**
- 3. THE REAR AXLE AREA IS OIL SOAKED.**
- 4. THE REAR BRAKE VALVE AND HOSES ARE OIL SOAKED.**
- 5. THE GLASS FOR THE EMERGENCY EXIT WINDOW LATCH NEEDS ADJUSTED. THE WINDOW DOES NOT PULL UP TIGHT TO THE WINDOW SEAL TO PREVENT UNFILTERED DUST FROM ENTERING THE CAB.**
- 6. THE CATAGORY 2 AND 3 WARNING LIGHTS ARE STAYING**

⁶ An aside, reflecting the inherent importance of 104 (b) orders, it is noted that, per 15 U.S.C. 78m-2, there is a reporting requirement under the Securities Exchange Act that each coal or other mine must file the total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)), among other periodic reporting requirements such as the total number of S&S violations.

⁷ The Court agrees that it was incorrect in tying any section 105(b) order to the issuance of a section 104(a) citation. As noted above, the two exist independently, with a section 104(b) order being part of the record associated with a section 104(a) citation and a section 105 (b) order being a separate enforcement decision. In *Perry Cnty*, and again in this matter, the Secretary has apparently decided not pursue enforcement actions under section 105(b).

ILLUMINATED AND MINERS ARE TAPING OVER THEM SO THEY CANT SEE THE LIGHTS FLASH.

7. THERE ARE SEVERAL TROUBLE CODES STAYING ON THE DISPLAY ALL THE TIME WHILE THE LOADER IS RUNNING THATS KEEPING THE LIGHTS ON.

8. THE LEFT FRONT WIPER WILL WORK INTERMITTENTLY. IT WILL COME ON ONE TIME ITS CHECKED AND NOT WORK THE NEXT.

9. THE RIGHT SIDE STEERING JACK HAS EXCESSIVE SLACK/SLOP IN THE REAR PIN FIT_

10. THE BUCKET TILT CYLINDER HAS EXCESSIVE AMOUNTS OF OIL LEAKING OUT AROUND THE STEM SEAL.

11. THE HYDRAULIC OIL TANK HAS EXCESSIVE AMOUNT OF OIL LEAKING. THE BOTTOM OF THE TANK IS OIL SOAKED WITH DRIPS.

FAILURE TO CORRECT THE CITED CONDITIONS EXPOSES TWO OPERATORS TO THE HAZARDS 10 HOURS EACH SHIFT 6 DAYS A WEEK.

THE LOADER WAS REMOVED FROM SERVICE.

Standard 77.1606(c) was cited 68 times in two years at mine 4608930 (67 to the operator, 1 to a contractor).

Petition for civil penalty at 13 (emphasis added).

Citation No. 9567103 was assessed, under what the Secretary describes in Part 100, Criteria and Procedures for Proposed Assessment of Civil Penalties, as “Determination of penalty amount; **regular assessment.**” 30 C.F.R. §100.3 (emphasis added). The amount assessed was \$626.00. Understandably, the 10% good faith reduction was not applied, as the Inspector issued a section 104(b) order upon determining that the violation was not totally abated within time allowed. The citation is to be paid in full. Motion at 2.

Two days later, on June 15, 2022, the same inspector issued section 104(a) **Citation No. 9567108**. In that instance, the same standard, equipment defects affecting safety, was cited as in Citation No. 9567103; 30 C.F.R. §77.1606(c). This time, not 11 (eleven) defects were identified, **but rather 19 (nineteen) defects were listed in the citation.** The motion proposed to reduce the regular assessment for that Citation by **54% (fifty-four percent), from \$4,624.00 to \$2,124.00.** In arriving at the *regular* assessment of \$4,624.00, the 10% ‘good faith’ reduction was not applied in this instance either, an understandable decision given that, as with **Citation No. 9567103**, the issuing inspector also issued a section 104(b) order, upon determining that the violation was not totally abated within time allowed.

In the Condition or Practice section for this citation, the Inspector listed the following:

DEFECTS AFFECTING SAFETY ARE NOT BEING CORRECTED ON THE CAT 785D TRUCK, CO. NO. 111, PRIOR TO PLACING IT INTO SERVICE. WHEN CHECKED, THE FOLLOWING DEFECTS WERE OBSERVED.

1. THE LEFT SIDE REAR INSIDE TIRE HAS LARGE PATCHES OF TREAD TORN OFF THE TIRE.
THE METAL CORDS ARE SEVERED AND STICKING OUT OF THE TIRE.
2. THE HYDRAULIC OIL TANK IS OIL SOAKED FROM LEAKS ON THE TOP AND SIDE OF IT.
3. THE RIGHT FRONT WHEEL ASSEMBLY HAS A STUD AND NUT MISSING THAT HOLDS THE WHEEL ON.
4. THE CAB SIDE MUD FLAP UNDER THE DOOR IS MISSING ALLOWING MUD TO BE FLUNG ON THE WALKWAY AND MIRROR.
5. THE LEFT SIDE STEERING JACK IS LEAKING OIL OUT OF THE ROD END SEAL ON THE JACK.
6. THE RIGHT SIDE STEERING JACK IS LEAKING OIL OUT OF THE ROD END SEAL ON THE JACK.
7. THE LOWER FUEL TANK MOUNT IS DAMAGED. TWO OF THE MOUNTING BOLTS ARE MISSING THE MOUNTING NUTS AND THE BOLTS ARE PULLING OUT OF THE BRACKET.
8. THE RIGHT SIDE UPPER FRAME HORN THAT SUPPORTS THE UPPER DECK IS CRACKED 4 INCHES OR SO ON THE FRONT RIGHT CORNER ABOVE THE HOSES.
9. THE RIGHT FRONT BRAKE OIL COOLER HOSES ARE OIL SOAKED AND LEAKING OIL.
10. THE RIGHT FRONT BRAKE COOLER HOSE MANIFOLD IS LEAKING OIL.
11. THE BRAKE VALVE, LOCATED INSIDE THE LEFT FRAME RAIL BELOW THE CAB IS OIL SOAKED AND LEAKING OIL TO THE GROUND.
12. THE BACK OF THE FUEL TANK IS LEAKING FUEL TO THE GROUND.
13. THE WIPER ARM LINKAGE IS WORN EXCESSIVE AND ALLOWING THE WIPER ARM AND BLADE TO GO OFF THE GLASS ACROSS THE RUBBER SEAL AND WILL DAMAGE THE WIPER IF LEFT UNCORRECTED. THE ARM NEEDS REPLACED OR ADJUSTED.

14. THE DOME LIGHT DOES NOT WORK INSIDE THE CAB.

15. THE PORCH LIGHT DOES NOT WORK TO PROVIDE ILLUMINATION AROUND THE DECK AREA.

16. THE DIGITAL GEAR INDICATOR THAT TELLS IF YOU ARE IN FORWARD, REVERSE, NUTERAL ETC. AND WHAT GEAR YOU ARE IN DOES NOT WORK.

17. THE CATAGORY 2 WARNING LIGHT IS TAPPED OVER WITH BLACK TAPE.

18. THE TRUCKS MONITOR SCREEN IS KEEPING SEVERAL CODES FLASHING THAT CAUSED THE CAT 2 LIGHT TO STAY ON ALL THE TIME AND MINERS TO TAPE THEM OVER.

19. THE ROCK PROTECTOR THAT STICKS OUT ABOVE THE CAB TO PROTECT MINERS FROM ROCKS FALLING OFF THE BED ONTO THE CAB IS NOT WELDED/ATTACHED GOOD AND STURDY. IT LOOKS TO BE TACKED INTO PLACE/MOCKED UP BUT WAS NEVER WELDED TO BE A PERMANENT FIXTURE.

THIS TRUCK IS USED ON STEEP GRADES, ELEVATED ROADWAYS, IN CONGESTED AREAS, AND AT TIMES NEAR FOOT TRAFFIC. FAILURE TO CORRECT THE CITED CONDITIONS PRIOR TO PLACING IT INTO SERVICE EXPOSES THE DRIVERS TO SERIOUS HAZARDS. THE TRUCK WAS REMOVED FROM SERVICE UNTIL THE CITED CONDITIONS ARE CORRECTED.

Standard 77.1606(c) was cited 70 times in two years at mine 4608930 (69 to the operator, 1 to a contractor).

Petition for civil penalty at 17-18.

Presented as support for the **54% (fifty-four percent) reduction in the penalty**, the Motion, employing an economy of words, stated:

Citation #9567108 will remain as issued with a reduction in penalty. The Respondent contends that the gravity of the citation was over-evaluated and should not have been issued as “reasonably likely” and “S&S”. Respondent would argue at hearing that there were no operational issues with the steering or brakes. Additionally, the tire at issue is a 58 ply tire and only 2 plies were damaged. The Secretary recognizes that the ALJ may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to reduce the penalty for Citation #9567108 from \$4,624 to \$2,124, and the Respondent has agreed to pay the reduced penalty. If this citation had been issued at unlikely and non S&S, the penalty per 30 CFR part 100.3 would have been \$934.00.

Motion at 3-4

Accordingly, the Secretary took the incongruous position that he/she was standing by the inspector's evaluation in all respects but agreeing to reduce the penalty by more than half from the proposed regular assessment. To arrive at that conclusion, the Secretary posits that *the Court*, but with the Secretary completely abstaining as to its own view, may find merit in the Respondent's assertion that an injury is 'not reasonably likely' to occur.

On this record, the Court does not buy into that claim, not with operational issues identified on this 550,000 lb/155-ton payload mining truck⁸ such as the gear indicator not indicating the gear position, the multiple leaking oil fluids from: the hydraulic oil tank, the left and right side steering jack, the brake oil cooler hoses, and the brake valve, not to mention the fuel tank leaking fuel. An indication that the mine was ignoring obvious problems, the category 2 warning light had been taped over.⁹ And further, the Court does not buy into the claim that it may find merit that an accident was not reasonably likely to occur, when considered with the unchallenged facts in the citation that the truck was being used on steep grades, along elevated roadways, in congested areas and at times near foot traffic, all of which led the issuing inspector to conclude that failure to correct the cited conditions exposed the driver to serious hazards which were reasonably likely to occur.

Approval of the settlement motion; application of the Commission's decisions in *Perry Cnty and AmCoal*

The Court 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.

⁸ https://www.cat.com/en_MX/products/new/equipment/off-highway-trucks/mining-trucks/18089285.html

⁹ "Caterpillar warning lights, symbols and meanings are important for operating machinery safely. Caterpillars have a range of warning lights on their machines that indicate when something is wrong with the machine or its components, such as low oil pressure, overheating engine temperature and other problems." <https://warninglightsoncar.com/caterpillar-warning-light/> As noted, the Court is not permitted in the context of settlement motions to ask questions about such matters.

Per the Commission’s decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. As set forth below, meeting the first two requirements are 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.¹⁰ In discussing 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).

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.*

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.¹¹

¹⁰ 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 not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

¹¹ 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

The settlement terms are summarized in the following table:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEVA 2022-0555			
9565193	\$3,546.00	\$1,771.00	50 % Reduction in Penalty
9565194	\$716.00	\$716.00	Sustained as Issued
9567103	\$626.00	\$626.00	Sustained as Issued
9567109	\$1,156.00	\$1,156.00	Sustained as Issued
9567108	\$4,624.00	\$2,124.00	54% Reduction in Penalty
9567119	\$774.00	\$774.00	Sustained as Issued
9567120	\$1,156.00	\$1,156.00	Sustained as Issued
9567122	\$840.00	\$840.00	Sustained as Issued
9567123	\$716.00	\$716.00	Sustained as Issued
9567126	\$1,593.00	\$1,116.00	30% Reduction in Penalty
9567130	\$3,546.00	\$1,546.00	56% Reduction in Penalty
TOTAL	\$19,293.00	\$12,541.00	35% overall reduction in penalty

Summary

Apart from any consideration of the Secretary’s enforcement authority under Section 105 of the Mine Act, the Court takes note that the Commission has concluded that, at least in the context of settlement motions, the **104(b)** order paper issued as part of the official actions taken by a mine inspector upon determining that no further extensions should be granted for abatement of a section 104(a) citation, may not be viewed by the Court, miners or the public.¹²

That said, the Court must and does respect the Commission’s decisions in *Perry Cnty* on the issue of disclosure of the 104(b) orders which were issued in this case. In addition, the Court adheres to Commission case law and approves the Secretary’s Motion for settlement but **solely on the basis of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied**

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).

¹² As noted, miners, the public and safety advocates may obtain the section 104(b) orders through a Freedom of Information Act request.

by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. 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.

It is **ORDERED** that the operator pay a penalty of **\$12,541.00** within 30 days of this order.¹³ Upon receipt of payment, this case is **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

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