

**ON APPEAL TO THE COMMISSION**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor, Mine Safety and Health  
Administration (MSHA),

Petitioner

v.

Hopedale Mining LLC,

Respondent

No. LAKE 2019-0149

**Petition for Discretionary Review**

The Secretary of Labor petitions the Federal Mine Safety and Health Review Commission to review the decision of a Commission administrative law judge issued on June 24, 2019, in this case. The ALJ made four legal errors, all of them intertwined: she did not apply (or did not correctly apply) the *American Coal* standard for reviewing settlements; she issued a subpoena to obtain evidence in connection with settlement; she convened a hearing that denied the parties the right to seek interlocutory review by the Commission; and she vacated four citations even though the parties stipulated that the violations occurred.

The Secretary seeks review of the decision on the grounds that (1) findings of fact are not supported by substantial evidence, (2) the decision is contrary to law and to Commission decisions, (3) a prejudicial error of procedure was committed, and (4) a substantial question of law, policy or discretion is involved. *See* 30 U.S.C. § 823(d)(2)(A)(ii); 29 C.F.R. § 2700.70(c).

## Introduction

After MSHA issued four § 104(a) citations to Hopedale Mining, LLC, the Secretary and Hopedale reached a settlement agreement: Hopedale agreed to accept all four violations and their S&S designations, while the Secretary agreed to reduce the negligence associated with each violation and to reduce the gravity associated with two. Three times, the parties gave the ALJ more and more facts in support of this settlement. And three times, the ALJ denied it.

The *AmCoal* standard (whether a settlement is fair, reasonable, appropriate, and in the public interest) governs the Commission's review of settlement motions. The ALJ here did not apply that standard. She determined, based on her interpretation of the facts, that they did not justify the modifications; the *AmCoal* standard, however, is not whether an ALJ agrees with any particular modification, but whether the settlement as a whole is sufficient. She determined that the facts did not meet the Commission's definition of low negligence; the *AmCoal* standard, however, is not whether the facts establish any particular level of negligence or whether they match a definition of negligence that does not apply during review of settlements. And she refused to consider any facts other than the § 110(i) penalty factors, including the significant future enforcement value of S&S citations; *AmCoal*, however, requires ALJs to consider these nonmonetary factors.

The ALJ also erred by subpoenaing an MSHA inspector while a settlement motion was pending. This effectively sought to compel a party to provide testimony and documentary evidence during the ALJ's review of a settlement which, under Commission Rule 31 and § 113(e) of the Mine Act, ALJs do not have the authority to do.

Attempting to correct these errors before a hearing, the Secretary filed a motion to certify the ALJ's rulings for interlocutory review. The ALJ denied the motion, but she did not give the

Secretary the opportunity to seek interlocutory review by the Commission, even though Commission Procedural Rule 76(a)(1)(ii) gives the Secretary that right. Instead, the ALJ erred by compelling the parties to appear at a hearing.

The hearing led to even more errors. The Secretary and Hopedale stipulated that all four violations occurred, but the ALJ rejected those stipulations and vacated the citations. This rejection ignored the principle that stipulations are sufficient to establish facts and threatens to undermine the common (and useful) practice of using stipulations at hearings. Moreover, the ALJ's decision that the facts did not establish even a violation cannot be reconciled with her finding that the facts were so egregious that they did not justify any reductions in negligence or gravity.

#### **Statement of the Issues**

- (1) Did the ALJ abuse her discretion by failing to apply the *AmCoal* standard and by rejecting the settlements?
- (2) Did the ALJ lack the authority to compel testimony and documents during her review of a settlement?
- (3) Did the ALJ deny the Secretary the procedural right, under Commission Rule 76(a)(1)(ii), to seek interlocutory review by the Commission?
- (4) Did the ALJ err by rejecting the joint stipulations? And is her decision unsupported by substantial evidence?

## Statement of the Case

This case arose out of a December 4, 2018 inspection of the Hopedale Mine, an underground coal mine in Harrison County, Ohio. MSHA Inspector John William Dye issued four citations alleging violations of 30 C.F.R. § 75.370(a)(1), for failure to follow the mine's ventilation plan:

- Citation No. 8055975 alleged a failure to provide 3,000 cfm of air where a roof bolter was operating. The anemometer measured 2,792 cfm behind line curtain. It was designated as S&S and the result of moderate negligence, and as reasonably likely to cause injury or illness.
- Citation No. 8055976 alleged a failure to remove a tail curtain, exposing miners to dust generated by the continuous mining machine. It was designated as S&S and the result of high negligence, and as highly likely to cause injury or illness.
- Citation No. 8055977 alleged that only 19 of the 30 required water sprays were operating on the continuous mining machine. It was designated as S&S and the result of moderate negligence, and as highly likely to cause injury or illness.
- Citation No. 8055978 alleged that only 10 inches of the required 12 inches of mercury was provided in the roof bolter vacuum. It was designated as S&S and the result of moderate negligence, and as reasonably likely to cause injury or illness.

Hopedale and the Secretary negotiated a settlement agreement. Hopedale agreed to accept all four violations and all four S&S designations. The Secretary agreed to reduce the negligence associated with each citation by one level (*i.e.*, from high to moderate or from

moderate to low) and to reduce the gravity associated with Citations Nos. 8055976 and 8055977 from highly likely to reasonably likely to cause injury or illness.

On March 25, 2019, the Secretary filed a motion to approve the settlement. Appeal Ex.

A.<sup>1</sup> The motion gave these facts in support of settlement:

- For Citation No. 8055975, the section supervisor's air reading showed 3,200 cfm behind the line curtain just before Dye arrived. Dye's notes confirm that the foreman stated he had over 3,000 cfm before operating the roof bolter. This justified reducing the negligence to low.
- For Citation No. 8055976, Hopedale provided CPDM samples for shuttle car operators, which were below the 1.5 mg/m<sup>3</sup> limit. Dye's notes confirm that management did not know about the violation. This justified reducing the negligence to moderate. The CPDM samples and short duration of miners' exposure supported reducing the gravity from highly likely to reasonably likely to cause injury.
- For Citation No. 8055977, Dye's notes confirm that management did not know about the violation, which justified reducing negligence to low. The CPDM samples and short duration of miners' exposure supported reducing the gravity from highly likely to reasonably likely.
- For Citation No. 8055978, Dye's notes confirm that the roof bolter parameters were compliant at the beginning of the shift, which justified reducing the negligence to low.

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<sup>1</sup> The exhibits attached to this PDR are designated "Appeal Ex. \_\_\_" to distinguish them from the exhibit designations used before the ALJ. The designations on appeal appear in the top left corner of the exhibits.

That same day, the ALJ emailed the parties to tell them that she would not approve the settlement. Four days later, the ALJ set a hearing for April 24.

Unbeknownst to the Secretary, and without a request by either party, on April 10, the ALJ signed a subpoena for Dye. It ordered him to appear at the hearing to testify, and to “bring all notes, photographs, and documents associated with the 12/4/2018 inspection at the Hopedale mine and the citations at issue in this docket.” Appeal Ex. B.

Hopedale and the Secretary, meanwhile, continued to develop an amended settlement motion. The Secretary filed the amended motion on April 15. Appeal Ex. C. It gave these additional facts to support the modifications:

- For Citation No. 8055975, the air measured by the inspector (2,792 cfm) was 93% of what the plan requires, and the difference is not easily detectable.
- For Citation No. 8055976, the foreman was at the continuous mining machine but did not know the curtains had not been adjusted before the machine was operated.
- For Citation No. 8055977, the location of the plugged sprays made it difficult to see them, and there was no dust “rolling” in the area. The inspector’s notes confirm that the sprays were operational at the start of the shift and had recently been checked.
- For Citation No. 8055978, the difference between 10 and 12 inches of mercury was difficult to detect.

The next day, because the hearing was still scheduled, the parties submitted their prehearing statements. These stated that the parties would submit joint stipulations but did not plan to call any witnesses. The Secretary also submitted a copy of the joint stipulations, which included the facts that the parties had submitted in support of the settlement. Appeal Ex. D. The

parties stipulated that all four violations occurred and were S&S, and that the negligence and gravity designations were those they had agreed to in settlement.

The next day, on April 17, a Commission representative served the subpoena on Dye at MSHA's Morgantown, West Virginia, field office. Appeal Ex. B. That same day, the ALJ denied the amended settlement motion. Order Denying Amended Motion for Settlement, LAKE 2019-0149 (Apr. 17, 2019) (“Ord.”).<sup>2</sup> She did not consider the Secretary’s statement that the accepted violations have future enforcement value; instead, she “rel[ie]d] on the Commission direction to address Sections 110(i) and 110(k) of the Act.” Ord. 2 n.1 (citing *Am. Coal Co.*, 38 FMSHRC 1972, 1981–82 (Aug. 2016)). The ALJ also reasoned that the facts did not support the modifications. Ord. 3.

The next Monday, April 22, the Secretary filed a motion (1) for reconsideration of the denials of the settlement, or (2) to revoke the subpoena, or (3) to certify the case for interlocutory review and stay the case pending interlocutory review. Appeal Ex. E. The ALJ did not rule on the motion, and two days later, she convened the hearing in Pittsburgh.

The parties—including Dye, under the compulsion of the subpoena—appeared at the hearing. *See* Tr. 3–4, 36–37. (Dye was away from his inspection work for an entire day to travel to and from the hearing.) They defended the settlement, but the ALJ stated that she would, for the third time, reject it. Tr. 19. The parties then reiterated their intent to rely on joint stipulations and submitted a revised set of stipulations. JX-2. The parties stipulated that all four violations occurred, that all four were S&S, and that the negligence and gravity they had agreed to in

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<sup>2</sup> The order is attached to this PDR as Addendum 1.

settlement were accurate. JX-2. They also stipulated to even more facts that supported the modifications made in settlement:

- For Citation No. 8055975, as the continuous mining machine advances, it moves farther from the source of air, potentially resulting in a reading lower than what is required by the plan but that is not readily discernable to a miner. Dye had not considered this when the citation was issued.
- For Citation No. 8055976, Dye did not know about the CPDM levels or foreman's lack of knowledge, and there was no evidence that any miner was exposed to respirable dust that exceeded the 1.5 mg/m<sup>3</sup> standard. Hopedale had never previously been cited for a violation of this plan provision.
- For Citation No. 8055977, Dye did not know about the CPDM levels or lack of "rolling" dust, and there was no evidence about how long the sprays were down or that the respirable dust exceeded the standard.
- For Citation No. 8055978, Dye did not consider the difficulty detecting the difference in mercury or management's lack of knowledge, and there was no evidence about how long the low mercury existed.

The ALJ stated that she would not accept the stipulations in place of testimony and other evidence. Tr. 27, 34. She also stated that she would vacate the citations because the Secretary had not met his burden of proof. Tr. 40.

### **The ALJ's Decision**

In the first part of the decision, incorporating her April 17, 2019 order denying the amended motion for settlement, Dec. 3, the ALJ denied the settlement once more. Dec. 2-5.

Generally, the ALJ reasoned that the information the parties provided “did not support the proposed reductions to gravity and negligence.” Dec. 4. The ALJ also denied the Secretary’s motion for reconsideration of her settlement denial. Dec. 5–7.

The ALJ also denied the Secretary’s motion to revoke the subpoena. Dec. 8–9. She acknowledged the Secretary’s position (which he has advanced in a case pending before the Commission<sup>3</sup>) that ALJs may not compel a party to produce documents when reviewing a settlement. Dec. 9. But she reasoned that this case involved an ALJ’s authority to compel documents at a hearing, which is authorized by § 113(e) of the Mine Act. Dec. 9 (citing 30 U.S.C. § 823(e)).

Finally, the ALJ vacated the citations. Dec. 9–17. She rejected the parties’ stipulations that the violations had occurred and were S&S, as well as the other stipulations, but relied upon the “factual information” they contained to analyze the violations. Dec. 9–10. For all four violations, the ALJ concluded that the facts did not support reducing the negligence or gravity. Dec. 10–17. She also concluded, inconsistently, that the Secretary had not met his burden to prove even the fact of the violation for all four citations. Dec. 10–17.

### **Argument**

#### **1. The ALJ did not apply the *AmCoal* standard in her decisions denying settlements.**

When reviewing settlement motions, ALJs must determine “whether the proposed reduction in penalties is fair, reasonable, appropriate under the facts, and protects the public interest.” *Am. Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016) (*AmCoal I*). They must both

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<sup>3</sup> *Solar Sources Mining, LLC*, No. LAKE 2017-52 (argued May 22, 2019).

articulate and apply that standard. *Am. Coal Co.*, 40 FMSHRC 983, 988 (Aug. 2018) (*AmCoal II*). To determine whether a settlement satisfies the standard, ALJs must consider the settlement in its entirety, including the penalty criteria from § 110(i); considerations other than the penalty criteria, such as the value of preserving citations for future enforcement; and other nonmonetary aspects of the settlement. *Id.* at 989. ALJs may not “assign[] probative value to some facts without the benefit of an evidentiary hearing.” *Id.* at 991. The Commission reviews an ALJ’s denial of settlement for abuse of discretion. *Id.* at 987.

The ALJ abused her discretion because she did not apply the *AmCoal* standard. Her denial was based on her belief that the facts did not justify reduced negligence or gravity designations and did not match the Commission’s definition of low negligence. Dec. 3–4. The *AmCoal* analysis, however, is not whether an ALJ agrees with a particular modification to a citation or whether an ALJ believes the facts establish any particular level of negligence; it is whether the settlement package as a whole is fair, reasonable, appropriate, and in the public interest. The ALJ’s reliance on the Commission’s definition of low negligence is also error, because *AmCoal* does not instruct ALJs to apply those definitions and because those definitions do not govern parties’ settlement negotiations. *Cf. Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016) (explaining that MSHA’s negligence definitions are not binding on the Commission).

The ALJ did not apply the *AmCoal* standard in four other ways. First, the ALJ’s repeated focus on the facts of the negligence and gravity suggests that she improperly assigned probative value to some of those facts without a hearing. Second, she refused to consider any facts other than the § 110(i) factors, Ord. 2 n.1, including nonmonetary factors. Third, she did not consider

the future enforcement value of four S&S citations. Ord. 2 n.1, Dec. 6. And fourth, she misinterpreted *AmCoal II* as holding that *only* citations preserved as originally written have relevant future enforcement value. Dec. 6.

**2. Under these circumstances, the ALJ had no authority to subpoena the inspector.**

Parties must provide ALJs with facts in support of settlements. 29 C.F.R. § 2700.31(b)(1). ALJs may, under appropriate circumstances, conclude that additional facts are necessary to determine whether a settlement meets the *AmCoal* standard. *AmCoal II*, 40 FMSHRC at 989 & n.9. But they may not demand trial-type evidence in settlement proceedings. Facts in support of settlement can be both facts the parties have agreed on and facts about which “the parties have agreed to disagree.” *Id.* at 991. That is, facts sufficient to support a settlement are not the same as evidence sufficient to support a citation at a hearing. *See id.* (“In a final disposition after a hearing, a Judge must make findings on each section 110(i) factor in assessing a penalty, while a Judge’s decision approving settlement need only ‘set forth the reasons for approval and . . . be supported by the record.’”) (quoting 29 C.F.R. § 2700.31(g) and citing *Cantera Green*, 22 FMSHRC 616, 622–26 (May 2000)).

The ALJ erred by subpoenaing the inspector. A settlement motion was pending when the ALJ signed the subpoena and when it was served. The ALJ’s review of the settlement should have been restricted to determining whether the facts in that motion established that the settlement is fair, reasonable, appropriate, and in the public interest. The ALJ was not entitled to compel trial-type evidence in addition to reviewing the facts the parties had agreed upon and submitted. Reviewing that kind of evidence outside a hearing and without context could lead ALJs to draw inaccurate conclusions or assign improper probative weight to particular facts. *See*

*AmCoal II*, 40 FMSHRC at 991. Because ALJs would have already seen evidence that the parties might not have introduced at any hearing, parties would also be less able to control how they present their cases if they did proceed to hearing. And an inspector's testimony and documents are only some of the evidence the parties might present at a hearing. They might not, on their own, support the settlement; they might even prejudice the Secretary or the operator by denying them the opportunity to explain or contradict that evidence.

The Mine Act does authorize ALJs to issue subpoenas, but only “[i]n connection with hearings . . . .” 30 U.S.C. § 823(e). If there is no hearing, there is no subpoena power. *See Lowe v. Veris Gold USA, Inc.*, 38 FMSHRC 25, 26 (Jan. 2016) (explaining that the Commission is a creature of statute and may act only within the scope of the authority given to it by the statute). The Commission should not allow ALJs to convene hearings just to give themselves that power: ALJs may not deny settlements based on supposedly-inadequate information and then convene hearings to obtain that information. If they could, the limiting language of § 113(e) would be meaningless, and the important distinction between settlements and hearings would be erased.

In this case, the ALJ issued the subpoena not just in connection with a hearing, but also in connection with her ongoing review of the settlement. The subpoena, in effect, attempted to force the release of documents and testimony that are neither available during, nor relevant to, an ALJ's review of settlements, during the ALJ's review of this settlement.

### **3. The ALJ denied the parties their right to seek interlocutory review by the Commission.**

Commission Rule 76 provides two ways for a party to obtain interlocutory review of an ALJ's non-final ruling. Either the ALJ must certify the ruling for interlocutory review, or the ALJ must deny a party's motion for certification and the party must file with the Commission a

petition for interlocutory review within 30 days of that denial. 29 C.F.R. § 2700.76(a)(1). Parties must follow these procedures to obtain interlocutory review. *See, e.g., Runyan Constr., Inc.*, 36 FMSHRC 886, 887 (Apr. 2014). The Commission should require its ALJs to follow these procedures, too. *Shamokin Filler Co., Inc.*, 34 FMSHRC 1897, 1910 (Aug. 2012) (while ALJs “are accorded broad discretion in their conduct of proceedings before them, such conduct must comply with the Commission’s procedural rules”). To comply with Rule 76(a)(1)(ii), ALJs must give parties the 30 days guaranteed by the rule to file a petition for interlocutory review with the Commission before resuming any proceedings that involve the issues for interlocutory review.

The ALJ erred in denying the parties the opportunity to seek interlocutory review by the Commission. She did not rule on the Secretary’s motion to certify the case for interlocutory review before conducting the hearing. *See* Tr. 22–23. The effect was to completely deny the Secretary the opportunity, guaranteed by Rule 76, to seek interlocutory review by the Commission. *Cf. Madison Branch Mgmt.*, 16 FMSHRC 1934 (Sept. 1994) (granting motion for interlocutory review and canceling a hearing that was scheduled two days later).

#### **4. The ALJ’s decision to vacate the citations is not supported by substantial evidence.**

Even if the Commission concludes that the ALJ properly denied the settlement and convened the hearing, it should still direct review of this case because the ALJ’s decision to vacate the citations is not supported by substantial evidence. The ALJ erred by rejecting the parties’ stipulations and by reaching a decision that is internally inconsistent.

A stipulation is

an express waiver made . . . preparatory to trial by the party or his attorney conceding for the purposes of trial the truth of some alleged fact . . . *the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it*

*and the other is not allowed to disprove it . . . .* It is, in truth, a substitute for evidence, in that it does away with the need for evidence.

*Vander Linden v. Hodges*, 193 F.3d 268, 279–80 (4th Cir. 1999) (quoting 9 Wigmore, *Evidence*

§ 2588, at 821 (Chadburn 1981) (emphasis in *Hodges*)). Stipulations “have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.

Thus . . . unless allowed by the court to be withdrawn, [they are] conclusive in the case . . . .” 2

McCormick On Evid. § 254 (7th ed.).

Stipulations are binding on the Commission, *see, e.g., Sec’y o/b/o Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293, 1297 (Sept. 1986), and parties may submit cases based solely on stipulations. *Id.*; *see also, e.g., U.S. Steel Mining Co.*, 10 FMSHRC 146, 147 (Feb. 1988). ALJs may not reject or ignore stipulations (unless, of course, a party disputes their validity). The ALJ erred both by rejecting the parties’ stipulations as a whole, Dec. 9–10, and by finding that there were no violations when the parties stipulated that all four violations in fact occurred. Dec. 10–17.

The ALJ’s decision is also internally inconsistent. She concluded that the facts alleged in the citation were so egregious that they did not support any reductions in negligence or gravity, but simultaneously concluded that the facts did not even establish a violation. *See generally* Dec. This contradiction is not supported by substantial evidence. *Cf. Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 907 (Dec. 2005) (remanding for ALJ to reconcile finding that violation was of high gravity but not S&S).

## Conclusion

Any one of the four errors the ALJ made warrants review by the Commission. The Commission should grant the petition for review.

Respectfully submitted,

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## **Certificate of Service**

I certify that on July 23, 2019, a copy of the foregoing petition for discretionary review was served by email on:

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s/ Emily Toler Scott

## **Addendum 1**

ALJ's April 17, 2019 Order Denying Amended Motion for Settlement

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
721 19th St., Suite 443  
Denver, CO 80202-2500  
Office: (303) 844-5266/Fax: (303) 844-5268

April 17, 2019

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2019-0149
Petitioner,	:	A.C. No. 33-00968-481020
	:	
v.	:	
	:	
HOPEDALE MINING LLC,	:	
Respondent.	:	Mine: Hopedale Mine

**ORDER DENYING AMENDED MOTION FOR SETTLEMENT**

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed an amended motion to approve settlement. This case involves four citations detailing alleged violations of mandatory health standards with respect to Respondent's coal mine ventilation plan. In the Secretary's amended motion, the parties argue that they have set forth facts that sufficiently justify the significant modifications they have agreed to for each citation.

On March 25, 2019, the Secretary filed his initial settlement motion. The Secretary represented that the parties agreed to significant reductions in gravity, negligence, and penalty with respect to each citation at issue, and set forth information purporting to support the terms of settlement. After being notified that the motion was not sufficient, the Secretary filed an amended settlement motion on April 5, 2019. The amended motion included the same terms proposed in his initial motion along with some additional information concerning each citation. The parties asserted further that the amended settlement motion included a description of the "issue[s] on which the parties have agreed to disagree" and that the motion demonstrated "the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 40 FMSHRC 983, 991 (Aug. 2018). The originally assessed amount for the citations at issue was \$18,093.00 and the proposed settlement amount is \$3,339.00. The parties have proposed to modify each citation as follows:

<b>Citation No.</b>	<b>Originally Proposed Assessment</b>	<b>Settlement Amount</b>	<b>Modification</b>
<b>Docket No. LAKE 2019-0149</b>			
8055975	\$1,031.00	\$462.00	Modify negligence from moderate to low.
8055976	\$12,321.00	\$1,666.00	Modify likelihood of injury or illness from highly likely to reasonably likely. Modify negligence from high to moderate.
8055977	\$3,710.00	\$749.00	Modify likelihood of injury or illness from highly likely to reasonably likely. Modify negligence from moderate to low.
8055978	\$1,031.00	\$462.00	Modify negligence from moderate to low.
<b>TOTAL</b>	<b>\$18,093.00</b>	<b>\$3,339.00</b>	

The case was set for hearing on April 24, 2019 and the parties were directed to submit a list of witnesses and exhibits. Both parties filed a prehearing response that indicated that no witnesses would be called and that the only exhibit offered would be a joint stipulation. Following a conference call on April 16, 2019, the Secretary submitted a copy of the parties' Joint Stipulations. The Joint Stipulations contain much of the same information the parties had previously set forth in their initial and amended motions for settlement. The Joint Stipulations added some information regarding jurisdiction and addressed the ability to pay. Notably, the Joint Stipulations contain no mention of the operator's significant history of similar violations for failure to adhere to ventilation plan requirements. That two-year history, with highlights to denote the standard at issue here, was referenced in the citations and has been attached to this order as Exhibit A.

The Commission has directed its judges to consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). As required by the Mine Act, I have reviewed the motion and penalty criteria and evaluated the proposed settlement pursuant to the requirements set forth in Sections 110(i) and 110(k).<sup>1</sup> The parties assert that they have submitted information supporting the proposed modifications to the gravity and negligence of each citation. However, even if everything the parties have set forth is true, the information contained in the file does not support the proposed modifications. Notably, this operator has a history of similar violations for failure to adhere to ventilation plan requirements and the mine foreman was present when the citations were issued. In addition, the conditions present at the mine when the citations were issued suggest that the mining crew was at serious risk of exposure to respirable

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1. In reviewing this proposed settlement, I do not consider the Secretary's statements in paragraph 4, and particularly statements regarding prosecutorial impact. Instead, I rely on the Commission direction to address Sections 110(i) and 110(k) of the Act. *Am. Coal Co.*, 38 FMSHRC 1972, 1981-82 (Aug. 2016).

coal dust and silica. The parties assert that personal samples measured on the shuttle car operators near the time of the inspection show no violation of the dust standard. However, the continuous miner operator and the roof bolter do not have the same exposure as shuttle car operators. Therefore, these factors do not support the drastic modifications to negligence, gravity, and penalty that have been proposed in the amended settlement motion.

The Secretary argues that the amended settlement motion is fair and in the public interest. I find that the settlement is not fair, reasonable, or appropriate under the facts, and it does not protect the public interest. The Secretary also states that he has met the requirements of *American Coal* by setting forth the facts upon which the parties have agreed to disagree. I find no merit to the Secretary's argument, as *American Coal* requires more than a list of facts to which the parties disagree. If that were the sole criteria for the approval of a settlement motion, it would be impossible for a Judge to question any proffered settlement. The "agree to disagree" is only a part of the Commission's discussion in *American Coal*, and it was included in a discussion related to including facts outside of the penalty criteria in considering a settlement motion. The Commission requires more of a settlement motion.

Similarly, the parties' Joint Stipulations add little to the proposed settlement. The Joint Stipulations are simply another way of stating the same settlement terms that have been under review since the parties submitted their initial motion. With respect to the three citations that the parties seek to reduce to low negligence, there is hardly any information available to justify such modifications. I note that numerous publications have recently pointed to a resurgence of black lung among miners due to inhalation of coal mine and silica dust. *See, e.g., An Epidemic is Killing Thousands of Coal Miners. Regulators Could Have Stopped It*, National Public Radio: All Things Considered (Dec. 18, 2018) (transcript available at <https://www.npr.org/templates/transcript/transcript.php?storyId=675253856>).<sup>2</sup> It is therefore difficult to see how any of the purported mitigating circumstances to which the parties have stipulated would justify such reductions to low negligence or promote the public interest.

Accordingly, I have considered the representations and documentation submitted in support of the amended motion to approve settlement. I conclude that the proposed settlement is not appropriate under the criteria set forth in Section 110(i) of the Act. The amended motion to approve settlement is therefore **DENIED**.

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2. I note that I may take judicial notice of "the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true." *Union Oil Co.*, 11 FMSHRC 289, 300 n.8 (Mar. 1989).

While some of the proposed stipulations may be accepted into the record, they do not change the nature of the settlement and I reject the effort of the parties to circumvent the requirements for filing an acceptable settlement agreement. Finally, the parties are **ORDERED** to appear at the hearing scheduled for April 24, 2019. The parties will be given one additional opportunity to explain why the settlement should be approved. If the settlement is rejected, the parties shall move forward to present witnesses and exhibits to support or refute the violations as issued.

  
Margaret A. Miller  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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## Mine Citations, Orders, and Safeguards

### Current Mine Information

**Mine ID:** 3300968  
**Operator:** Hopedale Mining LLC  
**Opr. Begin Date:** 10/14/2004  
**Mine Name:** Hopedale Mine  
**Current Controller:** Rhino Resource Partners LP  
**Controller Start Date:** 10/5/2010  
**Mine Status:** Active  
**Status Date:** 4/26/2005  
**Mined Material:** Coal (Bituminous)  
**Type of Mine:** Underground  
**Location:** Harrison County, OH  
**State:** OH

### Operator History for Mine ID: 3300968

<u>Operator Name</u>	<u>Begin Date</u>	<u>End Date</u>
Hopedale Mining LLC	10/14/2004	
Harrison Mining Corp	11/24/1992	10/13/2004
Youghiogheny & Ohio Coal Company	Unknown	11/23/1992

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**PLEASE NOTE:** The information provided by the Mine Data Retrieval System (MDRS) is based on data gathered from various MSHA systems. As there may be a lag time in data being entered into those systems, there will also be a lag in the reflection of that data on the MDRS.

Assessment data is not available prior to 1/1/1995.

### Citations, Orders, and Safeguards

The current operator Hopedale Mining LLC has been the operator since 10/14/2004

- Indicates violations pending hearings, appeals, and/or other actions.
- Indicates violations that have not yet been assessed.
- These are non-assessable.

— [Assessment Process Overview](#)

Note: Vacated Citations are not included in any reports on the MDRS.

Violator	Contractor ID	Citation/Order No.	Case No.	Date Issued	Final Order Date	Section of Act	Date Terminated	Citation/Order	S & S	Standard	Proposed Penalty (\$)	Citation/Order Status	Current Penalty (\$)	Amount Paid To Date (\$)
Hopedale Mining LLC		9181736		8/16/2018		103(k)	9/11/2018	O	N/A			Non-Assessable		
Hopedale Mining LLC		4867531		2/28/2017		103(k)	3/7/2017	O	N/A			Non-Assessable		

Hopedale Mining LLC	9090983	000441477	5/8/2017	7/30/2017	104(a)	5/8/2017	C	N		1,218.00	Closed	1,218.00	1,218.00
Hopedale Mining LLC	9125991	000458445	12/5/2017	4/9/2018	104(a)	12/5/2017	C	N		168.00	Closed	168.00	168.00
Hopedale Mining LLC	9124661	000443752	6/1/2017	8/27/2017	104(a)	6/8/2017	C	N		312.00	Closed	312.00	312.00
Hopedale Mining LLC	9130919	000481020	11/6/2018	2/11/2019	104(a)	11/19/2018	C	N		132.00	Closed	132.00	132.00
Hopedale Mining LLC	9181723	000468571	5/29/2018	8/15/2018	104(a)	6/6/2018	C	N		182.00	Closed	182.00	182.00
Hopedale Mining LLC	9127324	000454107	10/30/2017	2/5/2018	104(a)	10/30/2017	C	N	50.20(e)	150.00	Closed	150.00	150.00
Hopedale Mining LLC	9126074	000458445	11/20/2017	4/9/2018	104(a)	11/22/2017	C	N	62.110(d)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9084690	000438946	3/31/2017	7/2/2017	104(a)	6/14/2017	C	Y	70.100(a) (2)	625.00	Closed	625.00	625.00
Hopedale Mining LLC	9181966	000470729	6/26/2018	9/12/2018	104(a)	6/26/2018	C	N	70.212(e)	151.00	Closed	151.00	151.00
Hopedale Mining LLC	9125456	000446268	6/13/2017	10/1/2017	104(a)	6/26/2017	C	N	70.212(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123131	000434146	2/1/2017	4/30/2017	104(a)	2/1/2017	C	N	72.630(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	8051167	000474992	8/27/2018	11/14/2018	104(a)	8/27/2018	C	N	72.630(b)	395.00	Closed	395.00	395.00
Hopedale Mining LLC	9124757	000450962	9/5/2017	12/3/2017	104(a)	9/7/2017	C	N	72.630(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9130713	000462305	2/27/2018	5/26/2018	104(a)	2/27/2018	C	Y	72.630(b)	1,312.00	Closed	1,312.00	1,312.00
Hopedale Mining LLC	9126072	000458445	11/13/2017	4/9/2018	104(a)	11/13/2017	C	N	72.630(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125349	000452778	10/16/2017	12/31/2017	104(a)	10/17/2017	C	N	75.1100- 2(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124555	000448610	8/3/2017	11/14/2017	104(a)	8/10/2017	C	N	75.1100- 2(e)	116.00	Closed	116.00	116.00

Hopedale Mining LLC	9087330	000441477	4/27/2017	7/30/2017	104(a)	5/1/2017	C	N	75.1100-3	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127776	000468571	6/6/2018	8/15/2018	104(a)	6/6/2018	C	N	75.1100-3	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127766	000466484	4/23/2018	7/21/2018	104(a)	5/1/2018	C	N	75.1100-3	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9183581	000477221	9/19/2018	12/26/2018	104(a)	9/26/2018	C	N	75.1101-14(e)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127910	000464527	3/13/2018	6/23/2018	104(a)	3/14/2018	C	N	75.1103-5(a)(2)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9182085	000481020	11/27/2018	2/11/2019	104(a)	12/6/2018	C	N	75.1103-8(a)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125041	000450962	8/28/2017	12/3/2017	104(a)	8/28/2017	C	N	75.1106-3(a)(2)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127350	000460084	1/31/2018	4/21/2018	104(a)	1/31/2018	C	N	75.1106-3(a)(2)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124606	000443752	5/22/2017	8/27/2017	104(a)	5/22/2017	C	N	75.1106-3(e)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124897	000448610	7/31/2017	11/14/2017	104(a)	7/31/2017	C	N	75.1106-3(e)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127764	000466484	4/16/2018	7/21/2018	104(a)	4/18/2018	C	Y	75.1107	502.00	Closed	502.00	502.00
Hopedale Mining LLC	9127772	000468571	5/7/2018	8/15/2018	104(a)	5/8/2018	C	N	75.1200	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123058	000436253	3/1/2017	5/28/2017	104(a)	3/1/2017	C	N	75.1200(d)	126.00	Closed	126.00	126.00
Hopedale Mining LLC	9127340	000460084	1/17/2018	4/21/2018	104(a)	1/17/2018	C	N	75.1202	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125350	000452778	10/16/2017	12/31/2017	104(a)	10/17/2017	C	N	75.1403	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127635	000460084	1/24/2018	4/21/2018	104(a)	1/30/2018	C	N	75.1403	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127769	000468571	5/7/2018	8/15/2018	104(a)	5/8/2018	C	N	75.1403	118.00	Closed	118.00	118.00

## MSHA - Mine Violations

Hopedale Mining LLC	9127636	000460084	1/29/2018	4/21/2018	104(a)	1/30/2018	C	N	75.1403	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127903	000462305	2/28/2018	5/26/2018	104(a)	2/28/2018	C	N	75.1403	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123133	000434146	2/2/2017	4/30/2017	104(a)	2/2/2017	C	N	75.1403	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124604		5/9/2017		314(b)	5/11/2017	S	N/A		Non-Assessable			
Hopedale Mining LLC	9127630	000460084	1/18/2018	4/21/2018	104(a)	1/18/2018	C	N	75.1403	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123527	000438946	3/21/2017	7/2/2017	104(a)	3/21/2017	C	N	75.1403	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180697	000477221	9/11/2018	12/26/2018	104(a)	9/11/2018	C	N	75.1505(g)	264.00	Closed	264.00	264.00
Hopedale Mining LLC	9127501	000462305	3/6/2018	5/26/2018	104(a)	3/6/2018	C	N	75.1505(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125381	000454107	10/25/2017	2/5/2018	104(a)	10/25/2017	C	N	75.1505(b)	420.00	Closed	420.00	420.00
Hopedale Mining LLC	9123057	000436253	3/1/2017	5/28/2017	104(a)	3/1/2017	C	Y	75.1700	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9130717	000462305	2/28/2018	5/26/2018	104(a)	2/28/2018	C	Y	75.1713-2(e)	502.00	Closed	502.00	502.00
Hopedale Mining LLC	9130716	000462305	2/28/2018	5/26/2018	104(a)	2/28/2018	C	N	75.1713-2(b)(1)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9130715	000462305	2/28/2018	5/26/2018	104(a)	2/28/2018	C	N	75.1713-2(f)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9130714	000462305	2/28/2018	5/26/2018	104(a)	2/28/2018	C	N	75.1714-1	118.00	Closed	118.00	118.00
Hopedale Mining LLC	8051496	000438946	4/5/2017	7/2/2017	104(a)	4/5/2017	C	N	75.1718	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9183748	000481020	11/29/2018	2/11/2019	104(a)	11/29/2018	C	Y	75.1722(a)	749.00	Closed	749.00	749.00
Hopedale Mining LLC	9127348	000460084	1/31/2018	4/21/2018	104(a)	1/31/2018	C	Y	75.1722(g)	749.00	Closed	749.00	749.00

MSHA - Mine Violations

Hopedale Mining LLC	9124553	000448610	7/25/2017	11/14/2017	104(a)	7/25/2017	C	Y	75.1722(g)	492.00	Closed	492.00	492.00
Hopedale Mining LLC	9127770	000468571	5/7/2018	8/15/2018	104(a)	5/8/2018	C	N	75.1722(g)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124607	000443752	5/25/2017	8/27/2017	104(a)	5/25/2017	C	N	75.1722(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125042	000450962	8/30/2017	12/3/2017	104(a)	8/30/2017	C	Y	75.1722(g)	734.00	Closed	734.00	734.00
Hopedale Mining LLC	9124605	000443752	5/22/2017	8/27/2017	104(a)	5/22/2017	C	Y	75.1725(g)	492.00	Closed	492.00	492.00
Hopedale Mining LLC	9124898	000448610	7/31/2017	11/14/2017	104(a)	8/3/2017	C	Y	75.1725(g)	577.00	Closed	577.00	577.00
Hopedale Mining LLC	9125044	000452778	9/21/2017	12/31/2017	104(a)	9/22/2017	C	Y	75.1725(g)	259.00	Closed	259.00	259.00
Hopedale Mining LLC	9127338	000458445	12/27/2017	4/9/2018	104(a)	12/27/2017	C	Y	75.1725(g)	544.00	Closed	544.00	544.00
Hopedale Mining LLC	8051497	000438946	4/5/2017	7/2/2017	104(a)	4/5/2017	C	N	75.1725(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123128	000434146	1/19/2017	4/30/2017	104(a)	1/19/2017	C	N	75.1731(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127765	000466484	4/23/2018	7/21/2018	104(a)	5/1/2018	C	N	75.1731(g)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123139	000436253	2/22/2017	5/28/2017	104(a)	2/22/2017	C	N	75.1731(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127633	000460084	1/18/2018	4/21/2018	104(a)	1/18/2018	C	N	75.1731(g)	336.00	Closed	336.00	336.00
Hopedale Mining LLC	9180237	000478987	10/22/2018	1/9/2019	104(a)	10/23/2018	C	N	75.1731(g)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124893	000448610	7/20/2017	11/14/2017	104(a)	7/20/2017	C	N	75.1731(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127762	000466484	4/16/2018	7/21/2018	104(a)	4/18/2018	C	N	75.1731(g)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9180698	000477221	9/12/2018	12/26/2018	104(a)	9/12/2018	C	Y	75.1731(g)	225.00	Closed	225.00	225.00

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Hopedale Mining LLC	9125459	000446268	6/14/2017	10/1/2017	104(a)	6/14/2017	C	N	75.1731(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180696	000474992	9/5/2018	11/14/2018	104(a)	9/6/2018	C	N	75.1731(a)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9183745	000481020	11/27/2018	2/11/2019	104(a)	11/27/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125353	000454107	10/25/2017	2/5/2018	104(a)	10/25/2017	C	Y	75.1731(b)	492.00	Closed	492.00	492.00
Hopedale Mining LLC	9127909	000464527	3/12/2018	6/23/2018	104(a)	3/12/2018	C	N	75.1731(b)	151.00	Closed	151.00	151.00
Hopedale Mining LLC	9180686	000474992	8/7/2018	11/14/2018	104(a)	8/7/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124896	000448610	7/27/2017	11/14/2017	104(a)	7/27/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127757	000464527	4/5/2018	6/23/2018	104(a)	4/5/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124559	000448610	8/10/2017	11/14/2017	104(a)	8/10/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180689	000474992	8/15/2018	11/14/2018	104(a)	8/15/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125354	000454107	11/1/2017	2/5/2018	104(a)	11/1/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127327	000454107	10/31/2017	2/5/2018	104(a)	10/31/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123137	000436253	2/22/2017	5/28/2017	104(a)	2/22/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	8051499	000438946	4/11/2017	7/2/2017	104(a)	4/11/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9183744	000481020	11/26/2018	2/11/2019	104(a)	11/26/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127347	000460084	1/31/2018	4/21/2018	104(a)	1/31/2018	C	N	75.1731(b)	128.00	Closed	128.00	128.00
Hopedale Mining LLC	9127603	000458445	11/28/2017	4/9/2018	104(a)	11/28/2017	C	Y	75.1731(b)	589.00	Closed	589.00	589.00

Hopedale Mining LLC	9183388	000477221	9/25/2018	12/26/2018	104(a)	9/25/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127908	000464527	3/12/2018	6/23/2018	104(a)	3/12/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127605	000458445	12/5/2017	4/9/2018	104(a)	12/5/2017	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123528	000438946	3/22/2017	7/2/2017	104(a)	3/22/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125043	000450962	9/5/2017	12/3/2017	104(a)	9/5/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125040	000450962	8/28/2017	12/3/2017	104(a)	8/28/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127604	000458445	12/4/2017	4/9/2018	104(a)	12/4/2017	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125351	000454107	10/17/2017	2/5/2018	104(a)	10/17/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180692	000474992	8/27/2018	11/14/2018	104(a)	8/27/2018	C	N	75.1731(b)	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9180238	000478987	10/22/2018	1/9/2019	104(a)	10/22/2018	C	N	75.1731(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125458	000446268	6/14/2017	10/1/2017	104(a)	6/14/2017	C	N	75.1731(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123522	000436253	3/7/2017	5/28/2017	104(a)	3/7/2017	C	N	75.1731(f)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123524	000438946	3/13/2017	7/2/2017	104(a)	3/13/2017	C	N	75.202(g)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180694	000474992	8/28/2018	11/14/2018	104(a)	8/29/2018	C	N	75.202(g)	151.00	Closed	151.00	151.00
Hopedale Mining LLC	9124894	000448610	7/24/2017	11/14/2017	104(a)	7/24/2017	C	N	75.202(g)	135.00	Closed	135.00	135.00
Hopedale Mining LLC	9183746	000481020	11/27/2018	2/11/2019	104(a)	11/27/2018	C	N	75.202(h)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125359	000458445	11/15/2017	4/9/2018	104(a)	11/15/2017	C	N	75.202(g)	118.00	Closed	118.00	118.00

Hopedale Mining LLC	9123126	000434146	1/17/2017	4/30/2017	104(a)	1/18/2017	C	N	75.202(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123124	000432290	1/12/2017	4/2/2017	104(a)	1/12/2017	C	N	75.202(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123138	000436253	2/22/2017	5/28/2017	104(a)	2/22/2017	C	N	75.202(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125457	000446268	6/14/2017	10/1/2017	104(a)	6/14/2017	C	Y	75.202(a)	677.00	Closed	677.00	677.00
Hopedale Mining LLC	8044740	000441477	5/4/2017	7/30/2017	104(a)	5/4/2017	C	Y	75.202(a)	577.00	Closed	577.00	577.00
Hopedale Mining LLC	9123135	000434146	2/7/2017	4/30/2017	104(a)	2/7/2017	C	N	75.202(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124668	000446268	6/21/2017	10/1/2017	104(a)	6/21/2017	C	N	75.202(a)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125348	000452778	10/11/2017	12/31/2017	104(a)	10/11/2017	C	N	75.220(a) (1)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180690	000474992	8/16/2018	11/14/2018	104(a)	8/20/2018	C	N	75.220(a) (1)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9180695	000474992	8/28/2018	11/14/2018	104(a)	8/29/2018	C	N	75.220(a) (1)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127502	000462305	3/6/2018	5/26/2018	104(a)	3/7/2018	C	N	75.333(f)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124662	000443752	6/8/2017	8/27/2017	104(a)	6/9/2017	C	N	75.333(h)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180699	000477221	9/13/2018	12/26/2018	104(a)	9/18/2018	C	N	75.333(h)	429.00	Closed	429.00	429.00
Hopedale Mining LLC	9183741	000481020	11/5/2018	2/11/2019	104(a)	11/5/2018	C	N	75.333(h)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127638	000462305	2/5/2018	5/26/2018	104(a)	2/6/2018	C	N	75.340(a) (2)(i)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9180687	000474992	8/8/2018	11/14/2018	104(a)	8/8/2018	C	N	75.342(a) (4)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127506	000464527	3/21/2018	6/23/2018	104(a)	3/21/2018	C	N	75.342(a) (4)	191.00	Closed	191.00	191.00

Hopedale Mining LLC	9125252	000458445	12/4/2017	4/9/2018	104(a)	12/4/2017	C	N	75.342(e) (4)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123639	000454107	10/25/2017	2/5/2018	104(a)	10/25/2017	C	N	75.342(a) (4)	160.00	Closed	160.00	160.00
Hopedale Mining LLC	9127628	000460084	1/9/2018	4/21/2018	104(a)	1/9/2018	C	N	75.350(e)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123638	000452778	10/13/2017	12/31/2017	104(a)	10/13/2017	C	N	75.350(a)	126.00	Closed	126.00	126.00
Hopedale Mining LLC	8040597	000441477	4/25/2017	7/30/2017	104(a)	4/26/2017	C	N	75.350(a) (2)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9182086	000481020	11/27/2018	2/11/2019	104(a)	12/13/2018	C	N	75.350(a) (2)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125397	000462305	2/22/2018	5/26/2018	104(a)	2/22/2018	C	N	75.350(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127326	000454107	10/31/2017	2/5/2018	104(a)	11/1/2017	C	N	75.360(b)	492.00	Closed	492.00	492.00
Hopedale Mining LLC	9127803	000468571	5/10/2018	8/15/2018	104(a)	5/10/2018	C	N	75.360(b)	336.00	Closed	336.00	336.00
Hopedale Mining LLC	9127511	000466484	4/24/2018	7/21/2018	104(a)	4/25/2018	C	N	75.360(b) (1)(iii)	953.00	Closed	953.00	953.00
Hopedale Mining LLC	9125385	000458445	11/20/2017	4/9/2018	104(a)	11/22/2017	C	N	75.360(b) (1)(iii)	1,118.00	Closed	1,118.00	1,118.00
Hopedale Mining LLC	9127631	000460084	1/18/2018	4/21/2018	104(a)	1/18/2018	C	N	75.360(f)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127905	000462305	3/7/2018	5/26/2018	104(a)	3/7/2018	C	N	75.360(g)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124608	000443752	6/6/2017	8/27/2017	104(a)	6/6/2017	C	N	75.360(g)	220.00	Closed	220.00	220.00
Hopedale Mining LLC	9124602	000441477	4/24/2017	7/30/2017	104(a)	4/24/2017	C	N	75.362(e) (2)	280.00	Closed	280.00	280.00
Hopedale Mining LLC	9127774	000468571	5/8/2018	8/15/2018	104(a)	5/8/2018	C	N	75.362(e) (3)(iii)	1,118.00	Closed	1,118.00	1,118.00
Hopedale Mining LLC	9125840	000446268	6/14/2017	10/1/2017	104(a)	6/14/2017	C	Y	75.362(b)	492.00	Closed	492.00	492.00

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Hopedale Mining LLC	9127349	000460084	1/31/2018	4/21/2018	104(a)	1/31/2018	C	N	75.362(g) (2)(i)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	8051498	000441477	4/10/2017	7/30/2017	104(a)	4/11/2017	C	N	75.363(b)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127634	000460084	1/18/2018	4/21/2018	104(a)	1/18/2018	C	N	75.363(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125544	000441477	5/1/2017	7/30/2017	104(a)	5/2/2017	C	Y	75.364(b)	420.00	Closed	420.00	420.00
Hopedale Mining LLC	9127637	000460084	1/30/2018	4/21/2018	104(a)	2/5/2018	C	N	75.364(b) (2)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	8060516	000446268	7/12/2017	10/1/2017	104(a)	7/27/2017	C	N	75.364(b) (2)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	8055976	000481020	12/4/2018		104(a)	12/4/2018	C	Y	75.370(a) (1)	12,321.00	Hearing Case Filed	12,321.00	0.00
Hopedale Mining LLC	8051168	000474992	8/28/2018	11/14/2018	104(a)	8/28/2018	C	Y	75.370(a) (1)	1,312.00	Closed	1,312.00	1,312.00
Hopedale Mining LLC	9127339	000460084	1/17/2018	4/21/2018	104(a)	1/24/2018	C	N	75.370(a) (1)	336.00	Closed	336.00	336.00
Hopedale Mining LLC	9124603	000441477	5/9/2017	7/30/2017	104(a)	5/9/2017	C	N	75.370(a) (1)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125358	000458445	11/13/2017	4/9/2018	104(a)	11/13/2017	C	Y	75.370(a) (1)	363.00	Closed	363.00	363.00
Hopedale Mining LLC	8055978	000481020	12/4/2018		104(a)	12/4/2018	C	Y	75.370(a) (1)	1,031.00	Hearing Case Filed	1,031.00	0.00
Hopedale Mining LLC	8055975	000481020	12/4/2018		104(a)	12/4/2018	C	Y	75.370(a) (1)	1,031.00	Hearing Case Filed	1,031.00	0.00
Hopedale Mining LLC	9123326	000460084	1/11/2018	4/21/2018	104(a)	1/11/2018	C	N	75.370(a) (1)	128.00	Closed	128.00	128.00
Hopedale Mining LLC	9125253	000458445	12/18/2017	4/9/2018	104(a)	12/18/2017	C	N	75.370(a) (1)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124663	000446268	6/13/2017	10/1/2017	104(a)	6/13/2017	C	Y	75.370(a) (1)	2,077.00	Closed	2,077.00	2,077.00
Hopedale Mining LLC	9124601	000441477	4/24/2017	7/30/2017	104(a)	4/24/2017	C	N	75.370(a) (1)	280.00	Closed	280.00	280.00

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Hopedale Mining LLC	8055977	000481020	12/4/2018		104(a)	12/4/2018	C	Y	75.370(a) (1)	3,710.00	Hearing Case Filed	3,710.00	0.00
Hopedale Mining LLC	9127325	000464527	10/31/2017	6/23/2018	104(a)	10/31/2017	C	N	75.370(a) (1)	589.00	Closed	589.00	589.00
Hopedale Mining LLC	9127639	000462305	2/6/2018	5/26/2018	104(a)	2/6/2018	C	N	75.370(a) (1)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127777	000470729	6/12/2018	9/12/2018	104(a)	6/12/2018	C	N	75.380(d) (1)	151.00	Closed	151.00	151.00
Hopedale Mining LLC	9125391	000458445	12/7/2017	4/9/2018	104(a)	12/7/2017	C	N	75.380(d) (4)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9180685	000472691	8/2/2018	10/10/2018	104(a)	8/2/2018	C	N	75.380(d) (7)(i)	589.00	Closed	589.00	589.00
Hopedale Mining LLC	9124660	000441477	5/10/2017	7/30/2017	104(a)	5/10/2017	C	N	75.380(d) (7)(iv)	305.00	Closed	305.00	305.00
Hopedale Mining LLC	9125347	000452778	10/10/2017	12/31/2017	104(a)	10/10/2017	C	N	75.380(d) (7)(vi)	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125352	000454107	10/25/2017	2/5/2018	104(a)	10/25/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9180239	000478987	10/23/2018	1/9/2019	104(a)	10/24/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127771	000468571	5/7/2018	8/15/2018	104(a)	5/8/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127913	000464527	3/20/2018	6/23/2018	104(a)	3/22/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	7131702	000441477	4/19/2017	7/30/2017	104(a)	4/19/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127904	000462305	3/5/2018	5/26/2018	104(a)	3/5/2018	C	Y	75.400	395.00	Closed	395.00	395.00
Hopedale Mining LLC	9127632	000460084	1/18/2018	4/21/2018	104(a)	1/22/2018	C	N	75.400	177.00	Closed	177.00	177.00
Hopedale Mining LLC	9127606	000458445	12/5/2017	4/9/2018	104(a)	12/5/2017	C	Y	75.400	880.00	Closed	880.00	880.00
Hopedale Mining LLC	9183747	000481020	11/29/2018	2/11/2019	104(a)	11/29/2018	C	N	75.400	208.00	Closed	208.00	208.00

Hopedale Mining LLC	9127902	000462305	2/28/2018	5/26/2018	104(a)	3/7/2018	C	N	75.400	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9125355	000458445	11/6/2017	4/9/2018	104(a)	11/6/2017	C	N	75.400	177.00	Closed	177.00	177.00
Hopedale Mining LLC	9180693	000474992	8/28/2018	11/14/2018	104(a)	8/28/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127759	000466484	4/9/2018	7/21/2018	104(a)	4/10/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123132	000434146	2/1/2017	4/30/2017	104(a)	2/1/2017	C	N	75.400	160.00	Closed	160.00	160.00
Hopedale Mining LLC	9127577	000478987	10/23/2018	1/9/2019	104(a)	10/24/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127912	000464527	3/19/2018	6/23/2018	104(a)	3/21/2018	C	N	75.400	177.00	Closed	177.00	177.00
Hopedale Mining LLC	8040600	000441477	4/25/2017	7/30/2017	104(a)	4/25/2017	C	N	75.400	135.00	Closed	135.00	135.00
Hopedale Mining LLC	9127911	000464527	3/19/2018	6/23/2018	104(a)	3/21/2018	C	N	75.400	177.00	Closed	177.00	177.00
Hopedale Mining LLC	9123134	000434146	2/7/2017	4/30/2017	104(a)	2/7/2017	C	N	75.400	160.00	Closed	160.00	160.00
Hopedale Mining LLC	9127802	000468571	5/10/2018	8/15/2018	104(a)	5/10/2018	C	N	75.400	589.00	Closed	589.00	589.00
Hopedale Mining LLC	9127758	000464527	4/5/2018	6/23/2018	104(a)	4/9/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124560	000448610	8/14/2017	11/14/2017	104(a)	8/14/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123127	000434146	1/18/2017	4/30/2017	104(a)	1/18/2017	C	N	75.400	204.00	Closed	204.00	204.00
Hopedale Mining LLC	9127773	000468571	5/8/2018	8/15/2018	104(a)	5/9/2018	C	N	75.400	1,956.00	Closed	1,956.00	1,956.00
Hopedale Mining LLC	9180684	000472691	7/26/2018	10/10/2018	104(a)	8/2/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123523	000436253	3/7/2017	5/28/2017	104(a)	3/7/2017	C	N	75.400	116.00	Closed	116.00	116.00

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Hopedale Mining LLC	9180236	000478987	10/9/2018	1/9/2019	104(a)	10/9/2018	C	N	75.400	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9124665	000446268	6/13/2017	10/1/2017	104(a)	6/13/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124895	000448610	7/24/2017	11/14/2017	104(a)	7/26/2017	C	N	75.400	204.00	Closed	204.00	204.00
Hopedale Mining LLC	9127602	000458445	11/28/2017	4/9/2018	104(a)	11/28/2017	C	Y	75.400	429.00	Closed	429.00	429.00
Hopedale Mining LLC	9123521	000436253	3/1/2017	5/28/2017	104(a)	3/1/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9130712	000462305	2/27/2018	5/26/2018	104(a)	3/7/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123204	000434146	1/23/2017	4/30/2017	104(a)	1/23/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9183742	000481020	11/19/2018	2/11/2019	104(a)	11/19/2018	C	N	75.400	208.00	Closed	208.00	208.00
Hopedale Mining LLC	9183740	000478987	10/29/2018	1/9/2019	104(a)	10/29/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124567	000452778	9/20/2017	12/31/2017	104(a)	9/20/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9124892	000448610	7/18/2017	11/14/2017	104(a)	7/18/2017	C	N	75.400	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9123130	000434146	1/24/2017	4/30/2017	104(a)	1/24/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9127505	000464527	3/14/2018	6/23/2018	104(a)	3/14/2018	C	N	75.400	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9124551	000448610	7/20/2017	11/14/2017	104(a)	7/20/2017	C	N	75.400	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9127608	000458445	12/18/2017	4/9/2018	104(a)	12/18/2017	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9180209	000478987	10/24/2018	1/9/2019	104(a)	10/24/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127763	000466484	4/16/2018	7/21/2018	104(a)	4/18/2018	C	N	75.400	191.00	Closed	191.00	191.00

Hopedale Mining LLC	9180721	000474992	8/23/2018	11/14/2018	104(a)	8/23/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127906	000462305	3/7/2018	5/26/2018	104(a)	3/7/2018	C	N	75.400	177.00	Closed	177.00	177.00
Hopedale Mining LLC	9124666	000446268	6/13/2017	10/1/2017	104(a)	6/19/2017	C	N	75.400	116.00	Closed	116.00	116.00
Hopedale Mining LLC	8051169	000474992	8/28/2018	11/14/2018	104(a)	8/28/2018	C	N	75.400	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127756	000464527	4/5/2018	6/23/2018	104(a)	4/9/2018	C	N	75.402	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9183580	000477221	9/19/2018	12/26/2018	104(a)	9/26/2018	C	N	75.402	953.00	Closed	953.00	953.00
Hopedale Mining LLC	9123136	000436253	2/16/2017	5/28/2017	104(a)	2/22/2017	C	N	75.403	160.00	Closed	160.00	160.00
Hopedale Mining LLC	9125380	000454107	10/25/2017	2/5/2018	104(a)	10/25/2017	C	N	75.403	305.00	Closed	305.00	305.00
Hopedale Mining LLC	9125387	000458445	11/27/2017	4/9/2018	104(a)	11/30/2017	C	N	75.403	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9125384	000458445	11/20/2017	4/9/2018	104(a)	11/20/2017	C	N	75.403	1,666.00	Closed	1,666.00	1,666.00
Hopedale Mining LLC	9123525	000438946	3/16/2017	7/2/2017	104(a)	3/20/2017	C	N	75.403	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9125388	000458445	11/27/2017	4/9/2018	104(a)	11/30/2017	C	N	75.403	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9125392	000458445	12/13/2017	4/9/2018	104(a)	12/14/2017	C	N	75.403	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9123180	000429254	12/14/2016	3/5/2017	104(a)	12/23/2016	C	N	75.403	114.00	Closed	114.00	114.00
Hopedale Mining LLC	9183582	000477221	10/5/2018	12/26/2018	104(a)	10/9/2018	C	N	75.403	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9088814	000432290	12/20/2016	4/2/2017	104(a)	12/27/2016	C	N	75.403	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9125399	000462305	3/5/2018	5/26/2018	104(a)	3/6/2018	C	N	75.403	191.00	Closed	191.00	191.00

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Hopedale Mining LLC	9123182	000432290	12/21/2016	4/2/2017	104(a)	12/22/2016	C	N	75.403	453.00	Closed	453.00	453.00
Hopedale Mining LLC	9123181	000429254	12/14/2016	3/5/2017	104(a)	12/23/2016	C	N	75.403	114.00	Closed	114.00	114.00
Hopedale Mining LLC	9088812	000429254	12/13/2016	3/5/2017	104(a)	12/14/2016	C	N	75.403	114.00	Closed	114.00	114.00
Hopedale Mining LLC	9123183	000432290	12/21/2016	4/2/2017	104(a)	12/22/2016	C	N	75.403	420.00	Closed	420.00	420.00
Hopedale Mining LLC	9123526	000438946	3/16/2017	7/2/2017	104(a)	3/20/2017	C	N	75.403	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9127500	000462305	3/5/2018	5/26/2018	104(a)	3/6/2018	C	N	75.403	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9127510	000466484	4/24/2018	7/21/2018	104(a)	4/24/2018	C	N	75.403	1,539.00	Closed	1,539.00	1,539.00
Hopedale Mining LLC	9125254	000458445	12/18/2017	4/9/2018	104(a)	12/18/2017	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127804	000468571	5/10/2018	8/15/2018	104(a)	5/10/2018	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127653	000462305	2/15/2018	5/26/2018	104(a)	2/15/2018	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127901	000462305	2/6/2018	5/26/2018	104(a)	2/6/2018	C	Y	75.503	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9124568	000452778	9/21/2017	12/31/2017	104(a)	9/22/2017	C	N	75.503	116.00	Closed	116.00	116.00
Hopedale Mining LLC	9123325	000460084	1/10/2018	4/21/2018	104(a)	1/10/2018	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9181737	000474992	8/16/2018	11/14/2018	104(a)	8/16/2018	C	Y	75.503	953.00	Closed	953.00	953.00
Hopedale Mining LLC	9127915	000464527	3/21/2018	6/23/2018	104(a)	3/22/2018	C	Y	75.503	225.00	Closed	225.00	225.00
Hopedale Mining LLC	9125398	000462305	2/28/2018	5/26/2018	104(a)	3/1/2018	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9090992	000458445	12/5/2017	4/9/2018	104(a)	12/6/2017	C	N	75.503	118.00	Closed	118.00	118.00

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Hopedale Mining LLC	9127601	000458445	11/27/2017	4/9/2018	104(a)	11/28/2017	C	N	75.503	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9181739	000474992	8/30/2018	11/14/2018	104(a)	8/30/2018	C	N	75.503	138.00	Closed	138.00	138.00
Hopedale Mining LLC	9127900	000462305	2/6/2018	5/26/2018	104(a)	2/6/2018	C	Y	75.503	243.00	Closed	243.00	243.00
Hopedale Mining LLC	9181724	000474992	9/5/2018	11/14/2018	104(a)	9/5/2018	C	Y	75.511	953.00	Closed	953.00	953.00
Hopedale Mining LLC	9127914	000464527	3/21/2018	6/23/2018	104(a)	3/22/2018	C	N	75.515	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9183384	000474992	9/6/2018	11/14/2018	104(a)	9/6/2018	C	N	75.515	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9124899	000448610	8/11/2017	11/14/2017	104(a)	8/11/2017	C	Y	75.517	1,633.00	Closed	1,633.00	1,633.00
Hopedale Mining LLC	9127768	000466484	5/2/2018	7/21/2018	104(a)	5/2/2018	C	N	75.517	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9123125	000432290	1/12/2017	4/2/2017	104(a)	1/12/2017	C	N	75.517	330.00	Closed	330.00	330.00
Hopedale Mining LLC	9183749	000481020	11/29/2018	2/11/2019	104(a)	11/29/2018	C	Y	75.517	4,355.00	Closed	4,355.00	4,355.00
Hopedale Mining LLC	9127654	000462305	2/15/2018	5/26/2018	104(a)	2/15/2018	C	Y	75.517	880.00	Closed	880.00	880.00
Hopedale Mining LLC	9124562	000450962	8/30/2017	12/3/2017	104(a)	8/30/2017	C	Y	75.517	220.00	Closed	220.00	220.00
Hopedale Mining LLC	9127815	000470729	6/18/2018	9/12/2018	104(a)	6/18/2018	C	Y	75.517	749.00	Closed	749.00	749.00
Hopedale Mining LLC	9180722	000474992	8/23/2018	11/14/2018	104(a)	8/23/2018	C	Y	75.517	953.00	Closed	953.00	953.00
Hopedale Mining LLC	9183743	000481020	11/19/2018	2/11/2019	104(a)	11/19/2018	C	Y	75.517	1,956.00	Closed	1,956.00	1,956.00
Hopedale Mining LLC	9123520	000436253	2/27/2017	5/28/2017	104(a)	2/27/2017	C	Y	75.517	188.00	Closed	188.00	188.00
Hopedale Mining LLC	9127767	000466484	5/2/2018	7/21/2018	104(a)	5/2/2018	C	N	75.523	118.00	Closed	118.00	118.00

Hopedale Mining LLC	9127607	000458445	12/14/2017	4/9/2018	104(a)	12/19/2017	C	N	75.523-3(e)(2)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125992	000458445	12/5/2017	4/9/2018	104(a)	12/5/2017	C	N	75.601-1	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127775	000468571	5/9/2018	8/15/2018	104(a)	5/9/2018	C	N	75.604(b)	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127629	000460084	1/17/2018	4/21/2018	104(a)	1/17/2018	C	N	75.605	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9127600	000458445	11/20/2017	4/9/2018	104(a)	11/20/2017	C	N	75.807	118.00	Closed	118.00	118.00
Hopedale Mining LLC	9125356	000458445	11/6/2017	4/9/2018	104(e)	11/6/2017	C	N	75.807	151.00	Closed	151.00	151.00
Hopedale Mining LLC	9180683	000472691	7/19/2018	10/10/2018	104(a)	7/20/2018	C	N	75.807	151.00	Closed	151.00	151.00
Hopedale Mining LLC	7128686	000441477	5/4/2017	7/30/2017	104(a)	5/4/2017	C	N	75.904	126.00	Closed	126.00	126.00
Hopedale Mining LLC	9180691	000474992	8/21/2018	11/14/2018	104(a)	8/21/2018	C	N	75.904	191.00	Closed	191.00	191.00
Hopedale Mining LLC	9127760	000466484	4/10/2018	7/21/2018	104(a)	4/10/2018	C	N	75.904	118.00	Closed	118.00	118.00
Hopedale Mining LLC	7120850	000441477	4/24/2017	7/30/2017	104(a)	4/24/2017	C	N	77.1110	116.00	Closed	116.00	116.00
Hopedale Mining LLC	7140991	000441477	4/24/2017	7/30/2017	104(a)	4/27/2017	C	N	77.205(f)	116.00	Closed	116.00	116.00

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# Appeal Ex. A

U.S. Department of Labor

Mine Safety and Health Administration  
604 Cheat Road  
Morgantown, West Virginia 26508



March 25, 2019

The Honorable Margaret A. Miller  
Acting Chief Administrative Law Judge  
Federal Mine Safety and Health  
Review Commission  
721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2536

Re: *SECRETARY OF LABOR (MSHA) v. HOPEDALE MINING LLC*  
Docket No.: LAKE 2019-0149  
Assessment Control No.: 481020  
Mine: Hopedale Mine  
Mine ID: 33-00968

Dear Judge Miller:

Attached for filing is the Secretary's Motion to Approve Settlement in the above-referenced case. The Operator has agreed to pay Three Thousand Three Hundred and Thirty-Nine Dollars (\$3,339.00) of the Eighteen Thousand and Ninety-Three Dollar (\$18,093.00) proposed penalty. Representative for the Respondent, Alan S. VanCuren has reviewed this Motion and has consented to the granting of the Motion and entry of the proposed Order approving settlement.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey C. Maxwell". The signature is written in a cursive, somewhat stylized script.

Jeffrey C. Maxwell  
Conference and Litigation Representative

Enclosures

cc: Alan S. VanCuren, Safety Director  
Office of Assessments

Exhibit D

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
721 19th Street, Suite 443  
Denver, CO 80202-2536  
Office: (303) 844-1616/Fax: (303) 844-5268

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2019-0149
Petitioner,	:	A.C. No. 33-00968-481020
	:	
v.	:	
	:	
HOPEDALE MINING LLC,	:	Mine: Hopedale Mine
Respondent.	:	

**MOTION FOR DECISION AND ORDER APPROVING SETTLEMENT**

Pursuant to Section 110(k) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) and Commission Procedural Rule 31, the Secretary of Labor moves the administrative law judge to approve the settlement reached by the parties and to order Respondent to pay civil penalties. In support of this motion, the Secretary states:

1. The Mine Safety and Health Administration (“MSHA”) proposed civil penalties for the citations at issue in accordance with the statutory penalty criteria in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and MSHA’s civil penalty regulations at 30 C.F.R. Part 100.
2. Representatives for the Secretary and Respondent have discussed the alleged violations and MSHA’s proposed penalties, and seek to settle the contested citations and penalties in the above-captioned docket as follows:

<b>Citation/ Order</b>	<b>MSHA's Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other modifications to citation/order</b>
8055975	\$1,031.00	\$462.00	Modify Negligence from "Moderate" to "Low"
8055976	\$12,321.00	\$1,666.00	Modify Gravity: "Highly Likely" to "Reasonably Likely" and Negligence from "High" to "Moderate"
8055977	\$3,710.00	\$749.00	Modify Gravity: "Highly Likely" to "Reasonably Likely" and Negligence from "Moderate" to "Low"
8055978	\$1,031.00	\$462.00	Modify Negligence from "Moderate" to "Low"
<b>Total</b>	<b>\$18,093.00</b>	<b>\$3,339.00</b>	

3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

4. The representatives of the Secretary and Respondent have discussed the alleged violation(s) and the statutory criteria under Section 110 of the Federal Mine Safety Act of 1977, 30 U.S.C. §§ 801 et seq. in reaching this settlement.

5. In accordance with 29 C.F.R. § 2700.31(b)(2), the undersigned representative for the Secretary certifies that Respondent has authorized the Secretary to represent that Respondent consents to the granting of this motion and the entry of the proposed Order Approving Settlement.

6. To assist the Commission in evaluating the appropriateness of the settlement penalties under Section 110(i), the Secretary presents the following information in support of the penalties agreed to by the parties:

a. 104(a) Citation 8055975 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$1,031.00 for this violation. Gravity was evaluated as: Reasonably Likely, Permanently Disabling, 2 Persons Affected.

Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the section supervisor's air reading, which was taken just prior to the inspector showed over 3,200 cfm of air behind the line curtain. The inspector's contemporaneous notes confirm the foreman stated he had over 3,000 cfm prior to roof bolters installing roof bolts. In consideration of the above, the Secretary agrees to a reduction in negligence and a corresponding reduction in the penalty to \$462.00 pursuant to Part 100.

b. 104(a) Citation 8055976 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$12,321.00 for this violation.

Gravity was evaluated as: Highly Likely, Permanently Disabling, 5 Persons

Affected. Consequently, the violation was designated as S&S. Negligence was

evaluated as high. Respondent asserted the condition should not have been

evaluated as highly likely to result in an over-exposure of respirable dust, and was

not a result of high negligence. Respondent provided results of Continuous Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued; which were below the 1.5 mg standard. The Secretary affirms the Inspector's contemporaneous notes reflect management was unaware of the cited condition. Based on the results of the CPDM Samples and the short duration of exposure to this condition it would be reasonably likely; not highly likely to result in a permanently disabling injury. In consideration of the above, the Secretary agrees to a reduction in gravity and negligence and a corresponding reduction in the penalty to \$1,666.00 pursuant to Part 100.

- c. 104(a) Citation 8055977 was issued for an alleged violation of §75.370(a)(1). The Secretary has proposed a civil penalty of \$3,710.00 for this violation. Gravity was evaluated as: Highly Likely, Permanently Disabling, 5 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the condition should not have been evaluated as highly likely to result in a respirable dust over-exposure, and was not a result of moderate negligence. Respondent provided results of Continuous Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued; which were below the 1.5 mg standard. The Secretary affirms the Inspector's contemporaneous notes reflect management was unaware of the cited condition and the respirable dust parameters were in compliance at the start of the shift. Based on the results of the CPDM Samples and the short duration of exposure to this condition it would be

reasonably likely; not highly likely to result in a permanently disabling injury. In consideration of the above, the Secretary agrees to a reduction in gravity and negligence and a corresponding reduction in the penalty to \$749.00 pursuant to Part 100.

- d. 104(a) Citation 8055978 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$1,031.00 for this violation. Gravity was evaluated as: Reasonably Likely, Permanently Disabling, 2 Persons Affected.

Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the condition was not a result of moderate negligence. The Inspector's contemporaneous notes reflect the roof bolter parameters were compliant at the start of the shift. In consideration of the above, the Secretary agrees to a reduction in negligence and a corresponding reduction in the penalty to \$462.00 pursuant to Part 100.

7. A proposed Order Approving Settlement setting forth the factual bases for this motion is attached and incorporated herein by reference. Based upon the review of the facts and the assessment procedures of 30 C.F.R. Part 100, the Secretary believes that a penalty of Three Thousand Three Hundred and Thirty-Nine Dollars (\$3,339.00) for the citations (incorporated by reference) is reasonable and that payment of this amount will serve to affect the intent and purpose of the Act. Except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or regulations. Further, except for proceedings under the Act, nothing contained herein is intended to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.

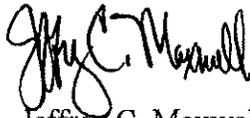
8. Each party agrees to bear its own attorney fees, costs, and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including, but not limited to, attorney fees which may be available under the Equal Access to Justice Act, as amended.

Accordingly, the Secretary respectfully requests that the attached proposed Order be issued.

Mailing Address:

Jeffrey C. Maxwell  
U. S. Department of Labor  
Mine Safety and Health  
Administration  
604 Cheat Road  
Morgantown, WV 26508  
(304) 225-6835

Respectfully Submitted,



Jeffrey C. Maxwell  
Conference and Litigation Representative

UNITED STATES DEPARTMENT OF LABOR  
Mine Safety and Health Administration

**CERTIFICATE OF SERVICE**

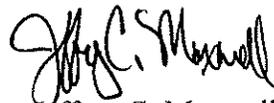
I hereby certify that on **March 25, 2019** a copy of the Secretary of Labor's Settlement Motion to Dismiss and Proposed Order, were electronically served upon the following:

The Honorable Margaret A. Miller  
Acting Chief Administrative Law Judge  
Federal Mine Safety and Health  
Review Commission  
721 19th Street, Suite 443  
Denver, CO 80202-2536

Alan S. VanCuren  
Safety Director  
Hopedale Mining LLC  
P.O. Box 415  
Hopedale, OH 43976  
[SVanCuren@rhinolp.com](mailto:SVanCuren@rhinolp.com)

Whitney Kegley  
[wkegley@rhinolp.com](mailto:wkegley@rhinolp.com)

Cathy Frazier  
[cfrazier@rhinolp.com](mailto:cfrazier@rhinolp.com)



Jeffrey C. Maxwell  
Conference and Litigation  
Representative  
[maxwell.jeffrey@dol.gov](mailto:maxwell.jeffrey@dol.gov)

# Appeal Ex. B



UNITED STATES OF AMERICA  
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
721 19TH STREET, SUITE 443  
DENVER, COLORADO 80202-2500

## SUBPOENA

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

Petitioner/Complainant/Contestant

v.

HOPEDALE MINING LLC,

Respondent

Docket No. LAKE 2019-0149

TO: John William Dye



YOU ARE DIRECTED to appear at the place, date, and time specified below to testify at a hearing in the above proceeding.

PLACE OF HEARING

Federal Mine Safety & Health Review Commission Courtroom  
875 Greentree Rd., 7 Parkway Center, Suite 290, Pittsburgh, PA 15220

DATE AND TIME

April 24, 2019, 9:00 a.m.



YOU ARE DIRECTED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above proceeding.

PLACE OF DEPOSITION

DATE AND TIME



YOU ARE DIRECTED to bring the following items with you:

Please bring all notes, photographs, and documents associated with the 12/4/2018 inspection at the Hopedale mine and the citations at issue in this docket.

This subpoena is issued upon the application of (indicate if attorney/representative for party):

PERSON REQUESTING SUBPOENA

ADDRESS, TELEPHONE AND FAX NUMBERS

ISSUED BY:

Margaret A. Miller, Administrative Law Judge  
Office: (303) 844-5267 Facsimile: (303) 844-5268

April 10, 2019

Date

PROOF OF SERVICE

SERVED: 04/17/19  
DATE

MINE SAFETY AND HEALTH ADMIN  
PLACE

SERVED ON (Print Name): JOHN WILLIAM DYE

MANNER OF SERVICE: HAND DELIVERED

SERVED BY (Print Name): SCOTT W. VERNON

TITLE: ATTY

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct. (If service was by Registered or Certified Mail, attach return receipt.)

Executed On: 04/17/19  
Date

Scott W. Vernon  
Signature of Server

Address of Server: 875 GREENTREE RD., STE 290, P6H, PA 15220

TITLE 29, CODE OF FEDERAL REGULATIONS  
CHAPTER XXVII - FEDERAL MINE SAFETY AND HEALTH  
REVIEW COMMISSION  
PART 2700, PROCEDURAL RULES

[Any motion to revoke or modify a subpoena; must be in writing; must identify the case by name and docket number; must be signed by the filing person; and shall include the filing person's address and phone number.

§ 2700.60 Subpoenas

The motion shall be filed by facsimile transmittal, and a copy shall be served by facsimile on the person upon whose application the subpoena was issued. Commission Procedural Rules 5, 6, 7, and 10.]

(a) *Compulsory attendance of witnesses and production of documents.* The Commission and its Judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents and physical evidence. A subpoena may be served by any person who is at least 18 years of age. A subpoena may also be served by registered or certified mail, return receipt requested, but, in such case, any risk of delivery is on the serving party. A copy of the subpoena bearing a certificate of service shall be filed with the Commission or the Judge.

(d) *Availability of Transcript.* Persons compelled to submit evidence at a public proceeding are entitled to obtain, on payment of prescribed costs, a transcript of that part of the proceeding that sets forth their testimony or refers to their production of evidence.

(b) *Fees payable to witnesses.* Subpoenaed witnesses shall be paid the same fees and mileage as are paid in the district courts of the United States. The witness fees and mileage shall be paid by the party at whose request the witness appears, or by the Commission if a witness is subpoenaed on the motion of the Commission or a Judge. This paragraph does not apply to Government employees who are called as witnesses by the Government.

(e) *Failure to Comply.* Upon the failure of any person to comply with an order to testify or with a subpoena issued by the Commission or the Judge, the Judge or the Commission's General Counsel, at the request of the Judge or at the direction of the Commission, may undertake to initiate proceedings in the appropriate district court of the United States for the enforcement of the subpoena.

TENDER OF FEES AND MILEAGE

(c) *Motions to revoke or modify subpoenas.* Any person served with a subpoena may move within 5 [business] days of service or at the hearing, whichever is sooner, to revoke or modify the subpoena. The Commission or the Judge, as appropriate, shall revoke or modify the subpoena if it seeks information outside the proper scope of discovery as set forth in § 2700.56(b); or if it does not describe with sufficient particularity the evidence required to be produced; or if for any other reason it is found to be invalid or unreasonable. The Commission or the Judge shall set forth a concise statement of the grounds for such ruling.

Service of a subpoena directing a person's attendance at a hearing or deposition shall be accompanied by tendering to that person the fees or one day's attendance and the mileage allowed by law, except that, when a subpoena is issued at the request of the United States or an officer or agency thereof, fees and mileage need not be tendered. Fed.R.Civ.P.45(b).

PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. A party or attorney who breaches this duty may be subject to an appropriate sanction. Fed.R.Civ.P.45(c)(1).

**Appeal Ex. C**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
721 19th Street, Suite 443  
Denver, CO 80202-2536  
Office: (303) 844-1616/Fax: (303) 844-5268

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. LAKE 2019-0149
	:	A.C. No. 33-00968-481020
	:	
v.	:	
	:	
HOPEDALE MINING LLC, Respondent.	:	Mine: Hopedale Mine
	:	

**AMENDED MOTION FOR DECISION AND ORDER APPROVING SETTLEMENT**

Pursuant to Section 110(k) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) and Commission Procedural Rule 31, the Secretary of Labor moves the administrative law judge to approve the settlement reached by the parties and to order Respondent to pay civil penalties. In support of this motion, the Secretary states:

1. The Mine Safety and Health Administration (“MSHA”) proposed civil penalties for the citations at issue in accordance with the statutory penalty criteria in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and MSHA’s civil penalty regulations at 30 C.F.R. Part 100.

2. The parties hereby resubmit their proposed settlement agreement, with the same modifications to the citations and the same proposed penalty reductions previously submitted.

In addition, the parties hereby submit additional information to support the modifications to the citations. The parties rely on the requirements of settlement language as set out in the recent decision from the FMSHRC in American Coal Co., LAKE 2011-13, FMSHRC August 2, 2018.

**ACTING CHIEF JUDGE MILLER**

The parties assert that the settlement motion includes a description of the “fact on which the parties have agreed to disagree.” American Coal, page 9. Further, the settlement motion demonstrates “the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest.” Id.

3. Representatives for the Secretary and Respondent have discussed the alleged violations and MSHA’s proposed penalties, and seek to settle the contested citations and penalties in the above-captioned docket as follows:

<b>Citation/ Order</b>	<b>MSHA’s Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other modifications to citation/order</b>
8055975	\$1,031.00	\$462.00	Modify Negligence from "Moderate" to "Low"
8055976	\$12,321.00	\$1,666.00	Modify Gravity: "Highly Likely" to "Reasonably Likely" and Negligence from "High" to "Moderate"
8055977	\$3,710.00	\$749.00	Modify Gravity: "Highly Likely" to "Reasonably Likely" and Negligence from "Moderate" to "Low"
8055978	\$1,031.00	\$462.00	Modify Negligence from "Moderate" to "Low"
<b>Total</b>	<b>\$18,093.00</b>	<b>\$3,339.00</b>	

4. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

5. The representatives of the Secretary and Respondent have discussed the alleged violations and the statutory criteria under Section 110 of the Federal Mine Safety Act of 1977, 30 U.S.C. §§ 801 et seq. in reaching this settlement.

6. In accordance with 29 C.F.R. § 2700.31(b)(2), the undersigned representative for the Secretary certifies that Respondent has authorized the Secretary to represent that Respondent consents to the granting of this motion and the entry of the proposed Order Approving Settlement.

7. To assist the Commission in evaluating the appropriateness of the settlement penalties under Section 110(i), the Secretary presents the following information in support of the penalties agreed to by the parties:

- a. 104(a) Citation 8055975 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$1,031.00 for this violation. Gravity was evaluated as: Reasonably Likely, Permanently Disabling, 2 Persons Affected.

Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the section supervisor's air reading, which was taken just prior to the inspector's arrival, showed over 3,200 cfm of air behind the line curtain. Respondent argued the air reading taken by the inspector (2,792 cfm) is 93% of what is required by the plan (3,000). Respondent further argued this difference is not easily detected. The inspector's contemporaneous notes confirm the foreman stated he had over 3,000 cfm prior to roof bolters installing roof bolts. In consideration of the above, the Secretary agrees to a reduction in negligence to low and a corresponding reduction in the penalty to \$462.00 pursuant to Part 100.

The citation remains designated as S&S.

- b. 104(a) Citation 8055976 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$12,321.00 for this violation.

Gravity was evaluated as: Highly Likely, Permanently Disabling, 5 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as high. Respondent asserted the condition should not have been evaluated as highly likely to result in an over-exposure of respirable dust, and was not a result of high negligence. Respondent provided results of Continuous

Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued; which were below the 1.5 mg standard. The Secretary agrees the section foreman was at the continuous miner as it cut through from E to F, but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through. Based on the results of the CPDM Samples and the short duration of exposure to this condition it would be reasonably likely not highly likely to result in a permanently disabling injury. In consideration of the above, the Secretary agrees to a reduction in gravity and negligence to moderate and a corresponding reduction in the penalty to \$1,666.00 pursuant to Part 100. The citation remains designated as S&S.

- c. 104(a) Citation 8055977 was issued for an alleged violation of §75.370(a)(1). The Secretary has proposed a civil penalty of \$3,710.00 for this violation. Gravity was evaluated as: Highly Likely, Permanently Disabling, 5 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the condition should not have been evaluated as highly likely to result in a respirable dust over-exposure, and was not a result of moderate negligence. Respondent provided results of Continuous Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued which were below the 1.5 mg standard. Respondent further argued the location of the plugged sprays made it difficult for the miner operator to recognize the sprays were plugged and dust was not observed “rolling” over the miner operator or shuttle car operators. The

Secretary agrees the Inspector's contemporaneous notes reflect the respirable dust parameters were in compliance at the start of the shift and the sprays were checked after the miner completed the third cut of the shift, when cutting through from E to F. Based on the results of the CPDM Samples and the short duration of exposure to this condition it would be reasonably likely not highly likely to result in a permanently disabling injury. In consideration of the above, the Secretary agrees to a reduction in gravity and negligence to low and a corresponding reduction in the penalty to \$749.00 pursuant to Part 100. The citation remains designated as S&S.

- d. 104(a) Citation 8055978 was issued for an alleged violation of §75.370(a)(1).

The Secretary has proposed a civil penalty of \$1,031.00 for this violation. Gravity was evaluated as: Reasonably Likely, Permanently Disabling, 2 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as moderate. Respondent asserted the condition was not a result of moderate negligence. Respondent argued the parameters were compliant at the start of the shift and the difference in 10 inches Hg and the 12 inches Hg required by the plan was not easily detected by the roof bolter operator. The Inspector's contemporaneous notes reflect the roof bolter parameters were compliant at the start of the shift. In consideration of the above, the Secretary agrees to a reduction in negligence to low and a corresponding reduction in the penalty to \$462.00 pursuant to Part 100. The citation remains designated as S&S.

8. A proposed Order Approving Settlement setting forth the factual bases for this motion is attached and incorporated herein by reference. Based upon the review of the facts and the

assessment procedures of 30 C.F.R. Part 100, the Secretary believes that a penalty of \$3,339.00 for the citations (incorporated by reference) is reasonable and that payment of this amount will serve to affect the intent and purpose of the Act. Except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or regulations. Further, except for proceedings under the Act, nothing contained herein is intended to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.

9. Each party agrees to bear its own attorney fees, costs, and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including, but not limited to, attorney fees which may be available under the Equal Access to Justice Act, as amended.

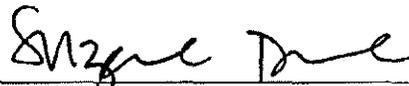
Accordingly, the Secretary respectfully requests that the attached proposed Order be issued.

Respectfully Submitted,

**KATE S. O'SCANNLAIN**  
Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor

P.O. ADDRESS:  
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Attorneys for **R. ALEXANDER ACOSTA**,  
Secretary of Labor, United  
States Department of Labor,  
Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on 4/5, 2019 a copy of the Secretary of Labor's Settlement Motion to Dismiss and Proposed Order, were electronically served upon the following:

The Honorable Margaret A. Miller  
Acting Chief Administrative Law Judge  
Federal Mine Safety and Health  
Review Commission  
721 19th Street, Suite 443  
Denver, CO 80202-2536

Alan S. VanCuren  
Safety Director  
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\_\_\_\_\_  
SUZANNE F. DUNNE  
Attorney

United States Department of Labor  
One of the Attorneys for Respondent

Hon. Margaret A. Miller

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

<hr/>		:	
<b>R. ALEXANDER ACOSTA</b> , Secretary of		:	<b>CIVIL PENALTY PROCEEDING</b>
Labor, United States Department		:	
of Labor,		:	
	Petitioner,	:	Docket No.: LAKE 2019-149
	v.	:	A.C. No.: 33-00968-481020
		:	
<b>HOPEDALE MINING, LLC</b> ,		:	
		:	
	Respondent.	:	Mine: Hopedale Mine
<hr/>		:	

**JOINT STIPULATIONS**

The parties hereby submit the following joint stipulations in the above-referenced matter:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
2. Respondent's operations affect interstate commerce.
3. At all times relevant to the instant proceedings, Respondent was an operator as defined in Section 3(d) of the Act and operated the Hopedale Mine, located in or around Harrison County, Ohio.

4. Respondent was cited for 178 violations in the 15-month period ending December 4, 2018. During calendar year 2018, only four Section 75.370(a)(1) violations were issued to the mine prior to the citations at issue in this docket.

5. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent on the date indicated therein.

6. The payment of \$3,339.00 will not affect Respondent's ability to continue in business.

7. With respect to Citation No. 8055975, the parties agree:

a. 104(a) Citation 8055975 is a violation of 30 C.F.R. § 75.370(a)(1).

b. 30 C.F.R. § 75.370(a)(1) is a "mandatory health or safety standard" as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

c. The number of persons affected is 2, which is the number of miners operating the Co. No. 3 roof bolter on the section who could have been exposed to respirable dust during the shift.

d. The hazard contributed to, overexposure to respirable coal dust and silica, would be reasonably likely result in permanently disabling injuries.

e. The section supervisor's air reading, which was taken just prior to the inspection, showed over 3,200 cfm of air behind the line curtain – a volume in excess of the ventilation plan's minimum requirement.

f. The air reading taken by the inspector (2,792 cfm) is 93% of what is required by the plan (3,000 cfm).

g. The inspector's contemporaneous notes confirm the foreman stated he had measured over 3,000 cfm prior to roof bolters installing roof bolts.

h. Based upon §§ 7(e)-(g), the parties agree the appropriate negligence level is "Low."

i. The reduction in negligence to "Low" reduces the proposed penalty pursuant to 30 C.F.R. § 100.3(g) – Table XIV, Penalty Conversion Table.

j. Using Part 100 penalty tables as a guide, the parties agree a penalty of \$462.00 is appropriate under § 110(i).

k. Hopdale Mining, LLC, withdraws its challenge to the S&S gravity determination.

8. With respect to Citation 8055976, the parties agree:

a. 104(a) Citation 8055976 is a violation of §75.370(a)(1).

b. 30 C.F.R. § 75.370(a)(1) is a "mandatory health or safety standard" as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

c. The number of persons affected is 5, which is the number of miners working in the section who could have been exposed to respirable dust during the shift.

d. The hazard contributed to, overexposure to respirable coal dust and silica, would be reasonably likely result in permanently disabling injuries.

e. Continuous Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued were below the 1.5 mg/m<sup>3</sup> respirable dust standard.

f. The section foreman was at the continuous miner as it cut through the E to F Crosscut, but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through.

g. The miners were exposed to the violative condition for a short period of time.

h. Based upon §§ 8(e)-(g), the parties agree the appropriate negligence level is “Moderate.”

i. Based upon §§ 8(e)-(g), the parties agree the likelihood of an injury is “Reasonably Likely.”

j. The reduction in negligence to “Moderate” and the reduction to “Reasonably Likely” reduces the proposed penalty to \$1,666.00 pursuant to 30 C.F.R. § 100.3(g) – Table XIV, Penalty Conversion Table.

k. Using Part 100 penalty tables as a guide, the parties agree a penalty of \$1,666.00 is appropriate under § 110(i).

l. Hopdale Mining, LLC, has withdrawn its challenge to the S&S gravity determination.

9. With respect to Citation 8055977, the parties agree:

a. 104(a) Citation 8055977 is a violation of §75.370(a)(1).

b. 30 C.F.R. § 75.370(a)(1) is a “mandatory health or safety standard” as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

c. The number of persons affected is 5, which is the number of miners working in the section who could have been exposed to respirable dust during the shift.

d. The hazard contributed to, overexposure to respirable coal dust and silica, would be reasonably likely result in permanently disabling injuries.

e. Continuous Personal Dust Monitoring (CPDM) Samples being conducted on the shuttle car operators on the section at the time the violation was issued were below the 1.5 mg/m<sup>3</sup> respirable dust standard.

f. Because of the location of the plugged water sprays, it would be difficult for the continuous miner operator to recognize the water sprays were plugged. Moreover, the rolling of dust is a reliable visual sign that water sprays may be ineffectively controlling dust, and dust was not observed “rolling” over the miner operator or shuttle car operators.

g. The Inspector’s contemporaneous notes reflect the respirable dust parameters were in compliance at the start of the shift and the water sprays were checked after the continuous miner completed the third cut of the shift, when cutting through E to F Crosscut.

h. Based upon ¶¶ 9(e)-(g), the parties agree the appropriate negligence level is “Low.”

i. Based upon ¶¶ 9(e)-(g), the parties agree the likelihood of the hazard to result in an injury is “Reasonably Likely.”

j. The reduction in negligence to “Moderate” and the reduction to “Reasonably Likely” reduces the proposed penalty to \$749.00 pursuant to 30 C.F.R. § 100.3(g) – Table XIV, Penalty Conversion Table.

k. Using Part 100 penalty tables as a guide, the parties agree a penalty of \$749.00 is appropriate under § 110(i).

l. Hopdale Mining, LLC, has withdrawn its challenge to the S&S gravity determination.

10. With respect to Citation 8055978, the parties agree:

a. 104(a) Citation 8055978 is a violation of 30 C.F.R. § 75.370(a)(1).

b. 30 C.F.R. § 75.370(a)(1) is a “mandatory health or safety standard” as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

c. The number of persons affected is 2, which is the number of miners operating the Co. No. 3 roof bolter machine on the unit who could have been exposed to respirable dust during the shift.

d. The hazard contributed to, overexposure to respirable coal dust and silica, would be reasonably likely result in permanently disabling injuries.

e. At the start of the shift, the roof bolting vacuum parameters were in compliance. As the shift progressed, the difference in 10 inches of mercury (Hg) observed by the inspector and the 12 inches Hg required by the approved ventilation plan was not easily detected by the roof bolter operator.

f. Based upon ¶ 10(e), the parties agree the appropriate negligence level is “Low.”

g. The reduction in negligence to “Low” reduces the proposed penalty to \$462.00 pursuant to 30 C.F.R. § 100.3(g) – Table XIV, Penalty Conversion Table.

h. Using Part 100 penalty tables as a guide, the parties agree a penalty of \$462.00 is appropriate under § 110(i).

i. Hopdale Mining, LLC, has withdrawn its challenge to the S&S gravity determination.

11. Each party agrees to bear its own attorney fees, costs, and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including, but not limited to, attorney fees which may be available under the Equal Access to Justice Act, as amended.

**Dated: April 16, 2019**

Respectfully submitted,

**KATE S. O'SCANNLAIN**  
Solicitor of Labor

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Regional Solicitor

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/s/ Edward V. Hartman

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I. Motion for Reconsideration of Denial of Settlement, And Motion to Approve Settlement

The legal standard for evaluating proposed penalty reductions is whether the proposed reductions are fair, reasonable, appropriate under the facts, and protect the public interest. *American Coal Company*, 40 FMSHRC 987 (Aug. 2018) (citing *American Coal Company*, 38 FMSHRC 1972, 1976 (Aug. 2016)). In applying this legal standard, the judge must “accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects.” *Id.* at 989 (citing *Madison Branch Mgmt*, 17 FMSHRC 859, 867-68 (June 1995)). The judge must consider any fact that is relevant to whether a settlement is fair, reasonable, appropriate under the facts, and protects the public interest, even if it falls outside § 110(i). *Id.* at 989. Facts may come from any party, individually or collectively. *Id.* at 990. The facts required under FMSHRC Rule 31 may include a description of an issue on which the parties have agreed to disagree. *Id.* at 990. The Commission does not require factual concessions from the parties in settlement. *Id.* In the settlement context, the judge may not assign probative value to one fact over another fact. *Id.* at 991.

In considering the public interest, the judge should bear in mind the flexibility of the public interest, and that the court’s function is not to determine whether the settlement is the one that will “best serve society,” but only to confirm that the settlement is “within the reaches” of the public interest. *Armstrong Coal Company, Inc.*, 36 FMSHRC 1097, 1103 (May 2014). The judge must provide a principled reason for approval or rejection of a settlement motion. *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (1981). “In reviewing information supporting a reduced penalty in settlement, a Judge ‘need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after a hearing.’ ” *American Coal*, 40 FMSHRC at 991. A judge’s decision approving a settlement need only set

forth reasons for the approval and be supported by the record. *Id.* (distinguishing the legal standard for approving a settlement based on information submitted by the parties from the higher legal standard requiring judicial findings on each § 110(i) factor following an evidentiary hearing).

The judge abused her discretion in denying both settlement agreements. The judge denied the Secretary's first settlement agreement without even citing the settlement standard articulated in *American Coal*, 40 FMSHRC 983 (Aug. 2018). This alone is error. *American Coal*, 40 FMSHRC at 988 (“ . . . the Judge did not refer to the standard we articulated for evaluating penalty reductions in settlement. . . . Neither is there any indication that the Judge attempted to apply that standard”). In addition, the judge failed to advise the parties with any concrete guidance about what might have been required upon resubmission. The judge's denial is replete with speculation that it “looks like” this operator has a “significant history” of ignoring the ventilation requirements, “given everything I see in the file.” The judge fails to describe the court's “file,” or what the court's “file” might contain other than the Secretary's petition and the operator's answer. This speculation is not a sufficient reason for denying a settlement, and leaves the parties guessing as to what the judge is actually seeking.<sup>1</sup>

The judge's decision denying the Secretary's second settlement motion in this case is bereft of the analysis required under *American Coal*. The judge's denial of the second settlement agreement is an abuse of discretion for four reasons. First, the judge's reliance on Section 110(i)

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<sup>1</sup> This is not the first time this judge has failed to adequately advise the parties regarding bases necessary to approve settlement. In *Northshore Mining*, the judge similarly provided terse and unilluminating denials. See Exhibit A (Secretary's Second Amended Motion for Decision Approving Settlement in *Northshore Mining*, Docket No. LAKE 2018-177, filed August 23, 2018).

as the legal standard for reviewing settlements is simply wrong.<sup>2</sup> In *American Coal*, “the Judge erred in restricting the factual submissions to facts relating to only the section 110(i) criteria.” 40 FMSHRC at 989. The judge’s rationale in this regard is troubling because she only cites the Commission’s 2016 *American Coal* decision, but does not cite the Commission’s 2018 *American Coal* decision, which fully articulates the Commission’s legal standard for evaluating proposed penalty reductions.

Second, the judge’s outright dismissal of the Secretary’s proffered enforcement value of the settlement does not comport with *American Coal*.<sup>3</sup> In *American Coal*, the Commission validated the Secretary’s interest in the enforcement value of any given settlement. *American Coal*, 40 FMSHRC at 989 (“The Secretary makes a valid point that the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary’s views regarding gravity and negligence stated in the citations”).

Third, in emphasizing the operator’s general history of violations, the judge assigned probative value to one fact over another fact – that is, emphasizing the operator’s general history of ventilation violations over the facts of the specific violations at issue in this case. This is particularly troubling in the context of the ventilation standard (§ 75.370(a)(1)), where there are

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<sup>2</sup> Order Denying Amended Motion for Settlement at 2, n. 1 (“Instead, I rely on the Commission direction to address Sections 110(i) and 110(k) of the Act. *Am. Coal Co.*, 38 FMSHRC 1972, 1981-1982 (Aug. 2016)”), and at 3 (“I conclude that the proposed settlement is not appropriate under the criteria set forth in Section 110(i) of the Act”).

<sup>3</sup> Order Denying Amended Motion for Settlement at 2, n. 1 (“In reviewing this proposed settlement, I do not consider the Secretary’s statements in paragraph 4, and particularly the statements regarding prosecutorial impact”).

many different provisions of a ventilation plan that could have been violated, because the judge has no evidence on which to conclude that the instant citations are factually related, in any way, to the general history to which she refers. Indeed, the Secretary declined to assess any points due to the repeated nature of the instant violations,<sup>4</sup> suggesting that the instant violations relate to different sections of the operator's ventilation plan.

Fourth, the judge's hyperbole in describing the parties' proposed settlement misrepresents the relatively nominal settlement terms in this case. For example, in her first settlement denial, the judge stated that "I cannot sign off on such a *huge* reduction in penalty."<sup>5</sup> In her second settlement denial, the judge stated that the parties' proposals "do not support the *drastic* modifications to negligence, gravity, and penalty that have been proposed in the amended settlement motion."<sup>6</sup> The modifications in this case can hardly be described as "huge" or "drastic" – the negligence of three of the four violations were modified by one level of negligence, all four violations were sustained as significant and substantial, and the penalties were recalculated based on the penalty tables in 30 C.F.R. § 100.3.<sup>7</sup> The judge's denials of the parties' proposed settlements constitute an abuse of discretion.

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<sup>4</sup> See 30 C.F.R. § 100.3(c)(2).

<sup>5</sup> Exhibit B (Email dated March 25, 2019, from ALJ Margaret Miller to CLR Jeff Maxwell) (emphasis added).

<sup>6</sup> Order Denying Amended Motion for Settlement at 3 (emphasis added).

<sup>7</sup> The judge has demonstrated her unwarranted aversion to revising penalties based on the regular assessment tables. See Exhibit C, pages 15-18 (Transcript of Pretrial Conference in *Northshore Mining Company*, Docket Nos. LAKE 2018-147 and LAKE 2018-177, October 16, 2018). The Secretary's use of the Part 100 regular assessment tables in settlement is a *prima facie* indication of a proposed penalty reduction's fairness, reasonableness, and adequacy under the facts, and protects the public interest. The tables in § 100.3 were promulgated pursuant to notice and comment rulemaking, are published in the Code of Federal Regulations, and constitute an

The proposed settlement in this case is eminently fair, reasonable, adequate under the facts and falls comfortably “within the reaches” of the public interest. *See generally American Coal*, 40 FMSHRC 987 (Aug. 2018). Accordingly, the judge should reconsider her denials and approve the settlement.

## II. Motion to Revoke Subpoena

Commission Rule 60(c) provides that a judge “shall revoke or modify the subpoena if . . . for any . . . reason it is found to be invalid or unreasonable.” 29 C.F.R. § 2700.60(c). The Court’s subpoena in this case should be revoked because it is unreasonable and unnecessary, and therefore constitutes an abuse of discretion.

### A. Relevant Facts and Timeline

On March 25, 2019, the Secretary submitted a settlement motion to resolve all violations in the present matter. Exhibit D. The case involves four citations alleging violations of Section 104(a) of the Mine Act, with all penalties calculated using the regular assessment formula outlined in 30 CFR § 100.3. In the motion, the Secretary proposed to settle the violations by retaining the “significant and substantial” designations, while modifying various aspects of the citations, and recalculating the penalty, based on those modifications, using the regular assessment formula. In the motion, the Secretary also provided a specific reason for each

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objective and predictable method of calculating settlement penalties. At least one other judge concluded it was “appropriate to defer to the judgment of the parties” in arriving at a modified penalty based on the § 100.3 tables. *Vindex Energy Corporation*, 34 FMSHRC 223, 224 (Jan. 2012) (ALJ).

proposed modification and penalty reduction. The settlement summary is as follows:

Citation	Initial Negligence	Initial Gravity	Initial Penalty	Negligence changed to	Gravity Changed to	Remains S&S?	Revised Penalty
8055975	Moderate	S&S	\$ 1,031	Low	None	Yes	\$ 462
8055976	High	S&S	\$ 12,321	Moderate	Highly Likely to Reasonably Likely	Yes	\$ 1,666
8055977	Moderate	S&S	\$ 3,710	Low	Highly Likely to Reasonably Likely	Yes	\$ 749
8055978	Moderate	S&S	\$ 1,031	Low	None	Yes	\$ 462

On March 25, 2019, the judge denied the settlement motion via email. Exhibit B. The judge’s rationale for denying the settlement reads, in its entirety:

I appreciate that you have worked hard to settle this case, but I cannot approve the settlement you have submitted. These are all serious ventilation citations and it looks like this operator has a significant history of ignoring the ventilation requirements. Ventilation and exposure to coal dust is very important and I cannot sign off on such a huge reduction in penalty given everything I see in the file. If you would like to renegotiate, let me know, if not, I will set i[t] for hearing. Thank you

On March 29, 2019, the judge set the trial for April 24, 2019, in Steubenville, Ohio.

On April 5, 2019, the Secretary submitted an amended settlement motion in this case.

Exhibit E. In this second settlement motion, the Secretary specifically cited to the Commission’s decision in *The American Coal Company (American Coal)*, 40 FMSHRC 983 (Aug. 2018). In this second motion, the Secretary proposed the same settlement terms, and provided additional explanation for the proposed settlement terms, arguing that the proposed terms meet the Commission’s legal standard that a proposed penalty reduction be fair, reasonable, appropriate under the facts, and protects the public interest.

On April 9, 2019, the judge changed the location of the trial to Pittsburg, Pennsylvania.

On April 10, 2019, the judge signed (issued) a subpoena directing the MSHA inspector to appear at the trial, and directing the inspector to “bring all notes, photographs, and documents associated with the 12/4/2018 inspection at the Hopedale mine and the citations at issue in this docket.” Exhibit F, page 1.

On April 12, 2019, the parties submitted a set of stipulations to the judge, advising the judge that the parties intended to submit the case on stipulations without calling any witnesses. Exhibit G.<sup>8</sup>

On April 17, 2019, at 11:45 a.m., the judge caused the inspector to be personally served with the subpoena. Exhibit F, page 2 (subpoena); Exhibit H (log from MSHA office that shows the time the subpoena was served).

On April 17, 2019, at 5:06 p.m., via email, the judge served the parties with the order denying the second settlement motion. Exhibit I.

## B. Argument

Commission Rule 60(c) provides that a judge “shall revoke or modify the subpoena if . . . for any . . . reason it is found to be invalid or unreasonable.” 29 C.F.R. § 2700.60(c). The Court’s subpoena in this case should be revoked because it is unreasonable and unnecessary, and therefore constitutes an abuse of discretion.

### 1. The Judge’s Subpoena Is Unreasonable

The subpoena is unreasonable and an abuse of discretion because it was issued and served in the context of the parties’ settlement motions and is an effort to directly and improperly examine the inspector and MSHA’s inspection file while this very issue is pending appeal in the

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<sup>8</sup> The parties intend to submit a revised set of stipulations to the judge in the event the judge denies the Secretary’s motion for reconsideration of her denials of the parties’ proposed settlements.

*Solar Sources* litigation. The subpoena is also unreasonable and an abuse of discretion because it seeks unqualified access to the inspector's testimony and MSHA's file without regarding to privileges that may apply. The subpoena, therefore, should be revoked.

First, the judge's subpoena is an effort to directly and improperly examine the inspector and MSHA's inspection file. The propriety of such ALJ demands is currently on appeal to the Commission. *See Solar Sources Mining, LLC*, Docket No. LAKE 2017-52 (fully briefed and pending at the Commission, with oral argument tentatively scheduled for May 20, 2019). It appears from the timeline of events that the judge never intended to approve the settlement without first examining the inspector and MSHA's file. Without notifying the Secretary's counsel, the judge *issued* the subpoena on April 10, 2019, seven days before issuing any order denying the second settlement motion (April 17, 2019), and *served* the subpoena (at 11:45 a.m. on April 19, 2019) five hours before serving the parties with the order denying the second settlement motion (at 5:06 p.m. on April 17, 2019). This is unreasonable and an abuse of discretion, and the subpoena should be revoked.

Second, the subpoena seeks unqualified access to the investigation file without regard to the relevance of any particular document in MSHA's file, without regard to any potential privileges that may apply, and without regard to any appropriate objection counsel may assert at any hearing. Quite simply, the subpoena amounts to a judicial fishing expedition.<sup>9</sup> To the extent that the judge intends to examine the inspector concerning his knowledge of the proposed

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<sup>9</sup> This is not the first time that this judge has engaged in similar activity. Recently, in *Northshore Mining*, the judge made inappropriate inquiries into the details of the parties' settlement discussions. *See* Exhibit C at 13 ("I haven't heard anything from the Secretary after [the operator's additional information] was provided.") (Transcript of *Northshore Mining*, dated October 16, 2018).

settlement, such a course is inconsistent with the spirit of Federal Rule of Evidence, Rule 408.

The subpoena is unreasonable and an abuse of discretion, and should be revoked.

2. The Judge's Subpoena is Unnecessary

The Inspector's testimony and investigation file are unnecessary for an evidentiary hearing in this case because the parties will stipulate to all necessary facts. Stipulations are favored. They are contemplated by the FMSHRC Rules of Procedure, Rule 2700.53; have been accepted in lieu of trial testimony, *Aggregate Products, Inc.*, 18 FMSHRC 794 (1996) (ALJ Manning); and are commonly required by FMSHRC ALJs in prehearing statements for the purpose of narrowing issues and facts for trial. Stipulated facts carry great weight, in part, because there is no need for credibility determinations of a live witness. There is no basis to question the facts, as proposed by the parties' stipulations, and those stipulated facts allow for a judicial ruling. The judge does not need additional information to issue a ruling with respect to the citations at issue. Rather, the stipulations provide sufficient factual information to allow her to evaluate the evidence, apply applicable precedent, and issue a ruling.<sup>10</sup> While the judge laments that the parties' stipulations "contain no mention of the operator's significant history of similar violations for failure to adhere to ventilation plan requirements,"<sup>11</sup> the parties'

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<sup>10</sup> The Secretary does not challenge the Commission's authority to issue subpoenas pursuant to Section 113(e) of the Mine Act, 30 U.S.C. § 823(e). Rather, the Secretary is arguing that, in the context of this case, the judge is abusing her discretion by compelling testimony and documents from MSHA in the context of a settlement agreement, in contravention of the Commission's decision in *American Coal*, and while the precise issue of ALJ demands for inspector notes and photos is pending before the Commission in *Solar Sources*.

<sup>11</sup> Order Denying Amended Motion for Settlement, at 2. It is unclear that Exhibit A referenced as attached to the order is anything beyond Exhibit A attached to the Petition. If so, the citation refers to 10 ventilation violations at this mine in the past two years. There is no information on whether those prior violations are even related to the same ventilation plan provision cited here or were significant in their own right. MSHA already considered the operator's "history" in proposing the penalty. No other information is required.

stipulations do not preclude the judge from making her own findings based on the stipulations presented. The judge is an adjudicator, not a prosecutor. The Court's subpoena in this case should be revoked because it is unreasonable and unnecessary, and therefore constitutes an abuse of discretion.

### III. Motion to Certify for Interlocutory Review

Pursuant to Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1), the Secretary moves that the judge certify the issue of her March 25, 2019 decision denying settlement, her April 17, 2019 decision denying settlement, and the propriety of her April 17, 2019 subpoena for review by the Commission. Because the hearing in this matter is scheduled for April 24, 2019, the Secretary respectfully requests the judge rule on this motion as soon as possible and stay the proceedings to allow review before the Commission.

The Secretary requests certification of the following questions for interlocutory review:

1. Whether the judge's March 25, 2019 denial of the settlement constitutes an abuse of discretion.
2. Whether the judge's April 17, 2019 denial of the settlement constitutes an abuse of discretion.
3. Whether the judge's April 17, 2019 subpoena to the MSHA inspector constitutes an abuse of discretion, or is otherwise unreasonable, as argued in *Solar Sources*.

Under Commission Rule 76(a)(1), a judge addressing a motion to certify for interlocutory review must determine whether the ruling of which review is sought "involves a controlling question of law" and whether "immediate review will materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(1)(i).

A question of law is a question that involves an "abstract legal issue" or an issue of "pure

law” rather than “a question of fact or matter for the discretion of the trial court.” *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1257-58 (11th Cir. 2004); *Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136-37 (5th Cir. 2004). Questions regarding the interpretation of a statute or regulation are questions of law. *Ahrenholz v. Bd. of Trs. of the Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000). The first two questions of which the Secretary seeks certification for interlocutory review are paradigmatic questions of “pure law,” as they involve the question of whether the judge correctly applied the correct legal standard when denying a proposed settlement agreements. The third question involves the judge’s prehearing evidentiary requirement for inspector testimony, notes and photographs either to evaluate a settlement or for trial purposes.

A question of law is “controlling” if reversal on interlocutory appeal “might save time for the [trial] court, and time and expense for the litigants.” *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (*quoting* 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice and Procedure* § 3930 (1977)). In the above-captioned case, reversal on interlocutory appeal could end the underlying proceedings “well before a full hearing on the merits,” thereby rendering the first two questions of pure law “controlling.” *See Black Butte Coal Co.*, 25 FMSHRC 457, 458 (2003) (granting interlocutory review). All questions satisfy the Commission’s first requirement for interlocutory review, that they be “controlling questions of law.”

Because resolution of the first two questions may obviate the need for a hearing on the merits and the need for the judge to issue a decision following a hearing, such resolution may “materially advance the final disposition of the proceedings,” thus satisfying the second requirement for interlocutory review. *See Arenholz*, 219 F.3d at 677 (resolution of a controlling

question of law could head off protracted litigation “because it was indeed a *controlling* issue”) (emphasis in original). The fact that an interlocutory appeal could potentially delay the final disposition of the proceedings does not distinguish this case from any other case in which a party seeks interlocutory review. That is, the outcome on interlocutory review is never a foregone conclusion; the possibility that the decision on interlocutory review would go against the petitioner, thus putting the parties back at square one, is always a possibility. *See, e.g., Arenholz*, 219 F.3d at 675 (the “mere[ ] filing of a . . . petition [for interlocutory review] tends to delay the litigation in the district court”).

Commission precedent also squarely supports granting interlocutory review in this case. The first two questions of which the Secretary seeks certification for interlocutory review in the above-captioned case are analogous to — and indistinguishable from — the question certified in *American Coal Company*, 40 FMSHRC 987 (Aug. 2018). The third question the Secretary seeks certification for interlocutory review is analogous to, and indistinguishable from, one of the questions certified in *Solar Sources*.

#### IV. Conclusion

In denying the settlement agreements, the judge abused her discretion, and the Secretary respectfully requests reconsideration of those denials, and moves for an order approving the proposed settlement. Alternatively, the Secretary respectfully moves for an order revoking the subpoena. The subpoena is unreasonable, and in issuing and serving the subpoena, the judge abused her discretion. Alternatively, the Secretary moves for an order certifying the issues for interlocutory review, and for a stay of the case pending interlocutory review.

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Respectfully submitted,

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