July 2023

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review Was Granted In The Following Cases During The Month Of July 2023

Secretary of Labor v. Carmeuse Lime, Docket No. SE 2022-0196 (Judge Moran, June 13, 2023)

Secretary of Labor v. Consol Mining Company, LLC, et al., Docket No. WEVA 2023-0141 (Judge Young, Interlocutory Review)

Review Was Denied In The Following Case During The Month Of July 2023

Todd Descutner v. Nevada Gold Mines LLC, Docket No. WEST 2022-0201 (Judge Simonton, May 25, 2023)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2022-0024
PERRY COUNTY RESOURCES, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), comes before us on interlocutory review of a decision of a Commission Administrative Law Judge denying a motion to approve settlement between Perry County Resources, LLC ("Perry") and the Secretary of Labor. The Judge based his denial on the Secretary's refusal to provide an order issued pursuant to section 104(b) of the Mine Act,[1] which was associated with a citation that was included in the motion to approve settlement.

For the reasons discussed below, we conclude that the Judge abused his discretion in denying the motion. Therefore, we reverse the Judge's decision and approve the settlement.

I.

Factual and Procedural Background

A. Factual Background

The Department of Labor's Mine Safety and Health Administration ("MSHA") sent Perry a proposed penalty assessment, proposing civil penalties against Perry for several citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), at Perry's E4-2 mine. Perry contested the penalty proposals with respect to four of the citations by checking the

[1] Section 104(b) provides in part that if an authorized representative of the Secretary finds during a follow-up inspection that a violation described in a citation "has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and . . . that the period of time for the abatement should not be further extended," the representative shall issue an order requiring the removal of certain persons from the affected area until "such violation has been abated." 30 U.S.C. § 814(b).

appropriate boxes on MSHA Form 1000-179. The Secretary subsequently filed a petition for assessment of penalty, and Perry filed an answer to the petition.

The four citations and associated penalties that Perry contested may be summarized as follows:

1. Citation No. 9282162, alleging a significant and substantial ("S&S")[2] violation of 30 C.F.R. § 75.202(a) because roof bolt plates were missing, due to rusting, on roof bolts along the primary escapeway. **Proposed penalty**: $336.
2. Citation No. 9282163, alleging an S&S violation of 30 C.F.R. § 75.380(d)(1) because the primary escapeway was not being maintained in safe condition because it had draw rock and thick mud which would impede safe passage. **Proposed penalty**: $302.
3. Citation No. 9282123, alleging an S&S violation of 30 C.F.R. § 75.380(d)(7)(i) because the lifeline in the secondary escapeway was broken and pulled apart and was not being properly maintained. **Proposed penalty**: $530.
4. Citation No. 9282125, alleging an S&S violation of 30 C.F.R. § 75.1722(a) because the equipment guard was not being properly maintained due to an opening in the guard along the belt tailpiece. **Proposed penalty**: $302.

Ex. A to PIR. In the row of MSHA Form 1000-179 that pertains to Citation No. 9282162, the type of action is listed as "104(a) C/104(b) O."

B. Motions and Correspondence

In April 2022, the parties filed a Joint Motion to Approve Settlement. In the motion, the parties proposed that there should be no modifications with respect to three of the four citations, and that the operator would pay the proposed penalties associated with those citations. Jt. Mot. at 2. Regarding the remaining citation, Citation No. 9282123, the parties agreed that the operator should pay a penalty of $264 rather than $530 due to a reduction in negligence from moderate to low. *Id.* at 2, 4. The parties proposed no modification with respect to Citation No. 9282162, which was associated with the failure to abate order.

A few weeks later, the Judge and the parties exchanged emails about the absence of the section 104(b) order from the record. On May 31, 2022, the Judge emailed the parties that he noticed that the section 104(b) order was not in the official file, and that he needed to be provided with a copy of the order before he could rule on the joint motion. Ex. C to PIR at 3. The Conference and Litigation Representative ("CLR") representing the Secretary's interests responded that the Secretary declined to provide other documents not before the court because the order requested by the Judge was not contested. *Id.* at 2-3. The Judge replied that he would be unable to proceed on the motion until he received the order and stated his opinion that the order was a matter of public record. *Id.* at 2. The CLR then stated that the citation affiliated with

[2] The "significant and substantial" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

the order, Citation No. 9282162, had been affirmed and that the good faith discount had not been given for the penalty for the underlying violation. *Id.* at 1. The Judge again responded that he disagreed with the CLR's position and that he would have no choice but to file a request under the Freedom of Information Act in order to obtain the order. *Id.*

Approximately two weeks later, the parties filed a Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review, which incorporated by reference the Joint Motion to Approve Settlement. Supp. Mot. at 1. In the supplemental motion, the Secretary submitted that she had not attached a copy of the section 104(b) order to the petition for assessment of penalty because she had not proposed a penalty for that order. *Id.* at 2. She noted that because Perry had not contested the order or sought temporary relief from it, the Commission never had jurisdiction over the order. *Id.* The Secretary asserted that the motion to approve settlement should be approved because the settlement satisfies the Commission's standard for approval of settlements. *Id.* at 3. Alternatively, the Secretary requested the Judge to certify this case for interlocutory review because the requirements for review had been met pursuant to 29 C.F.R. § 2700.76. *Id.* at 5-6.

C. Judge's Orders

On June 22, 2022, the Judge issued an order directing the Secretary to disclose all documents pertaining to the issuance of the section 104(b) order associated with Citation No. 9282162. 44 FMSHRC 501, 506 (June 2022) (ALJ). The Judge noted that the abatement time had been extended for Citation No. 9282162, that the record does not reveal whether the extended termination had been met, and that the section 104(b) order would provide such information. *Id.* at 502. The Judge reasoned that a section 104(b) order has significance in its own right in that a penalty may be assessed in connection with the order and that its issuance impacts the amount of penalty that is assessed for the underlying violation based upon consideration of the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. *Id.* at 504-05. The Judge observed that the record also does not reveal if the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period. *Id.* at 505.

The Secretary and operator provided no further documents in response to the Judge's June order.

On October 5, 2022, the Judge issued an order denying the Secretary's settlement motion and denying the Secretary's motion to certify the matter for interlocutory review. 44 FMSHRC 621 (Oct. 2022) (ALJ). The Judge reiterated much of the reasoning set forth in his June order, concluding that when presenting a motion to approve settlement, the Secretary should provide the entire documentary record related to the citations involved in the docket. *Id.* at 624. The Judge explained that Citation No. 9282162 is part of the docket, and that the documentary record concerning the violation is incomplete without the section 104(b) order. *Id*. at 627. The Judge further denied the Secretary's Motion to Certify for Interlocutory Review concluding that the requirements for interlocutory review had not been met. *Id.*

D. Interlocutory Review

The Secretary subsequently filed a petition for interlocutory review of the Judge's October 5 order. The Commission granted review "of the Judge's order of October 5, 2022, and the issue of whether the Judge abused his discretion in denying approval of the settlement motion based on the Secretary's refusal to provide a section 104(b) order that was associated with a citation that was a subject of the motion to approve settlement." 44 FMSHRC 703 (Dec. 2022).

On review, the Secretary argues that the Judge abused his discretion in denying the settlement motion. She explains that the instant docket involves four violations and only one penalty compromise, and that the failure to abate order was irrelevant both to the compromised penalty and to the citation associated with such penalty. The Secretary submits that she provided sufficient facts to permit the Judge to determine if the penalty modification protected the public interest.

She further notes that the section 104(b) order was a separate enforcement action with its own issuance number, and that if Perry wanted to contest the order, it could have done so separately. The Secretary explains that because MSHA did not propose a penalty for the order and Perry did not contest it, the Secretary did not attach a copy of the section 104(b) order to the penalty petition.

II.

Disposition

Section 110(k) of the Mine Act sets forth the Commission's authority to approve settlements of the Secretary's proposed assessments once contested. It provides:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k). Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include, for each violation, the original amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty amount agreed to by the parties. 29 C.F.R. § 2700.31(b)(1).

The Commission has explained that "Congress authorized the Commission to approve the settlement of contested penalties . . . 'to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.'" *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*") (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). In "effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and

protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. The Commission has recognized that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors. *Id.* at 1982.

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014). An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Id.* at 1101. In *Solar Sources Mining, LLC*, 41 FMSHRC 594, 599 (Sept. 2019), the Commission concluded that the Judge abused his discretion in denying a settlement motion because he: (1) failed to apply the *AmCoal I* standard, (2) denied the settlement based on the Secretary's refusal to provide a copy of the inspector's notes and photographs, and (3) erred in finding that the Secretary failed to prove any facts in support of the settlement.

We conclude that the Judge also abused his discretion in the case at hand; the Judge's decision is based on an improper understanding of the law. The Judge failed to apply the *AmCoal I* settlement standard and instead denied the settlement motion because the Secretary did not provide a copy of the section 104(b) Order related to Citation No. 9282162.

The Commission has repeatedly recognized that a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. *Solar Sources*, 41 FMSHRC at 602 (citing *Black Beauty*, 34 FMSHRC at 1863).

However, the Commission has explained that during the review of a proposed settlement, the Judge is not expected to engage in fact finding as the Judge would post-hearing. *Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). In the context of reviewing a proposed settlement, a Judge may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *American Coal Co*, 40 FMSHRC 983, 991 (Aug. 2018) ("*AmCoal II*"). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties." *See Solar Sources*, 41 FMSHRC at 602.

Under the circumstances of this case, the Judge erred by denying the settlement on the basis that he was not provided the section 104(b) failure to abate order associated with Citation No. 9282162. The operator agreed to accept Citation No. 9282162 as written and pay the proposed penalty in full. The Judge failed to identify relevant facts that would be provided by the order that had not already been made a part of the record.[3]

[3] In *Solar Sources Mining, LLC*, 41 FMSHRC 594, 603 (Sept. 2019), the Commission held that the Judge abused his discretion when he denied a settlement, in part, because the Secretary refused to provide evidentiary documents such as the inspector's notes and photographs. Without reaching the question of whether a section 104(b) order issued for a failure (continued…)

An operator's timeliness in achieving abatement impacts the penalty criteria of "the demonstrated good faith of the person charged in attempting to achieve rapid compliance." 30 U.S.C. § 820(i). Here, the Secretary provided factual information that the good faith abatement discount was not given with respect to the proposed penalty for Citation No. 9282162. Supp. Mot. at 3 (citations omitted).[4]

In addition, the Judge's repeated concern that the record does not reveal if the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period (44 FMSHRC at 627; 44 FMSHRC at 505) is irrelevant to the subject proceeding. Section 105(b)(1)(A)[5] requires the Secretary to provide notice to an operator and to the miners' representative that the operator has failed to timely abate a violation and that a penalty will be proposed under section 110(b) of the Mine Act, 30 U.S.C. § 820(b). Here, the Secretary provided factual information that she did not propose a penalty in connection with the section 104(b) order. Therefore, the provisions of section 105(b)(1)(A) do not apply to this proceeding.

Under Commission Procedural Rule 28, the Secretary is required to attach to a petition for assessment of penalty "[a] legible copy of each citation or order for which a penalty is sought." 29 C.F.R. § 2700.28(c). Since the Secretary did not propose a penalty for the section

---

[3] (…continued)
to abate a contested citation may ever appropriately be sought by a Judge to further the Judge's *AmCoal I* analysis or whether it constitutes prohibited evidentiary documentation, we find the Judge's request was inappropriate in this case. The Judge failed to identify a rationale for requiring the order, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full.

[4] Moreover, regarding the Judge's statement in his June 22 order that although the termination date had been extended in Citation No. 9282162, the record was missing information about whether the extended date had been met, the Judge acknowledged that "one may presume it was not, because Exhibit A for this docket reveals that a section 104(b) order was issued." 44 FMSHRC at 502.

[5] Section 105(b)(1)(A) provides in part:

> If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) . . . . A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. . . .

30 U.S.C. § 815(b)(1)(A).

104(b) order, the Secretary was not required to attach a copy of the order to the Secretary's petition.[6]

The Judge further erred by failing to evaluate the facts provided by the parties under the settlement against the *AmCoal* standard and to determine whether those facts support the penalty agreed to by the parties.[7] While we could remand this case to the Judge to apply the standard, relying upon relevant factual support in the record, we conclude that remand is unnecessary because the parties presented sufficient facts to support the conclusion that the settlement is fair, reasonable, appropriate, and serves the public interest.

In the Joint Motion to Approve Settlement, the parties stated in part that they had considered the alleged violations, the six statutory penalty criteria, "and other non-monetary considerations that fall outside of [section] 110(i) but that support settlement." Jt. Mot. at 2. The parties agreed that Citation Nos. 9282162, 9282163, and 9282125 should be accepted by Perry as written and that the operator should pay the original proposed penalties associated with those citations. *Id.* at 3; Supp Mot. at 1.

In addition, the parties stated that modification was appropriate for Citation No. 9282123. This citation alleged an S&S violation of 30 C.F.R. § 75.308(d)(7)(i) due to the lifeline in the secondary escapeway not being properly maintained. The parties provided information that the negligence associated with the violation should be reduced from moderate to low, and that the operator should pay a penalty of $264 rather than $530. The lowering of negligence was based on statements provided by the parties that: (1) mine management did not have knowledge of the condition or reason to believe that it existed; (2) the alleged condition was not present during the morning pre-shift examination or when the crew traveled to the section at the start of their shift; (3) the condition likely occurred when a load of supplies was transported to the section without the knowledge of the equipment operator; and (4) the condition was promptly corrected as soon as it was discovered. Jt. Mot. at 4.

The Commission has recognized that an "operator's knowledge (actual or constructive) is a key component of a negligence determination." *Ohio Cty Coal Co*., 40 FMSHRC 1096, 1099 (Aug. 2018). The Commission has considered evidence relating to an operator's lack of knowledge to support a reduction in negligence when approving a settlement agreement. *Id.*

Here, the parties have provided relevant information regarding the operator's lack of knowledge to support a reduction in negligence from moderate to low. We conclude that the facts alleged by the parties are sufficient to establish that the penalty reduction is fair, reasonable,

[6] The section 104(b) order was a separate enforcement action with its own issuance number (Order No. 9282166). S. Br. at 2 & Ex. A. Although the operator could have chosen to contest the order, it did not. The Commission has held that Commission jurisdiction attaches upon contest. *Black Beauty*, 34 FMSHRC at 1862 n.4.

[7] Although the Judge noted that the penalty reduction related to Citation No. 9282123 was based upon a reduction in negligence, the Judge did not evaluate the facts against the *AmCoal* standard. 44 FMSHRC at 622 n.1.

appropriate under the facts, and protects the public interest.[8] The settlement involved a modest reduction in penalty, and the parties provided sufficient facts to support that penalty reduction. Accordingly, we reverse the Judge's denial of the motion to approve settlement, and we hereby approve the settlement.

III.

Conclusion

For the foregoing reasons, we reverse the Judge's denial of the motion to approve settlement, and we approve the settlement.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[8] We note that the following principle–ensuring that the public interest is adequately protected by the reduction of a penalty in settlement–does not require a determination of whether the proposed settlement *best* serves the public interest. *Shemwell*, 36 FMSHRC at 1103-04. Rather, we consider whether the proposed settlement is "*within the reaches* of public interest." *Id.* at 1104 (quotations omitted and emphasis added).

Distribution:

Tracy E. Wolf, Esq.
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Wolf.tracy.e@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Gregory Q. Jensen
Perry County Resources, LLC
P.O. Box 606
Fishers, IN 46038
GQJ@AmericanResourcesCorp.com

Administrative Law Judge William Moran
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
wmoran@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 28, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of VICTOR TORRES	Docket No. WEST 2023-0256-DM
v.	
W.G. YATES & SONS CONSTRUCTION COMPANY	

BEFORE: Jordan, Chair; Althen, Rajkovich and Baker, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). The Secretary of Labor filed an Application for Temporary Reinstatement on behalf of Victor Torres against W.G. Yates & Sons Construction Company ("Yates") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). On July 6, 2023, the Administrative Law Judge issued an Order Granting Application for Temporary Reinstatement and Order Tolling Temporary Reinstatement, in which he found that Torres's complaint was non-frivolous but the remedy of temporary reinstatement was not available due to layoffs at the facility. 45 FMSHRC __, No. WEST 2023-0256-DM (July 6, 2023) (ALJ). The Secretary subsequently filed a timely petition for review of the Judge's order, directed at the tolling issue. For the reasons that follow, we grant the petition, and vacate and remand the part of the Judge's order addressing tolling.

I.

Factual and Procedural Background

A. Factual Background

Victor Torres worked as a journeyman millwright and welder for W.G. Yates and Sons Construction Company, which had been contracted by MP Materials Corporation to build a rare earth minerals processing facility in Mountain Pass, CA. Due to the secretive nature of the project, unauthorized photos were prohibited on the mine site. Torres testified that on April 10, 2023, his crew was tasked with using a manlift to bring pipe down from an elevated track. Torres believed this was unsafe and requested the use of a crane instead. The crew was instructed to proceed with the manlift. When Torres refused, he states that he was threatened with removal. The crew proceeded with the manlift, and Torres took photos to include in a report regarding the incident. Mine management informed Torres that taking photos was against policy, but he was

not disciplined at that time. He was subsequently laid off on April 13, 2023. *See* 45 FMSHRC __, slip op. at 2-5 (summary of Torres's testimony).

Around this time (April 2023) construction began to slow and the operation began downsizing. By the time of the hearing (June 2023) construction was nearly complete and the number of employees had decreased significantly. Testimony from various witnesses indicates that the project employed over 100 millwrights at its peak, which decreased to approximately 14 millwrights by April 2023 and three to five millwrights (and no welders) by June 2023. *Id.* at 2, 6, 7, 9. Yates's witnesses testified that personnel decisions regarding the layoffs were based on the millwright superintendent's working knowledge of the employees rather than an objective formula or ranking system. They stated that Torres was included in the April 13 layoff because there was no more structural welding work, he did not have the qualifications for the remaining millwright work, and the other millwrights did not have his issues with absenteeism. *Id*. at 6-11.

Torres filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he was discharged due to his safety complaint and work refusal. App. for Temp. Reinstatement, Ex. A. The Secretary determined that Torres's complaint was not frivolous, and on June 2, 2023, filed an application requesting that an Order of Temporary Reinstatement be issued directing Yates to reinstate Torres to the same or similar position he occupied prior to his discharge. App. for Temp. Reinstatement at 3. A hearing was subsequently scheduled for June 28, 2023.

On June 27, the day prior to the scheduled hearing, Yates filed a Hearing Brief stating that it would rely on the "affirmative defense of changed circumstances, such as layoffs . . . as part of the hearing on Applicant's Application for Temporary Reinstatement." Yates's Hr'g Br. at 1. The Secretary filed a Response in Opposition, arguing in part that affirmative defenses should not be weighed at temporary reinstatement hearings and that the brief was untimely because it did not provide the Secretary with adequate time to respond. Sec'y Opp. at 2.

The hearing was held on June 28, 2023. The Judge made a preliminary ruling allowing in evidence regarding layoffs. Tr. 13. Both parties addressed tolling in their closing arguments. Tr. 208-09, 212-14.

B. The Judge's Order and Arguments on Appeal

In a July 6, 2023 Order, the Judge granted the Secretary's application for temporary reinstatement. He found that Torres engaged in protected activity, that Yates's management knew of the protected activity on the day it occurred, and that Torres was discharged three days later. The Judge also found indications of animus toward Torres due to his protected activity. Given management's knowledge of the protected activity, the temporal proximity between the activity and Torres's discharge, and the evidence of animus, the Judge concluded that the Secretary's section 105(c)(2) complaint was not frivolously brought. Slip op. at 13.

However, the Judge also found that temporary reinstatement was not an immediately available remedy. Slip op. at 14. The Judge overruled the Secretary's objection to Yates's evidence regarding layoffs. Slip op. at 13-14 n.27. He found that Yates's witnesses provided credible, undisputed testimony that Torres would not have been one of the remaining millwrights still working as of the date of the hearing, that one of the currently employed millwrights would

have to be laid off to accommodate Torres's reemployment, and that there was no work for structural welders at the time of the hearing. Slip op. at 15-16. He concluded that the operator "demonstrated by a preponderance of the evidence, almost all of which was undisputed, that Torres would have been properly included in one of the many rounds of layoffs that occurred after April 13, 2023." Slip op. at 16. Accordingly, he ordered that Torres's temporary reinstatement be tolled.

On appeal, the Secretary seeks review of the part of the Judge's order tolling temporary reinstatement. The Secretary claims the Judge erred by considering Yates's tolling argument, both because tolling is outside the proper scope of a temporary reinstatement hearing and because the Secretary was prejudiced by the short time frame. Alternatively, the Secretary claims the Judge applied the wrong standard of review to the tolling argument. The Secretary requests that the Commission reverse and remand for further proceedings.

II.

Disposition

The Commission has long recognized that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), *cited in, e.g.*, *Scott, emp. By Mill Branch Coal Corp.*, 42 FMSHRC 481, 488-89 (Aug. 2020); *Jones v. D&R Contractors*, 8 FMSHRC 1045, 1051-52 (July 1986). For the reasons below, we find that the Secretary was denied a meaningful opportunity to respond to Yates's tolling argument.

Applications for temporary reinstatement are handled on an expedited schedule. *See* 29 C.F.R. § 2700.45. Here, the Secretary filed the application for temporary reinstatement on June 2, 2023, and Yates requested a hearing on June 12. The Judge informed the parties that the primary issue at the hearing would be "whether Mr. Torres's complaint of discrimination was frivolously brought," directed the parties to provide names of any witnesses by June 21, and scheduled the hearing for June 28. Unpublished Order dated June 14, 2023.

On June 27, Yates filed a brief stating that the Commission has recognized changed circumstances as a defense that can toll temporary reinstatement, and that it would rely on this affirmative defense to show at hearing that there was no job for Torres to return to because the construction project for which he was hired was largely complete.[1] Yates Hr'g Br. at 1-2.

The Secretary filed a same-day objection, claiming in part that she did not have adequate time to respond to the tolling argument. Sec'y Opp. at 2. The hearing occurred the next day as scheduled. The Judge overruled the Secretary's objection to the introduction of evidence regarding Yates's defense (Tr. 11-14) and subsequently issued an order finding that Torres was

[1] We note that the cited changed circumstance was not a particularly recent development. Yates's witnesses indicated that downsizing had been underway for months. If Yates had raised the tolling issue when it filed a hearing request on June 12, or even by the Judge's June 21 deadline, this could have been a different case. *See Sec'y on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 165, 169 (Jan. 2017) (ALJ), *aff'd* 39 FMSHRC 315 (Feb. 2017) (no issue of prejudice raised where the operator filed a motion to toll eight days before the hearing).

entitled to temporary reinstatement, but that temporary reinstatement should be tolled because no work was available for Torres.

In summary, until Yates's filing on June 27, the Secretary reasonably expected the June 28 hearing to focus on whether Torres's underlying discrimination complaint was frivolously brought. By permitting Yates to address its affirmative defense at the hearing, the Judge gave the Secretary less than 24 hours to marshal arguments and evidence regarding a new issue.

Generally, to show a due process violation, a party must show that he or she has sustained prejudice, i.e., that the party would have litigated the matter differently if adequate notice had been received. *Brody Mining, LLC*, 37 FMSHRC 1914, 1927 (Sept. 2015); *Cumberland Coal Res., LP*, 32 FMSHRC 442, 447-49 (May 2010). Here, the Secretary identifies one area of the case that would have been litigated differently with adequate notice; she indicates that with more time, she could have introduced evidence to counter Yates's claim that a millwright would have to be laid off for Torres to be reinstated. Sec'y Pet. at 16. Beyond this, the Secretary is unable to identify specific witnesses or lines of argument. However, this seems to be an inevitable result of the specific harm caused by the lack of time. With less than 24 hours' notice, the Secretary simply did not have the time to locate witnesses or prepare a litigation strategy.[2] *See Sec'y on behalf of Overfield v. Highland Mining Co. LLC*, 36 FMSHRC 1659, 1675 (June 2014) (ALJ) (finding the Secretary had no reasonable time to call into question the objectivity of a layoff where Secretary's counsel did not receive copies of the layoff documentation until the hearing).

Significantly, the Judge's order tolling temporary reinstatement relies almost exclusively on the "undisputed" testimony of Yates's two witnesses, Jimmy Hayes and Bryan French. Slip op. at 15-16. We question whether testimony is truly "undisputed" when the Secretary had less than 24 hours to prepare for cross-examination on the relevant issue and no practical opportunity to locate additional witnesses who may have been able to provide contrary testimony. Yates's tolling evidence was undisputed essentially by default, because the Secretary had no meaningful opportunity to dispute it.[3]

The Commission stresses that it takes no position on what conclusions the Judge should reach regarding the evidence presented on remand. Instead, we simply note that this is a case where providing the Secretary with a meaningful opportunity to address the tolling issue *could* have impacted the weight of evidence sufficiently to change the outcome of the Judge's order.

We find the Judge erred when he considered Yates's motion to toll at the initial temporary reinstatement hearing, prior to providing the Secretary a meaningful opportunity to investigate and respond to the tolling issue raised in Yates's June 27 Brief.[4] Accordingly, we

---

[2] We also note that the Secretary had only five business days to file her petition for review. 29 C.F.R. § 2700.45(f).

[3] As a comparison, there may have been no due process concerns if the Judge had based his tolling order on facts contained in joint stipulations.

[4] The Secretary claims it is *always* inappropriate to consider tolling arguments at an initial temporary reinstatement hearing, because Procedural Rule 45(d) limits the scope of such

(continued…)

vacate the Judge's order tolling temporary reinstatement and remand for further proceedings, where the Secretary will have the opportunity to present further argument and evidence on the tolling issue, including the proper standard of review. Yates shall also have the opportunity to present rebuttal evidence in the event of further development of the record.

III.

Conclusion

For the reasons discussed above, we vacate the Judge's order tolling Torres's temporary reinstatement and remand for further proceedings consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[4] (…continued)
hearings to whether the miner's complaint was frivolously brought. We note that we have previously rejected this argument. *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb 2013). Regardless, as we are remanding on different grounds, thus providing the parties with the opportunity to present evidence on tolling outside of the initial temporary reinstatement hearing as well as the opportunity to present further legal arguments regarding tolling in the temporary reinstatement context, we need not address this legal argument here. As a practical matter, however, we note that in this instance separating the tolling issue from the temporary reinstatement hearing would have provided the Secretary with a meaningful opportunity to respond.

Distribution:

McCord Wilson, Esq.
Rader and Campbell
2777 N. Stemmons Freeway, Suite 1125
Dallas, TX 75207
mwilson@radercampbell.com

Susannah M. Maltz, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Maltz.susannah.m@dol.gov

Natasha Magness, Esq.
Office of the Solicitor
U.S. Department of Labor
300 Fifth Avenue, Suite 1120
Seattle, WA 98104
Magness.natasha.a@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
Civil Penalty Compliance Division Chief
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge Richard W. Manning
Office of the Chief Administrative Law Judge
Federal Mine Safety Health Review Commission
721 19th Street, Suite 443
Denver, CO 80202-2536
RManning@fmshrc.gov

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 6, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON HARGIS	
v.	Docket No. SE 2021-0163
VULCAN CONSTRUCTION MATERIALS, LLC	Docket No. SE 2022-0001
JASON HARGIS	Docket No. SE 2022-0013
v.	
VULCAN CONSTRUCTION MATERIALS, LLC	

ORDER FOR SUPPLEMENTAL BRIEFING

These proceedings all involve cross-petitions for discretionary review by the Secretary of Labor ("Secretary"), Vulcan Construction Materials, LLC ("Vulcan"), and a miner, Jason Hargis ("Complainant"). On January 9, 2023, the Commission granted all three petitions for discretionary review. On January 20, 2023, the Commission consolidated the cases and set forth a briefing order. Since the filing of the parties' briefs, however, the Commission has noticed an issue not previously briefed by the parties.

The issue involves the interaction between two sections of the Mine Act. Specifically, section 105(c)(2) authorizes temporary reinstatement pending "the final order on the complaint" and instructs that the "order shall become final upon *30 days* after [the] issuance" of the decision. 30 U.S.C. § 815(c)(2) (emphasis added).

Section 113(d)(1) of the Act states that "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission *40 days* after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission . . . ." 30 U.S.C. § 823(d)(1) (emphasis added).

Thus, the issue in calculating the final order date for ending temporary reinstatement concerns the applicability and interaction of the 30-day language in section 105(c)(2) and the 40-day language in section 113(d)(1).

As a result, the Commission requests supplemental briefing on the calculation of a "final order" date for temporary reinstatement purposes given section 105(c)(2) and section 113(d)(1). The briefs of the parties shall be filed within 14 days of the date of this order and shall not exceed 15 pages in length.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Emma P. Cusumano, Attorney
April E. Nelson, Associate Solicitor
Emily Toler Scott, Counsel for Appellate
Litigation Office of the Solicitor, U.S. Department
of Labor Division of Mine Safety & Health
201 12th Street South, Ste. 401
Arlington, VA 22202
Cusumano.emma.p@dol.gov
Nelson.April@dol.gov
scott.emily.t@dol.gov

Christopher M. Smith, Esq.
Office of the Solicitor
U.S. Department of Labor
618 Church Street, Suite 230
Nashville, TN 37219
smith.christopher.m@dol.gov

Elaine M. Youngblood, Esq.
Ortale Kelley
330 Commerce Street, Suite 110
Nashville, TN 37201
eyoungblood@ortalekelley.com

Margaret S. Lopez, Esq.
William K. Doran, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, PC
1901 K Street NW, Suite 1000
Washington, DC 20006
margaret.lopez@ogletree.com
william.doran@ogletree.com

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge Michael Young
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
myoung@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HIGHWAY MATERIALS, INC.	Docket No. PENN 2023-0003 A.C. No. 36-00128-556080

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 6, 2022, the Commission received from Highway Materials, Inc. ("Highway Materials") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 3, 2022, and became a final order of the Commission on July 5, 2022.

Highway Materials alleges that on December 8, 2021, its Safety Coordinator "contested" Citation Nos. 9660855, 9660858, and 9660854 by requesting a conference with an MSHA Conference Litigation Representative ("CLR"). The conference took place on March 3, 2022, and the CLR informed the operator that he would subsequently inform the operator of his findings regarding the citations. The operator subsequently received a proposed assessment dated June 1, 2022, proposing civil penalties for the three citations. On June 9, 2022, Highway Materials contacted MSHA about the conference results. The operator did not receive a response from MSHA until August 17, 2022. On August 17, Material Highways received a "conference results letter" indicating that the citations should remain as issued. On August 18, MSHA mailed a delinquency notice to Highway Materials.

The operator states that it believed that it had 30 days from the date of the conference results letter to submit a contest of the proposed penalties, and filed a contest on September 8, 2022, with the Commission. After MSHA eventually received a copy of Highway Material's contest, it informed the operator by email dated September 21, 2022, that the contest was untimely.

Contrary to Highway Material's belief, a contest of proposed penalties must be filed with MSHA, rather than the Commission, within 30 days of the operator's receipt of the proposed penalty assessment, rather than receipt of the conference results letter.[1] 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed Highway Material's request and the Secretary's response, we find there is sufficient evidence that mistakes were made, thus satisfying the Rule 60(b) criteria. *See Keystone Cement Co.*, 32 FMSHRC 1040 (Sept. 2010); *Hanson Aggregates Midwest, LLC*, 31 FMSHRC 1292 (Nov. 2009); *South Ridge Granite Quarry*, 31 FMSHRC 873 (Aug. 2009). We find that Highway Materials acted diligently in attempting to discern the status of the penalties and promptly in filing its motion to reopen upon discovery of its error. The operator's good faith is demonstrated by its extensively documented contacts with MSHA and the Secretary's non-opposition. In the interest of justice, we hereby reopen this matter and remand it to the Chief

[1] As the Secretary noted in her response, notices of contests of proposed penalties should be mailed to MSHA's Civil Penalty Compliance Office, 201 12th Street South, Suite 401, Arlington, VA 22202.

Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Brian N. Sheehy
Safety Manager
Highway Materials, Inc.
409 Stenton Avenue
Flourtown, PA 19031
Brian.sheehy@depaulgroup.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. VULCAN ELECTRICAL SERVICES	Docket No. SE 2023-0014 A.C. No. 38-00010-561545

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 21, 2022, the Commission received from Vulcan Electrical Services ("Vulcan") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 29, 2022, and became a final order of the Commission on September 28, 2022.

Vulcan explains that a new administrative assistant received the proposed penalty assessment but did not understand the significance of the timing for filing a contest. Consequently, the assistant did not forward the proposed penalty assessment to the Director of Safety until October 20, 2022. Vulcan provided training regarding the 30-day contest period to the administrative assistant to ensure that future contests are timely. The operator filed the motion to reopen one day after the error was discovered. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed Vulcan's request and the Secretary's response, and in light of the operator's prompt filing of a motion to reopen and the operator's actions to correct the issue, we find that the delay in filing the penalty contest was the result of inadvertence and excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

William K. Doran, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
william.doran@ogletreedeakins.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. EAGLE ROCK, INC.	Docket No. WEST 2023-0012 A.C. No. 04-04900-559854

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 18, 2022, the Commission received from Eagle Rock, Inc. ("Eagle") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 8, 2022. On September 7, 2022, the proposed assessment became a final order of the Commission. On October 12, MSHA received a partial payment of the assessment for 10 of the 14 citations listed on the assessment.

Eagle asserts that it believed that its contest of the penalty assessment was due by September 9, 2022, two days after the assessment became a final order. The operator states that when it contacted MSHA's Civil Penalty Compliance Office, it was advised that the contest was late, and that Eagle would receive correspondence regarding the untimeliness. On October 11, 2022, after having failed to receive the correspondence, Eagle again contacted MSHA and subsequently received the letter by email. On that same date, the operator paid 10 of the 14 proposed penalties listed on the proposed penalty assessment. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Eagle's request and the Secretary's response, we find that the delay in filing the penalty contest was the result of mistake, satisfying the criteria of Rule 60(b). In the interest of justice, we hereby reopen the penalties associated with Citation Nos. 9507582, 9507586, 9507589, and 9507592 and remand this matter it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Sherrie Zappola
Office Manager
P.O. Box 1498
Weaverville, CA 96093
Eaglerockest.1980@aol.com

Larry E. Yingling
President
P.O. Box 1498
Weaverville, CA 96093
Eaglerockest.1980@aol.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CSI SANDS NE, LTD.	Docket No. YORK 2023-0003 A.C. No. 30-03261-548285

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 6, 2022, the Commission received from CSI Sands NE, Ltd. ("CSI") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 14, 2022, and became a final order of the Commission on February 14, 2022. CSI states that it was dealing with extraordinary circumstances involving a complete reconstruction of its facility, an employee's injury, a natural gas supply failure, and a change in management. CSI explains that

the reconstruction of its facility strained its staff. After the proposed assessment was delivered to the mine supervisor, the mine supervisor accepted another job offer. CSI explains that due to these circumstances, it filed its proposed penalty contest twelve days late. The operator states that its new manager has a history of successful mine operation and will ensure that the mine addresses any proposed penalty assessments in a timely manner. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed CSI's request and the Secretary's response, we find that the relatively brief delay in filing the notice of contest was the result of excusable neglect arising from unusual circumstances and staff disruption. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Sean S. Kelly, Esq.
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South
Suite 350
Cleveland, OH 44131
skelly@rbslaw.com

Brian K. Brittain, Esq.
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South
Suite 350
Cleveland, OH 44131
bbrittain@rbslaw.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 18,2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CALLENDER CONSTRUCTION COMPANY, INC.	Docket No. LAKE 2020-0189-M A.C. No. 11-00214-494016

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Bruce Callender, President
Callender Construction Company, Inc.
928 West Washington Street
Pittsfield, IL 62363
calconst928@yahoo.com

Emily Toler Scott, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Melanie Garris, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor
Office of Assessments
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn Voisin
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 18, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2022-0470 A.C. No. 46-09297-552215
BLUE CREEK MINING, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 18, 2022, the Commission received from Blue Creek Mining, LLC a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993) ("JWR"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); JWR, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on April 8, 2022. The assessment became a final order of the Commission on May 9, 2022, and MSHA issued a delinquency notice on June 23, 2022.

Blue Creek states that it is unclear exactly when it received the proposed assessment but notes that near the deadline to file the notice of contest in this case, its Corporate Safety Director, who usually files notices of contest, left the company on April 22, 2022. It contends that the outgoing Director did not file the required notice of contest, nor did he notify any other employee of the impending deadline. When a paralegal for Blue Creek learned of the oversight, the operator quickly retained counsel to file the required contest. Blue Creek has not filed any other motions to reopen with the Commission in the last two years.[1] The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

[1] Blue Creek's motion reflects that it relied on the same corporate personnel to file notices of contests of proposed civil penalties as Rockwell Mining, LLC, a separate subsidiary of Blackhawk Mining, LLC. On June 29, 2023, the Commission issued an Order noting that Rockwell's recent history of filing motions to reopen, if considered cumulatively, "may indicate an inadequate or unreliable internal processing system." *Rockwell Mining, LLC*, Order at 3. The Commission thus warned Rockwell that it "will closely scrutinize any future motions to reopen . . . for signs of an inadequate processing system." *Id*. Because the two subsidiaries rely on the same processes and personnel, Blue Creek is now also on notice.

Having reviewed Blue Creek's request and the Secretary's response, we find that due to mistake, inadvertence or excusable neglect the penalty assessment was not timely contested. *See Noranda Alumina, LLC*, 39 FMSHRC 441, 445 (Mar. 2017) (when the safety director left the company unexpectedly, the failure to timely contest constituted an inadvertent mistake). Moreover, we note that Blue Creek promptly filed its motion to reopen upon notification that the penalties were delinquent. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Jonathan R. Ellis, Esq.
Colton C. Parsons, Esq.
Steptoe & Johnson PLLC
707 Virginia Street East, Chase Tower, 17th Floor
Charleston, WV 25301
jonathan.ellis@steptoe-johnson.com
colton.parsons@steptoe-johnson.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 27, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL MINING COMPANY LLC	Docket No. WEVA 2023-0141

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 7, 2023, the Administrative Law Judge assigned to this matter issued an order granting certification of questions for interlocutory review.

Pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a Judge's ruling, prior to the Judge's final decision in the case, if certain conditions are met. This includes a Judge certifying that his interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding.

We find that the qualifications contained in Procedural Rule 76, 29 C.F.R. § 2700.76, have been met, and hereby GRANT interlocutory review.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Distribution:

Emily Toler Scott
Counsel for Appellate Litigation
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Robert S. Wilson
Office of the Solicitor
U.S. Department of Labor, MSHA
201 12th Street, Suite 401
Arlington, VA 22202
wilson.robert.s@dol.gov

D. Cass Trent, CLR
U.S. Department of Labor, MSHA
4499 Appalachian Hwy
Pineville, WV 24874
trent.david@dol.gov

Jim McHugh
Hardy Pence LLC
10 Hale Street, 4th Floor
P.O. Box 2548
Charleston, WV 25329
jmchugh@hardypence.com

Craig Aaron
CONSOL Energy Inc.
275 Technolgy Drive, Suite 101
Canonsburg, PA 15317
craigaaron@consolenergy.com

Michael G. Young
Administrative Law Judge
Federal Mine Safety and Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Ave, NW, Suite 520N
Washington, DC 20004
myoung@fmshrc.gov

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Telephone: 202-434-9933 / Fax 202-434-9949

July 3, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING: Docket No. WEVA 2023-0214 A.C. No. 46-01437-571004
v.	
MARSHALL COUNTY COAL, RESOURCES, INC., Respondent	Mine: Marshall County Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a Petition for Assessment of Civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Conference and Litigation Representative ("CLR"), who is not an attorney,[1] has filed a motion to approve settlement. A **fifty-six percent** reduction in the penalty from **$8,239.00** to **$3,660.00** is proposed. The settlement amounts and the one modification to a citation are as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
WEVA 2023-0214			
9581075	$2,561.00	$1,453.00	Reduce Monetary Penalty Only **43% reduction in penalty**
9581076	$1,858.00	$1,055.00	Reduce Monetary Penalty Only **Another 43% penalty reduction**
9581077	$3,820.00	$1,152.00	Modify Severity from "Fatal" to "Lost Workdays or Restricted Duty" **70 % reduction in penalty**
Total	**$8,239.00**	**$3,660.00**	**56% overall drop in penalty from the regularly assessed amount**

MSHA inspector Cody John Tominack, diligently performing his inspection responsibilities, found the three, now admitted, violations involved with this docket.

[1] None of the "CLRs" are attorneys. As such they are not licensed to practice law.

Analysis

As in this instance, the Secretary often touts in settlements that the modifications to some citations result "only" in a monetary reduction. Congress was not so cavalier about penalty reductions. Instead, it clearly expressed that penalties were to be of a sufficient order that non-compliance would be more expensive than compliance. As the Commission remarked in *Davis Coal*, 2 FMSHRC 619 (March 1980), "[i]n constructing the 1977 Act, **Congress paid significant attention to penalties, noting its dissatisfaction *with the low settlements* of penalties under the 1969 Coal Act. Section** 110(k)8 was therefore made a part of the 1977 Act, in order that penalties, mandatory under the 1977 Act, would not be compromised, mitigated or settled except with the approval of the Commission. As detailed in the Senate Report, the **Congress stated: 'In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.' To be successful in the objective of including (inducing) effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.**" *Id.* at 625. (emphasis added).

With both citations 9581075 and 9581076 resulting in **43% reductions in the penalty** assessed, the Secretary simultaneously stands by the issuing inspector's evaluations, an incongruous result is produced. Such arrangements lay bare that the mine operator's focus is on the penalty amounts, not the evaluations of gravity or negligence. And this makes sense because penalties are not tax deductible. Treasury Regulation 26 C.F.R. § 1.162-21 (2021). A reduction in civil penalties is therefore a tax savings, as such penalties as are imposed constitute a non-tax-deductible financial burden. In short, lower penalties benefit mine operators because it reduces their tax obligations

Citation No. 9581075; Failure to maintain equipment in safe operating condition, as required by 30 C.F.R. § 75.1725(a).

This citation, issued on December 15, 2022, stated that

> [t]he number 14464 feeder located at the 4 West seal construction area was not maintained in a safe operating condition. When inspected **the shut off cable** that stretches over the feeders chain **could not activate the emergency stop button** when pulled from any angle. When tested **the rusted spring** would hold the metal flap a measured 1.5 inches from pressing the emergency stop button. This could result in crushing injuries if a miner would fall into the mouth of the feeder.

Petition for civil penalty at 5. (emphasis added)

The cited standard, 30 C.F.R. § 75.1725(a), requires that "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." This standard was cited 10 times in two years at this mine (10 to the operator, 0 to a contractor)."

The motion seeks to have the negligence reduced to 'low,' meaning considerable mitigating circumstances must be present. The operator asserts it was unaware of the condition; that the coal feeder was not in service at the time of the citation's issuance, and that the last weekly electrical exam, conducted on December 12, 2022, indicated that the condition did not exist at that time. That the operator was 'unaware,' does not constitute *considerable* mitigation. The claim that the feeder was not in service counts for nothing in any negligence evaluation, as it doesn't even amount to the rejected "alternative safety measures" roundly rejected by United States Courts of Appeals. Further, there is no claim that the equipment was tagged out. Last, the claim that the condition didn't exist three days earlier is not credible, as a rusted spring would not develop in three days' time. Inferentially, the Secretary agrees with these observations, as she stands by the inspector's evaluation in all respects, including negligence. Motion at 3.

Given the above, it is disconcerting that the Secretary would still agree to such an enormous penalty reduction of 43% for this violation, especially given that, per the inspector's unchallenged determination that fatal crushing injuries could result if a miner were to fall into the mouth of the feeder.

Citation No. 9581076; Failure to adhere to safeguard notice, per 30 C.F.R. § 75.1403, a statutory provision, which safeguards are designed to minimize hazards with respect to transportation of men and materials

This citation, also issued on December 15, 2022, invokes, as noted above, the safeguard standard, 30 C.F.R. § 75.1403. The condition stated:

> [t]he clearance space along the 5 north 1 and 2 track haulage was not kept clear of loose rock and debris. **A move was observed dragging and rubbing loose materials along the rails and in between the rails.** Debris consisting of crushed stone was above the rail from Grapevine bottom to 58 crosscut on the North main line. The track clearance space needs cleaned of all debris.

Petition for civil penalty at 7. (emphasis added).

As with the citation discussed above, here too the operator seeks to have the negligence cast as 'low.' The operator asserts that the preshift exam did not reflect the problem, suggesting that it did not then exist. Also, the operator contends it did not know of the problem. Further, the operator stated that a motor crew was delivering a roof bolting 4 machine on a dolly that is 13 inches lower than a normal supply car, therefore, intermittently contacting material along the outer edge of the track bed. Respondent also asserted that that the inspector observed the condition being created by the dolly and that normal haulage equipment would not contact the material, thus, the cited condition would not be present and would not be deemed a violation by the preshift examiner. Motion at 3-4.

In this instance, the reasons advanced by the operator to recast the negligence appear plausible, although the Secretary's concession is not to the negligence evaluation listed by the inspector. Instead, the Secretary stands by the issuing inspector's designation that the negligence

was high. This is not a surprise as the inspector observed the violation in real time. Given that, it is disconcerting that the CLR agreed to a near half-off reduction in the penalty.

However, that is not the end of the story, as revealed in the third citation in this docket, Citation No. 9581077, discussed next.

Citation No. 9581077; Violation of 30 C.F.R. §75.360; Failure to conduct a preshift examination at within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.

This citation, as with the two citations just analyzed, was also issued on December 15, 2022. The now-admitted violation was issued for an alleged violation of §75.360(a)(1). Titled "Preshift examination at fixed intervals," this standard provides that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground."

Significantly, the citation is inextricably tied to the other two admitted violations in this docket. Inspector Tominack spelled this out in his description of the "Condition or Practice" for this citation, stating:

> A preshift examination was not being conducted within 3 hours preceding the beginning of an 8 hour interval on the 4 West Seal construction area. The conditions cited in citations **No. 9581074** and **No. 9581075**, accumulations in entire area and emergency stop button not working on feeder. The construction area is only operated on day shift. The midnight pre shifter needs to examine the area. **The construction area had 4 date, time, and initial boards without any initials found for 12/15/22. Four miners were in the area working when the inspection started.**

Petition for civil penalty at 9. (emphasis added).

The Secretary had proposed a civil penalty of $3,820.00 for this violation, but now seeks a **70% reduction in the penalty, reducing the penalty from $3,820.00 to $1,152.00.** The Gravity was evaluated as: Unlikely, Fatal, with 4 Persons Affected. The violation was designated as Non-S&S. Negligence was evaluated as high.

The operator seeks to have the likely injury or illness dropped two steps down from the inspector's designation of 'fatal,' to 'lost workdays or restricted duty.' To support that claim, the operator asserts that, regarding the other two violations, as just described above, "the condition cited in Citation 9581075 and referenced in the body of Citation 9581077 does not apply to 75.360(a)(1) [**preshift exams**] [and] Respondent further assert[s] that related citation, [No.] **9581074**,[2] was evaluated as lost workdays or restricted duty." Motion at 4.

[2] The Court thought that perhaps the reference to 9581074 was a typographical error but the response from the CLR indicated there was no such error.

The Commission has spoken in unambiguous terms about the vital importance of preshift exams, stating:

> The preshift inspection requirement is the linchpin of Mine Act safety protections. Without a timely preshift inspection, unwary miners may be sent into areas containing hazardous conditions. Congress explicitly acknowledged the **importance** of the **preshift** inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The Senate Report on the 1969 Coal Act emphasized the importance of these inspections, stating that "[c]hanges occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." S. Rep. 411, 91st Cong., 1st Sess. 57 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 183 (1975) ("*Coal Act Legis. Hist.*").
>
> Both the Senate Report and the Conference Report emphasized:
> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected. *Coal Act Legis. Hist.* and 183 and 1610.
>
> In its recent 1996 revision of safety standards for the ventilation of underground coal mines, **the Mine Safety and Health Administration acknowledged that: [t]he preshift examination is a critically important and fundamental safety practice in the industry.** It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof. 61 Fed. Reg. 9790 (1996) … In *Emerald Mines Corp.,* 7 FMSHRC 437 (March 1985) (ALJ), Administrative Law Judge Broderick recognized the **importance** of the **preshift** examination in the arsenal of protections afforded to those working in the mines. In holding that the failure to conduct a preshift inspection was S&S, he stated that: [t]he whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury. 7 FMSHRC at 444. This Commission has recently had occasion to pronounce the **preshift** requirement "unambiguous" and of "fundamental **importance** in assuring a safe working environment underground." *Buck Creek Coal Co.,* 17 FMSHRC 8, 15 (January 1995).

Manalapan Mining, 18 FMSHRC 1375, 1391-1393 (emphasis added).

That was then, this is now.

Both contentions offered by the operator are troublesome. As to the first ground, that Citation No. 9581075, which was referenced by the Respondent in claiming that the condition cited in that citation does not apply to preshift exams, the Secretary, per usual, says nothing about the validity of that contention. Case law suggests that the Respondent's claim is dubious.

Section 75.360(b)(3) states that the preshift examination is to include "working sections," which are defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. *Jim Walter Resources*, 28 FMSHRC 579, 599 (Aug. 2006)

The Commission has held that the scope of a preshift exam should be broadly construed to avoid anomalous results:

> Given that the statute and regulation require a preshift examination of 'the active workings of a coal mine' and that coal-carrying conveyor belt entries in which miners are normally required to work or travel clearly fall within the definition of 'active workings,' the statute and regulation appear to require coal mine operators to conduct a preshift examination of such entries. It would be anomalous if the mere addition of coal-carrying conveyor belts to an entry had the effect of removing the entry from the scope of the preshift examination requirement.

Jones and Laughlin Steel, 8 FMSHRC 1058, 1061.

The Court of Appeals for the D.C. Circuit reached a similarly broad conclusion in *Spartan Mining*, 415 F.3d 82, 85 (July 22, 2005).

A key element in evaluating the scope of preshift examinations is the "work or travel" aspect. Here, issuing inspector Tominack stated that in the seal construction area "four miners were in the area working when the inspection started." Petition for civil penalty at 9.

As set forth below, the Court's hands are tied in assessing the claim, as it is not permitted to make inquiry about the applicability of the preshift exam in the context of settlement motions.

As to the second ground, that a separate citation, No. 9581074, supports the argument that the preshift exam violation should also be listed as "lost workdays or restricted duty," the Court, in performing its due diligence in the spirit of the Mine Act's provision at 30 U.S.C. §820(k), that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." and in its Commission-designated role to provide "front-line oversight," per

AmCoal, 40 FMSHRC 983, 987,[3] requested that the parties supply a copy of the citation referenced as a basis for redesignating the preshift exam injury down from 'fatal,' to 'lost workdays, restricted duty.' In order to intelligently assess that claim, the Court asked the parties to supply a copy of that citation, No. 9581074.

The non-attorney representative for the Secretary, CLR Hayhurst, declined to provide the Court with the Citation identified in the motion informing, "[t]he Secretary stands by the information provided in the Motion to Approve Settlement and declines to provide additional evidence not in the record in this matter." Email from CLR Hayhurst to the Court, June 28, 2023.

With respect for the Commission's present case law on the issue of settlement motions, the Secretary's refusal to even provide the Court with a copy of the citation cited by the mine operator as support for its claim that the expected injury should be classified as "lost workdays or restricted duty," demonstrates that the Court's review role of settlements is only ministerial. It is worth it to stop and think about this. The parties submit that another citation, not in the docket before the Court, is instructive for their position that lost workdays is the more appropriate designation, but the Court may not see the referenced citation. Beyond ministerial, the Court's review role is perfunctory, if refusing to provide a copy of a cited document is an acceptable posture. To be blunt, in the Court's opinion, if it may not see a citation relied upon in support of the operator's position for reducing the gravity of the reasonably expected injury, then its review role is to act only as a rubber stamp.

As this Court has often remarked, reasonable inquiry is not allowed, as long as the *AmCoal* elements are present.

Reasonable Inquiry is not Permitted

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

[3] The full text of the Commission's description of the judge's role informed: "As the Commission has repeatedly observed, a Judge's 'front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.' *Id*. [citing *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014)]. Judges must have sufficient information to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest. Moreover, such information permits a Judge to fulfill the duty of articulating reasons for the approval so that the process of compromising penalty amounts is transparent, as Congress intended. A Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties." *AmCoal* at 987-988.

Rather, the Court's review of settlement motions is confined to comparing the parties' motion with the three criteria set forth by the Commission in its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

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

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

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

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

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

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

In the context of settlement motions, "facts" have an atypical meaning.[4] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *AmCoal* at 990. The only associated requirement with such *"facts"* is that *"there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*" *Id.* (emphasis added).

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

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

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

The Court has considered the Secretary's Motion and approves it **solely on the basis of the Commission's decisions in** *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Citation No. 9581077 is modified to list the gravity of the injury or illness from 'fatal' to 'lost workdays or restricted duty.' The penalties for the three citations in this docket are all reduced as reflected in the table above. The Respondent is **ORDERED TO PAY** a penalty of $3,660.00 within 30 days of this order. Upon receipt of payment, this case is **DISMISSED**. [5]

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Donald R. Hayhurst, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 604 Cheat Road, Morgantown, WV 26508 (hayhurst.donald@dol.gov)

Wm. Allen McGilton, American Consolidated Natural Resources, Inc., 46226 National Road, St. Clairsville, OH 43950. (amcgilton@acnrinc.com)

[5] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is vital to include Docket and A.C. Numbers when remitting payments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

July 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. NUFAC MINING COMPANY, INC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0149 A.C. No. 46-08786-569736 Mine: No. 57 Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Sullivan

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

This case is before me upon petition for assessment of 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 and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citations at issue was $19,574.00 and the proposed settlement amount is $11,684.00.

The proposed settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9568170	$ 8,095.00	$ 4,047.00	Reduce penalty
9568171	$ 2,641.00	$ 2,641.00	No change
9590118	$ 3,841.00	$ 1,920.00	Reduce penalty
9590119	$ 1,156.00	$ 1,156.00	No change
9590120	$ 3,841.00	$ 1,920.00	Reduce penalty
Total	**$ 19,574.00**	**$ 11,684.00**	

The Petition for Assessment of Civil Penalty filed by the Secretary of Labor on March 2, 2023, indicates that, as of January 12, 2023, this mine alone had unpaid penalties of $136,399.37, with delinquent amounts going back as far as 2017. Though it does not go back that far, the Mine Safety and Health Administration's Mine Data Retrieval System ("MDRS") reflects that Nufac still owes large amounts, with many unpaid penalties shown as delinquent and referred to the United States Department of the Treasury for collection.[1]

The MDRS also indicates that some of the unpaid penalties were reduced from the originally proposed amounts as the result of Commission judges approving joint motions for settlement in civil penalty proceedings. *See, e.g.,* Unpublished Decision Approving Settlement, *Nufac Mining Company, Inc*., No. WEVA 2020-0223 (Apr. 30, 2021) (ALJ). Even when a Judge approved an installment payment plan (as has been requested here), it appears that Nufac did not comply with the payment plan. *See* Unpublished Decision Approving Settlement, *Nufac Mining Company, Inc*., Nos. WEVA 2021-0254 & WEVA 2022-0065 (Jan. 21, 2022) (ALJ).[2]

Commission judges review proposed settlements to ensure that they are "fair, reasonable, appropriate under the facts, and protect[ive] of the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). I greatly question whether approving a settlement is consistent with the public interest when all indications are that it will be years, if ever, before even the reduced penalty amount is paid. However, here I will forgo denying the motion for settlement because the mine is presently shown on the MDRS as having gone into Non-Productive status within the past year, with no employees working so far in 2023.

The parties have set forth justifications for the modifications in the motion filed by the Secretary. 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). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violations has been considered. The negligence and gravity of the violations are addressed in the motion, in the citation, and in the file in general.

I accept the representations and modifications of the Secretary as set forth in the motion to approve settlement. I have considered the representations and documentation submitted, find that the modifications are reasonable, and conclude that the proposed settlement is appropriate

[1] The Court requested via email that the Secretary confirm the reliability of the delinquency data on the MDRS, but the Secretary indicated that she would not respond to the Court's inquiry.

[2] I further note that this apparent failure to pay even reduced penalties occurred *after* Nufac, along with other related mine operators, had agreed to an installment payment plan for unpaid penalties incurred for citations issued between May 3, 2014, and May 3, 2019. *See* Press Release, U.S. Dep't of Justice, U.S. Attorney for the Western District of Virginia, United States Announces Civil Settlement to Collect All Debts Owed by Justice Entities for Violations of Federal Mine Safety Act (April 1, 2020) https://www.justice.gov/usao-wdva/pr/united-states-announces-civil-settlement-collect-all-debts-owed-justice-entities (last visited July 7, 2023).

under the criteria set forth in Section 110(i) of the Act. The amended motion to approve settlement is **GRANTED**.

It is **ORDERED** that the Respondent pay the Secretary of Labor the sum of **$11,648.00** over the course of five consecutive monthly payments of $1,947.00 and one final payment $1,949.00, with the first payment due on August 1, 2023, and each subsequent payment due on the first day of each subsequent month until the total penalty amount is fully paid. If any payment is more the 15 days delinquent, then the entire remaining balance shall become immediately due and payable.[3]

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

Distribution (by email):

David C. Trent, Conference Litigation Representative, U.S. Department of Labor MSHA, 4499 Appalachian Highway, Pineville, WV 24874 (Trent.David@DOL.GOV)

Christopher D. Pence, Hardy Pence PLLC, 10 Hale Street, 4th Floor, Charleston, WV 25329 (cpence@hardypence.com)

Scott Wickline, Hardy Pence PLLC, 10 Hale Street, 4th Floor, Charleston, WV 25329 (Scott@hardypence.com)

[3] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 FAX: 202-434-9949

July 11, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JUSTICE ENERGY COMPANY, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0148 A.C. No. 46-03404-569444 Mine: No. 32

DECISION APPROVING SETTLEMENT

Before: Judge William B. Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Conference and Litigation Representative, ("CLR"), has filed a Motion to Approve Settlement. The originally assessed amount for the citations at issue was $4,081.00 and the proposed settlement amount is $3,061.00. The proposed settlement terms are reflected in the following table:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEVA 2023-0148			
9569727	**$987.00**	**$732.00**	**26% Penalty Reduction**
9569728	**$987.00**	**$732.00**	**26% Penalty Reduction**
9569730	**$133.00**	**$133.00**	**Sustained as Issued; minimum penalty assessed**
9569731	**$987.00**	**$732.00**	**26% Penalty Reduction**
9569732	**$987.00**	**$732.00**	**26% Penalty Reduction**
TOTAL	**$4,081.00**	**$3,061.00**	**Overall: 25% reduction in total penalty under regular assessment formula**

Analysis

Although the overall penalty reductions are moderate for this docket, several disconcerting aspects stand out. For each of the citations in this docket, save the one citation assessed at the minimum penalty, the basis for the reductions is that the injury would not result in

more than lost workdays or restricted duty. Motion at 3-4. However, examining the four citations, the now-admitted violations represent serious and extensive conditions, all as found by the issuing MSHA Inspector, Aaron D. Cline, who diligently recorded the conditions and practices he discovered.

As reflected here, citing 30 C.F.R. § 77.404(a),[1] the text of Inspector Cline's demonstrates the significant hazards he found:

Citation No. 9569727 provides the following unchallenged facts of the unsafe truck:

The CAT 785C rock truck #521 is not being maintained in safe operating condition. When checked, the following deficiencies exist:

1. door seal is damaged
2. cab filter is missing
3. **handrail in front of cab broke**
4. **off-side step top rung bent and steps bent into bumper causing no toe clearance**
5. **oil hose on off-side front brake leaking**
6. oil leak inside offside rear wheel
7. **emergency steering does not work**

The operator removed the truck from service until all repairs are made.

Petition for civil penalty at 9.

Seven defects constitute a large number and items 3 through 5 and 7 are particularly worrisome.

Citation No. 9569728

This admitted violation has the effect, in context, of making the serious defects identified in Citation No. 9569727 much worse. Th issuing MSHA Inspector, to his great credit, performed due diligence in citing the operator, per 30 C.F.R. § 77.1606 (a),[2] with a failure to perform a legitimate pre-operational check for the truck cited in Citation No. 9569727, above, noting:

[1] **30 C.F.R. § 77.404 Machinery and equipment; operation and maintenance. (a)** Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

[2] **30 C.F.R. § § 77.1606 Loading and haulage equipment; inspection and maintenance. (a)** Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

> The CAT 785C rock truck #521 has not been provided an adequate pre-operational check **on either shift**. When checked, citation 9569727 was issued with numerous deficiencies and **no defects were listed on the pre-ops except the cab filter.**

Petition for civil penalty at 10 (emphasis added).

In settlement motions, the Court has seen a rise as a defense in such motions that there was no citation for failure to perform a pre-check for equipment defects. To address such claims, the Court has stated that inspectors should evaluate whether there has been genuine pre-check for defects affecting safety, something Inspector Cline, to his credit, evaluated here, finding an abnegation by the operator of its duties to comply with the pre-shift exam requirement.

As described below, those two, inextricably related, citations were not the end of the matter.

Citation No. 9569731

Essentially the twin violations problems presented themselves again within the same inspection; that is to say, the inspector found multiple unsafe conditions on yet another truck and these hazards were also coupled with inadequate pre-operational checks.

This was a gross deficiency, far exceeding the 7 deficiencies found for Citation No. 9569727, as Citation, Citation No. 9569731 was considerably worse. Citing the same standard violated in Citation No. 9569727, this time Inspector Cline found **19 (nineteen) defects presenting unsafe conditions**. The citation provided the following unchallenged facts of the unsafe truck:

The Maroon Mack Lube truck #0009 is not being maintained in safe operating condition. When checked, the following deficiencies exist:

1. Door seal driver side damaged
2. Door seal passenger side damaged
3. **inside door handles don't work inside cab both doors**
4. **no passenger seat, wooden box is in place of seat, no buckle for seat belt**
5. **hood latch broke**
6. **hood handle gone**
7. oil leak on motor
8. ball stud has excessive slack on off side tie rod end
9. air dryer not working and leaking
10. green antifreeze tank ratchet strapped not bolted down
11. **no valve to shut air line off that must be changed from antifreeze to grease tanks, blows air out on operator**
12. jake brake is weak
13. shock missing on off side front

14. oil covering walkway in bed
15. oil covering hose bay
16. 2 lights out on rear
17. ladder to top of truck no toe clearance
18. **no handrail on top of tank and no antiskid material**
19. **All 6 brakes are out of adjustment**.

The operator removed the truck from service until all repairs are made. Standard 77.404(a) was cited 12 times in two years at mine 4603404 (12 to the operator, 0 to a contractor).

Petition for a civil penalty at 12-13 (emphasis added).

Here too, in the diligent performance of his inspection responsibilities, Inspector Cline issued Citation No. 9569732, with his unchallenged statement that:

> The maroon mack lube truck #0009 has not been provided an adequate pre-operational check on either shift. When checked, ***no*** **deficiencies were listed** on the pre ops and citation 9569731 was issued listing 17[3] deficiencies on the truck. Standard 77.1606(a) was cited 2 times in two years at mine 4603404 (2 to the operator, 0 to a contractor).

Petition for Civil Penalty at 14. (emphasis added).

In the Court's view, the motion is appalling, both because of the large number of hazards found on the two trucks and the dereliction of duties by the operator in not performing a legitimate precheck. The Respondent provides the same, empty, rationale to support the across-the-board 26% reductions for each of these four conceded violations.

The Respondent offers the *same* empty language for *each* of four admitted violations:

> **In the unlikely event of a mine accident, the listed conditions would not result in more than a lost workdays or restricted duty injury**.

Motion at 3-4. (emphasis added).

There is no substance to back up the bald claim; only the assertion is made.

The Secretary, acting through Conference and Litigation Representative David Trent, in like fashion, has an equally hollow response *for each*, stating:

> The Secretary recognizes **that the ALJ** may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation,

[3] The reference to 17 deficiencies appears to be a typographical error, as Inspector Cline listed 19, not 17, separate safety deficiencies in Citation No. 9569731.

Id. (emphasis added).

Despite its statutory role to protect miners, the Secretary does not inform if he/she consulted with the issuing inspector, who saw the admitted violations, for his take on the 'lost workday, restricted duty' claims. Further, for the Secretary to make no distinction between the numerous defects and the arguably more serious violation of not performing an honest pre-operational check, weakens the importance of the latter, and is a disservice to miners. Such a response is inimical to the Secretary's safety and health duties.

Reasonable Inquiry by the Court is not Permitted

It is obvious that for egregious violations such as these, the Court would have questions aplenty. However, Reasonable Inquiry about the contentions advanced in settlement motions is not Permitted

This is because, under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

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

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

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

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

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

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

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

In the context of settlement motions, "facts" have an atypical meaning.[4] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." AmCoal at 990. The only associated requirement with such "facts" is that "there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion." Id. (emphasis added).

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

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

The Court has considered the Secretary's Motion and approves it ***solely*** **on the basis of the Commission's decisions in** *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

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

WHEREFORE, the motion for approval of settlement is **GRANTED**. With significant misgivings, the penalties are reduced, per the summary table above, and those four reduced penalties are modified to provide that the injury or illness reasonably to be expected is downgraded from 'fatal' for each to 'lost workdays or restricted duty.' The Respondent is **ORDERED TO PAY** a penalty of **$3,061.00** within 30 days of this order.[5] Upon receipt of payment, this case is **DISMISSED**.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

David C. Trent, Conference & Litigation Representative, U.S. Department of Labor, MSHA
4499 Appalachian Highway, Pineville WV 24874 Trent.david@dol.gov

Scott Wickline, Esq., Hardy Pence, PLLC, 10 Hale Street, 4th Floor
P.O. Box 2548, Charleston, WV 25329 scott@hardypence.com

[5] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. It is vital to include Docket and A.C. Numbers when remitting payments.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577/rmanning@fmshrc.gov

July 6, 2023

SECRETARY OF LABOR, MSHA, on behalf of VICTOR TORRES, Applicant v. W. G. YATES & SONS CONSTRUCTION COMPANY, Respondent	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. WEST 2023-0256-DM MSHA Case No. VACA MD 2023-06 Mt. Pass Mine & Mill Mine ID 04-02542 G556

ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT & ORDER TOLLING TEMPORARY REINSTATEMENT

Appearances: Natasha Magness, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington for Applicant;
McCord Wilson, Esq., Rader & Campbell, Dallas, Texas for Respondent

Before: Judge Manning

This case is before me on an Application for Temporary Reinstatement (the "Application") filed by the Secretary of Labor on behalf of Victor Torres ("Torres") against W.G. Yates & Son's Construction Co., and all successors in interest ("Yates") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the "Mine Act").[1] The Secretary's Application alleges that on or about April 13, 2023, Yates terminated Torres from his position as a journeyman millwright in retaliation for "raising safety concerns including exercising his stop work authority." App. Temp. Reinstatement 2-3. The Secretary requests an order directing Yates to temporarily reinstate Torres "to the position of Journeyman Millwright, or to a similar position at the same rate of pay and benefits and with all of the same seniority or other perquisites of the job, and with the same or equivalent duties assigned to him" pending final hearing and disposition on the discrimination complaint. *Id.* 1, 3.

The undisputed evidence establishes that MP Materials Corp. is restarting a surface rare earth mine in California near the Nevada border at a location known as Mountain Pass. A different operator mined rare earths at the mine in the past but it went out of business. Because of the strategic importance of rare earths, the Department of Defense is involved in restarting operations, presumably by providing at least some of the funding. The critical work to restart operations is to build a facility to separate the targeted rare earths from the mined material. This facility, known as the processing facility (the "facility'), is being built from the ground up. Due to the secretive nature of the equipment being installed and the processes to be used, taking photos at the facility is prohibited except by authorized personnel.

[1] The application was filed by the Secretary on June 2, 2023. Yates timely requested a hearing within 10 days of receipt of the application. 29 C.F.R. § 2700.45(c). At the request of the parties, the hearing was held on June 28, 2023.

Yates was a major contractor hired to construct the facility. The construction of the facility was put on a fast track and at the time of the hearing work was virtually complete. All that remained was testing the facility by running product through the facility and the commissioning of the facility. At the beginning of 2023, Yates employed between 800 and 1,000 people at the facility. About 110 of these employees were journeymen millwrights. On the date of Torres's termination, about 270 people worked for Yates including 15 millwrights. On the day of the hearing in this case, about 22 people worked for Yates at the facility, including two millwrights and a millwright supervisor. The millwrights and millwright supervisor were primarily on standby in case repairs needed to be made during testing and commissioning. As discussed below, Torres was assigned welding duties for much of his employment at Yates. There were no welders employed on the date of the hearing.

The Secretary contends that Torres was selected for termination on April 13 because of his safety complaint. Yates contends Torres was laid off along with other millwrights because his demonstrated skills were no longer needed at the facility.

The parties stipulated that (1) Yates is a mine operator under the Mine Act; (2) the Mountain Pass Mine & Mill, which includes the subject facility, is a mine under the Mine Act; (3) Torres is a miner under the Mine Act, and (4) the Commission has jurisdiction over this case. Tr. 10-11.

The parties presented testimony and documentary evidence at a hearing held via the Commission's secure video conferencing system. For the reasons set forth below, I find that the application for temporary reinstatement must be **GRANTED**, but that temporary reinstatement is **TOLLED**.

I. SUMMARY OF THE EVIDENCE

Each party offered two witnesses. A summary of each witnesses' testimony follows.

Victor Torres

Torres was hired by Yates on September 8, 2022, as a journeyman millwright at the facility.[2] Tr. 17. Torres's job duties as a millwright included making equipment layouts and aligning, assembling, and installing equipment. Tr. 20. According to Torres, millwrights normally bring their own tools to job sites, and he brought his own tools to the job at the facility. Tr. 50.

[2] Torres testified he had eight years of experience as a millwright. Tr. 16. Prior to being hired by Yates, Torres was a 1099 independent contractor and spent time working for both Casey Industrial and Phoenix Industrial. Tr. 16. Torres earned $35 per hour and worked approximately 60 hours per week for Yates. Tr. 18, 21. According to Torres, roughly 18 other millwrights were hired around the same time as him, and an additional 12 millwrights after he was hired. Tr. 18.

Although Torres's job title never changed while he was with Yates, at some point after he was hired, at Yates's request, Torres took a test to become a structural welder. Tr. 18-19. At that time there were only four other certified welders.[3] Tr. 19. As a structural welder for Yates, Torres was tasked with fabricating equipment and making needed modifications. Tr. 20. Torres worked as a structural welder until that part of the project was completed and then switched back to being a millwright. Tr. 53-54.

Each day at the job began with a meeting of the crews and foremen during which Torres received his assigned tasks for the day. Tr. 21. Generally, Torres worked in one location on an assigned task until it was completed before moving to another location for his next task. Tr. 21.

On April 10, 2023, Torres was tasked with using a manlift to bring down pipe from an elevated rack. Tr. 26. According to Torres, the manlift manual says the lift should not be used as crane. [4] Tr. 30. Torres believed it was not safe to bring down a pipe with the manlift. Tr. 30. Torres's crew requested a crane to safely complete the task, but the request was denied by Tyler Towns, an engineer with Yates and Torres's foreman at the time. Tr. 26-27. Towns instead instructed the crew to use the manlift for the task. Tr. 27. At that point Torres refused to complete the task and exercised his "stop work authority." Tr. 27-28. "Stop work authority" allows anyone to stop all work when they see something unsafe.[5] Tr. 28. According to Torres, Towns said if Torres would not do the job as instructed then Towns would find someone else to do so and Torres would be removed. Tr. 28. Torres understood Towns's comment to mean that Torres would be fired. Tr. 28-29.

After Torres exercised "stop work authority" a group of supervisors came to the location and two other miners used the manlift to complete the task. Tr. 29. Torres used his phone camera to take photos of the miners completing the work for inclusion in a "stop work authority" report. Tr. 34; Sec'y Ex. 2 p. 1-3. According to Torres, he needed to take the photos for use as evidence when raising the safety concern so that this type of incident would not happen again. Tr. 34, 77-78. The photos show two individuals in an elevated manbasket with a length of pipe laying across the top rails of the basket. Tr. 29-32; Sec'y Ex. 2 p. 1-3. The pipe appears to be tied to the railing. Tr. 31. According to Torres, the procedure used by the miners was unsafe because the manlift should not have been used as a crane and the pipe could have exceeded the lift's weight limit and caused the lift to tip or hydraulics to fail, which could in turn cause an injury. Tr. 30.

At some point Torres traveled with Rumegus Eaton, the general foreman, to Yates's office to fill out a report about the manlift incident. Tr. 35; Sec'y Ex. 3. Torres met with Bryan French, who Torres described as the project manager, Jimmy Hayes, the millwright superintendent, and others. Tr. 58-59. Torres testified that neither French nor Hayes said it was wrong for Torres to use his "stop work authority," but both talked to Torres about how using the phone to take photos

[3] Only one other certified welder was left at the facility after April 13. Tr. 19.

[4] On cross-examination Torres acknowledged there is an attachment approved by the manlift manufacturer that can be used to safely raise and lower pipe with the lift. Tr. 65-66. However, the attachment could not be found on April 10. Tr. 65.

[5] Torres acknowledged that he was trained how to use "stop work authority." Tr. 72.

was against policy.[6] Tr. 59, 63. On cross-examination Torres acknowledged employees had been terminated in the past for taking photos and that he could have been terminated for that reason. Tr. 64. However, Torres received no discipline that day. Tr. 64-65. Torres ultimately left the office and went back to work on a task at a different location than where the manlift incident occurred. Tr. 67.

During the morning task meeting on April 11, the day after the manlift incident, Jose Segovia, a Yates foreman, gave Torres a written list[7] of tasks to complete in a different area of the facility than where Torres had worked on April 10. Tr. 36-38, 68; Sec'y Ex. 4. Torres's crew included two employees that had worked with Torres on April 10 and had been involved in the manlift incident. Tr. 66-67. According to Torres, the task list surprised him because it included tasks not normally undertaken by millwrights, tasks which only certain other crews were allowed to complete, and tasks for which Torres was overqualified. Tr. 38-39. Moreover, when speaking to a coworker during his lunch break that day, Torres learned that other employees were performing tasks that normally would have been performed by Torres. Tr. 39-40.

During the morning task meeting on April 12, two days after the manlift incident, Torres was surprised to learn that he was again assigned tasks outside of his normal duties and was not provided the necessary materials to complete those tasks.[8] Tr. 41-42. However, on cross-examination, Torres conceded the missing materials were things a millwright would use to install equipment and some of the tasks assigned on both April 11 and 12 were typical for a millwright. Tr. 73-74.

Torres testified that at some point on April 12 a coworker informed Torres that Eaton had told that coworker that people involved in taking photos of the manlift incident were going to be laid off. Tr. 44-45.

On April 13 Eaton pulled Torres and another individual from the morning task meeting and told them to gather their belongings because they were being laid off. Tr. 43. Both Torres and the other individual had exercised their "stop work authority" on April 10. Tr. 46. Eaton did not provide Torres with a reason for the layoff. Tr. 46.

At hearing, Torres stated he believed he was assigned tasks outside of his craft on April 11 and 12 and ultimately terminated because he raised safety concerns about the manlift and exercised his "stop work authority" on April 10. Tr. 42-43, 46-47. According to Torres, no one from Yates ever told him why he was laid off. Tr. 46. Torres filed his complaint of discrimination on April 19. Tr. 23; Sec'y Ex. 1.

---

[6] At hearing, Torres conceded that he was aware there was a policy against taking photos at the facility and that he violated that policy on April 10. Tr. 53, 63-64.

[7] Torres did not know who wrote the list. Tr. 68.

[8] Some of the April 12 assigned tasks were included on the written list provided to Torres on April 11. Tr. 41-42. Torres testified that the tasks assigned on April 12 required bolts, hardware, flanges, and hoses that were not provided. Tr. 42, 73-74

Torres testified he was never told that his work was deficient, and he had no reason to believe Yates was dissatisfied with his work. Tr. 47. On cross-examination Torres acknowledged he had been disciplined by Yates in the past after multiple instances of absenteeism/tardiness. Tr. 59-62; Yates Ex. R2. Still, Torres testified he wants to return to work for Yates, and, based on seeing the car of one of his former millwright coworkers at the facility on June 19, believes there is still millwright work to be done at the facility. Tr. 48. However, on cross-examination Torres acknowledged that, given that he did not know what millwrights were still at the facility, he could not compare his skillset to the skillsets of those individuals. Tr. 70-71.

Torres acknowledged he knew the government was involved in the Mountain Pass project and Yates was building facilities for processing rare earth metals. Tr. 52-53. Further, he understood that the job was temporary and was approaching completion at the time of his layoff.[9] Tr. 52, 68. Although he was aware many millwrights and structural welders were laid off prior to his termination, he did not expect to be laid off on April 13 because he was still getting millwright work.[10] Tr. 74-75.

Torres testified he is not from the area and only relocated to the area when he started the job in September. Tr. 48-49. He has had difficulty meeting financial obligations since being terminated. Tr. 49.

Kyle Jackson

Kyle Jackson[11] was the MSHA Special Investigator charged with investigating Torres's complaint. Tr. 87-88; Sec'y Ex. 1. As part of his investigation, he contacted both Torres and personnel from Yates. Tr. 88. Based on his investigation, Jackson determined that Torres's complaint was made in good faith and not frivolously brought.[12] Tr. 88.

---

[9] Torres conceded that at the time of the hearing he did not know the state of the project or if the equipment and machinery were in working order. Tr. 80-81.

[10] Torres acknowledged there was not much welding work available at the time of his termination. Tr. 75. Torres was also aware that four millwrights were laid off the week after his termination, one of whom was involved in the manlift incident and three of whom were not. Tr. 75-76.

[11] Jackson has been with MSHA for 22 years. Tr. 85. As a special investigator, part of his job is to investigate discrimination cases brought under section 105 of the Mine Act. Tr. 86-87.

[12] Jackson testified regarding two citations issued to Yates for alleged violations of mandatory standards during a hazard complaint inspection. Tr. 89-93; Sec'y Ex. 5. According to Jackson, the condition or practice described in the two citations was the same as that which Torres used to justify exercising his "stop work authority" during the manlift incident. Tr. 92. Jackson explained that the first citation was issued to address the hazard of raising and lowering pipe with the manlift when the pipe is only tied off to the basket, while the second citation was issued to address the hazard of the person directing the work not being task trained on safe operation of the manlift. Tr. 93.

On cross-examination Jackson agreed that during his inspection he learned Yates's work at the facility was temporary and originally scheduled for completion in May of 2023. Tr. 95-96. Further, he agreed the number of Yates employees had drastically decreased in recent months, including a reduction in the number of millwrights from over 100 to less than five, a reduction to zero structural welders, and a reduction in the total number of employees from roughly one thousand to less than 25. Tr. 96, 99, 102, 25. Jackson further acknowledged that four millwrights were laid off the week after Torres's layoff, and only one of those individuals was involved in the manlift incident on April 10. Tr. 105-106. Jackson agreed those layoffs indicated that millwrights were not needed by Yates at that time. Tr. 106.

Jackson conceded he had no knowledge regarding the skillsets of the few remaining millwrights and did not try to compare Torres's skillset as a millwright or structural welder to the skillsets of those individuals still onsite. Tr. 99-101. Moreover, although Jackson testified he was aware of the of the general duties of millwrights in other industries, he acknowledged he was not aware of the typical duties of millwrights for Yates, including whether raising and lowering pipe was a normal millwright duty. Tr. 103.

On cross-examination Jackson agreed Yates had in place a policy against taking photos and Yates had terminated other employees for violating that policy. Tr. 97. Moreover, he agreed Torres violated that policy on April 10. Tr. 98.

During Jackson's investigation Yates provided him with a list of laid off employees. Tr. 93-94; Yates Ex. R4. At hearing, Jackson testified the list did not change his determination that Torres's complaint was not frivolously brought. Tr. 94, 106. Although Jackson agreed Yates was conducting mass layoffs, he testified Torres's layoff on April 13 could nevertheless have been discriminatory because it occurred within three days of Torres's protected activity. Tr. 107. Moreover, according to Jackson, Torres brought his claim to MSHA in good faith and believed the layoff was a result of his protected activity. Tr. 109.

Jimmy Hayes

Jimmy Hayes was Yates's millwright superintendent at the facility until June 8, at which point he was taken off the project due to downsizing.[13] Tr. 113.

Hayes explained that Yates was contracted to build a rare earth mineral processing facility at the mine. Tr. 114. According to Hayes, the rare earth mineral processing facility will be only the second in the world, with the other being in China. Tr. 114. The Department of Defense runs the facility and, given the need to keep information about the facility from getting out, taking photos with phones is prohibited unless a person has proper clearance to do so. Tr. 114, 118. Hayes testified that employees have been terminated for violating this policy. Tr. 117.

[13] Hayes is currently employed by Yates as a project superintendent, presumably at a different Yates job site. Tr. 112. Hayes has been with Yates for approximately 13 years and has worked in construction for 28 years. Tr. 112.

Hayes explained that Yates's project was originally scheduled to be completed in April of 2023.[14] Tr. 115. Although the project has not yet been completed it has been winding down throughout 2023. Tr. 115. Hayes testified that, at the project's peak, Yates employed roughly 110 millwrights. Tr. 126. As of April 13, only 14 millwrights remained. Tr. 126. As of June 8, there were no structural welders and only four millwrights and one millwright foreman working on the project. Tr. 125-126. According to Hayes, the millwrights remaining on June 8 were "exceptional" and capable of doing every task. Tr. 126-127. Although Hayes is no longer working at the mine, he is aware that only two millwrights currently remain and there is no millwright work. Tr. 136-137. The remaining millwrights are essentially on "standby" in case there is an issue with a pump and are not doing true millwright work. Tr. 135-137. Hayes testified that Yates's contract ends on July 1, 2023, and, although extensions are possible, the plan is for all Yates employees to be gone on that date. Tr. 128, 160.

Hayes testified that on April 10 when he learned about the manlift incident he was not concerned about Torres's use of "stop work authority" but was concerned about Torres taking photos at the facility. Tr. 116. As a result, he had Torres come to the office to write a statement. Tr. 116-117.

Hayes and Bryan French, the project superintendent, met with Torres at the office. Tr. 119. Both Hayes and French agreed with Torres's use of "stop work authority." Tr. 119-120. According to Hayes, no one involved with the manlift incident was disciplined for exercising their "stop work authority." Tr. 119. Hayes explained that Torres was not terminated on April 10 for taking photos because the photos were taken in the interest of safety and did not show any processes. Tr. 117.

Following the meeting, Torres went back to work but was assigned tasks in a different area. Tr. 148-149. Hayes testified he did not want conflict among the employees and the job Torres was moved to, i.e., tank cleaning closures, was more important than the pipe task Torres had been assigned to at the time of the manlift incident.[15] Tr. 149. Torres never complained about his assignments after the manlift incident. Tr. 133.

Hayes described the layoff process. According to Hayes, layoffs occur in rounds. Tr. 137. French is responsible for determining how many man hours of work remain at the job and then determining the number of workers needed to complete that work. Tr. 120-121. French then determines the number of employees that must be laid off that round and provides the number to Hayes. Tr. 120. Hayes, as the millwright superintendent, in turn decides which millwrights

[14] At the time Hayes left the project on June 8 Yates had assembled and tested everything and was just waiting on the mine operator to move product through all areas of the facility. Tr. 115.

[15] Hayes testified the pipe task Torres was assigned to on April 10 was completed around April 15 or 16, and all pipe work, including fixing leaks, was completed at some point in April. Tr. 149-150. Although Torres was qualified to raise and lower pipe and fix leaks, Hayes testified that those tasks were not typical millwright duties but could be completed by a millwright. Tr. 150. However, because there was not enough millwright work at the time, Hayes was assigning millwrights tasks outside of their craft. Tr. 151.

should be laid off. Tr. 120. Hayes makes his determination who to lay off based on the working knowledge of the remaining millwrights, whether those individuals have the tools necessary to complete the remaining work, and whether those individuals have issues with absenteeism or tardiness. Tr. 121, 142-143. According to Hayes, there is no written list of criteria or performance evaluation to determine an employee's skillset and most of that determination is made by Hayes when observing the millwrights work in the field. Tr. 144-145. Employees are not given advance notice of layoffs. Tr. 162. Rather, the general foreman notifies the employees that they are being laid off the same day. Tr. 161. The laid off employees then complete the necessary paperwork before warehouse personnel conduct a toolbox check, and then the employees clock out and leave. Tr. 161-162.

Hayes explained that Torres was laid off on April 13 as part of a reduction in force due to a decrease in work for Yates at the facility. According to Hayes, Torres's lack of the necessary skillset, lack of tools, and issues involving absenteeism/tardiness played a part in the decision to include Torres in that round of layoffs.[16] Tr. 123-125, 143. Hayes acknowledged that the factors he considered were not weighted in any way and that, ultimately, it was his decision based on his own experience. Tr. 148.

Hayes testified that Torres lacked the necessary skillset and tools to remain employed at the project. According to Hayes, Torres was classified as a structural welder and all structural welding work had been completed.[17] Tr. 121. Hayes explained that, although there had been no structural welding work for some time, because Torres had been hired as a millwright, Torres was kept on to complete millwright tasks associated with the startup portion of the job. Tr. 121, 140-141. However, once the project entered the startup and commissioning phases, which Hayes described as "fast-paced[,]" "precision" work, Hayes did not believe Torres had the necessary knowledge or skillset to complete the remaining tasks. Tr. 124. Hayes did not believe Torres knew how to use a laser or indicator. Tr. 124. Hayes testified that, even if Torres had the necessary knowledge and skillset, he did not have the necessary tools[18] and even if he did, it may only have helped Torres last another week given that there was very little millwright work and the millwrights that remained were having to work other crafts.[19] Tr. 125, 146.

---

[16] At least one other millwright and three pipe workers were included in the round of layoffs that included Torres. Hayes testified that the decision to lay off Torres and the other employees in that round was made at the same time even though the millwrights were laid off on the April 13 and the others were laid off on April 14. Tr. 152. The individuals laid off on April 14 were laid off on that date because they worked the night shift. Tr. 152; *See* Yates Ex. R4 p. 8. Moreover, according to Hayes the other millwright laid off the same day as Torres lacked the necessary skillset. Tr. 158.

[17] Although one welder remained employed at the facility after Torres was laid off, that individual had much better welding qualifications than Torres, could read drawings, and had the ability to fabricate most anything. Tr. 122. That welder has since been laid off. Tr. 122.

[18] Hayes testified there is a list of millwright tools. Tr. 146.

[19] Hayes agreed that millwrights performed a wide range of tasks and were consistently asked to work on tasks outside of their craft, including changing pipes. Tr. 136.

Hayes also testified that over the course of Torres's employment Hayes generally selected other millwrights for work on critical tasks due to Torres's lack of knowledge. Tr. 141-142. Hayes knew Torres lacked knowledge in certain areas because of conversations with foremen and other employees, and the types of tools Torres had and did not have. Tr. 141-142. Further, Hayes testified that Yates offered voluntary training opportunities for employees to expand their skillsets, but Torres chose not to participate in those sessions. Tr. 142, 154-155.

Hayes testified that even if Torres had the necessary skills and tools, Torres would not have been kept on past April 13 because the remaining millwrights, all of whom had the necessary skills and tools, did not have the absenteeism/tardiness issues Torres had. Tr. 147-148.

Hayes testified that the week after he laid off Torres he had to lay off an entire crew of millwrights, as well as a millwright foreman, due to lack of millwright work. Tr. 123, 130-131; *See* Yates Ex. R4 p. 8. On cross-examination Hayes explained that Torres was not terminated with that group of millwrights because that group had been working with a vendor on a task involving conveyors, and Torres had never worked with that group on that task. Tr. 139. However, Hayes conceded he never asked Torres if he had the skillset for that task. Tr. 140.

Bryan French

Bryan French was, and currently is, Yates's job superintendent at the facility. Tr. 164. French described his position as "high level" and stated he is not involved in crew assignments. Tr. 169-170, 195.

French, like Hayes, testified that the facility is a Department of Defense job meant to compete with China. Tr. 165. Yates was contracted by the mine operator to put in new processes and procedures to extract rare earth minerals. Tr. 165.

French echoed Hayes's testimony that Yates's work at the facility is winding down because the project scope has been completed and Yates is now just waiting on the mine operator to deliver product through each part of the processing facility. Tr. 178. According to French, while there were between 800 and 1000 Yates employees at the facility at the beginning of 2023, that number has dwindled to 20 current employees, none of which are structural welders, and only three of which are millwrights, with one of those three being a supervisor.[20] Tr. 175-178; *See* Yates Exs. R3 (graph depicting total workforce) and R5 (job reports showing decline in number of millwrights during June 2023). French acknowledged that Yates is still performing limited work at the facility and estimated that the three remaining millwrights are working approximately 20 hours per week at present. Tr. 178, 183-184.

On April 10 French met with Torres in the safety office to discuss the manlift incident. Tr. 167. According to French, no one was disciplined for use of "stop work authority" and he even

[20] French testified that on April 13 only a couple hundred Yates employees remained at the facility, with only 15 of those employees being millwrights. Tr. 176-177. At one point there were approximately 120 millwrights working for Yates at the facility. Tr. 179. The only remaining welder at the facility is a pipe welder capable of both pipe welding and structural welding. Tr. 180. Torres was designated as a structural welder and did not weld pipe. Tr. 180.

told Torres he agreed with the decision to exercise "stop work authority." Tr. 168-169. Although French agreed he could have terminated or disciplined Torres for taking photos,[21] he ultimately decided not to do so because the photos were just of the pipe, and not the process, and had been taken in the interest of safety. Tr. 168-169. At some point after meeting with Torres, French made the decision to swap out the crew working on the pipe project because a crane was being called over to complete the task. Tr. 170, 186-187. According to French, Torres was not a certified rigger or signal person and, as a result, was not qualified to work with the crane. Tr. 186-187. Instead, Torres was assigned cleaning and closing tasks that needed to be completed for commissioning.[22] Tr. 170, 186. French explained that one of the reasons he swapped out the crew was because construction workers can be difficult at times, and occasionally workers need to be moved to a different task to get the most out of them and so that no one gets hurt. Tr. 186-187.

French explained that Yates started downsizing in March. Tr. 171. His role in that process involved evaluating the budget and man hours required and then determining how many people were needed in each craft to complete the work. Tr. 171-173, 189. French would then tell his craft superintendents how many of their employees needed to be laid off. Tr. 173. The superintendent then determined who needed to be laid off and justified that decision to French. Tr. 173-174, 189. On cross-examination French conceded there was no objective ranking or measuring system of employees. Tr. 190. French testified that advance notice of layoffs was not provided to hourly employees. Tr. 181.

Here, at some point prior to April 13, French provided the number of needed millwright layoffs to Hayes but did not tell Hayes who to lay off. Tr. 173. Hayes then evaluated his needs in the field and determined that Torres and another millwright should be laid off. Tr. 175, 191. According to French, Hayes justified Torres's inclusion in the layoff because there was no more welding work and what work was left involved precision commissioning tasks that, as far as French knew, Torres did not have the skillset for. Tr. 174-175. Because Hayes worked closely with the employees in the field, French relied on Hayes's evaluation of Torres's skillset. Tr. 191. Although French did not know Torres's skillset for millwright work, he was aware that when Torres was hired he did not have all the tools necessary for millwright work. Tr. 192. Like other hourly employees, Torres was not given advance notice of being laid off. Tr. 181-182. French testified that Torres's use of "stop work authority" played no role in the layoff decision. Tr. 171.

Ultimately, French signed paperwork that indicates Torres was laid off as part of a reduction in force. Tr. 196; Yates Ex. R1. The same paperwork indicates that Torres's job performance was rated as "good" and that Torres was recommended for rehire. Tr. 196-198.

---

[21] French testified that photos cannot be taken at the facility. Tr. 165. French has had to terminate employees for taking photos. Tr. 166. According to French, the decision to terminate an employee for taking photos is "immediate." Tr. 166.

[22] According to French, Torres was not given less desirable jobs because of his use of "stop work authority." Tr. 170. Moreover, Torres never complained about the assignments he was given. Tr. 170-171.

In addition to Torres, another millwright and a group of employees on the night shift were laid off together. Tr, 194-195. French described that round of layoffs as "tough" because he knew Yates was laying off "good help." Tr. 195.

On cross-examination French acknowledged that millwrights can do a wide range of work. Tr. 183. However, he testified that the only millwright work currently left at the facility involves pumps, and he has not seen Torres work on pumps, nor does he know if Torres has the skillset to do so. Tr. 193.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act.[23] 30 U.S.C. § 815(c). A miner who believes they have been discriminated against may "file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). "[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The person against whom relief is sought may request a hearing on the Secretary's application for temporary reinstatement. 29 C.F.R. § 2700.45(c).

The Commission's procedural rules and case law are clear that the scope of a hearing on an application for temporary reinstatement is narrow and "limited to a determination as to whether the miner's complaint was frivolously brought."[24] 29 C.F.R. § 2700.45(d); *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*").

The "not frivolously brought" standard does not require a judge to determine whether sufficient evidence of discrimination exists to justify permanent reinstatement. *JWR* at 744. Rather, under the standard, the judge is tasked with evaluating the evidence of the Secretary's case to determine whether the miner's complaint of discrimination appears to have merit, i.e., a non-frivolous issue of discriminatory motivation. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009).

---

[23] The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("Legis. Hist.").

[24] Although narrow in scope, a temporary reinstatement hearing must be a "full evidentiary process," during which the judge "must consider any evidence which is relevant to the adverse action[,] -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021) (citing *Sec'y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 (Apr. 2021)).

Although the Secretary need not prove a prima facie case of discrimination in a temporary reinstatement proceeding, "it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test." *Id*. at 1088. In order to prove a prima facie case of discrimination the Secretary has traditionally been required to establish that (1) a complaining miner engaged in protected activity and (2) that the adverse action complained of was motivated in part by that activity.[25] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Although direct evidence of a motivational nexus between a protected activity and adverse action is rarely available, the Secretary may establish discriminatory motive by circumstantial evidence such as (1) the operator's knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the miner. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-12 (Nov. 1981).

Unlike a discrimination proceeding in which a judge is tasked with resolving conflicting evidence, in a temporary reinstatement proceeding the judge should not make credibility determinations or weigh the operator's evidence against that of the Secretary's when determining whether to grant the application for temporary reinstatement. *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011); *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings."). Moreover, although evidence directed at an affirmative defense or rebuttal is permitted at a temporary reinstatement hearing, that "evidence may not serve as a basis for denial of reinstatement if it requires resolution of a credibility determination." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021).

A. The Secretary Established that the Complaint Was Not Frivolously Brought

The "not frivolously brought" standard imposes a low standard of proof upon the Secretary. Here, I find that the Secretary met that standard and that Torres's complaint involves a non-frivolous issue of discriminatory motivation.

The Commission has held that if the Secretary shows that the mine operator had knowledge of protected activity and that the time between the protected activity and the adverse

[25] In 2021 the Ninth Circuit Court of Appeals rejected the Commission's longstanding *Pasula-Robinette* framework and instead adopted a "but-for" causation standard for discrimination cases brought in the Ninth Circuit. *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021). Although the standard for proving discrimination cases in the Ninth Circuit has undoubtedly changed, the Commission has recognized that "the requirements for a full discrimination proceeding do not affect the 'not frivolously brought' standard in a temporary reinstatement case such as this." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 303 (June 2021).

action was short, she has met her burden in most temporary reinstatement cases.[26] Here, the Secretary introduced evidence that Torres engaged in protected activity when he raised safety concerns to Towns, a foreman, and exercised his "stop work authority." Neither Hayes nor French, both members of Yates management, disputed that Torres engaged in that activity, and both confirmed they had knowledge of that activity on the day it occurred. Moreover, there is no dispute Torres was discharged three days after that activity. Given management's knowledge of the alleged protected activity and the temporal proximity between that activity and Torres's discharge, I cannot find that the discrimination complaint filed by Torres was frivolously brought. Rather, I find that Torres's complaint appears to have merit.

In addition to the circumstantial evidence of discriminatory motivation discussed above, the Secretary introduced evidence that Torres was assigned undesirable tasks after engaging in protected activity. Namely, Torres testified he, among other things, was assigned tasks outside of his craft in a different area of the facility than where he had been working, was assigned tasks for which he was overqualified, and was not provided with materials necessary to complete some tasks. Further, Torres testified that prior to April 13 he heard from another employee that Yates planned to lay off employees involved in the April 10 manlift incident. In her closing argument the Secretary asserted that the events described by Torres "showed clear animus" toward Torres because of his protected activity. Tr. 205-207. Although Hayes and French offered testimony that disputes Torres's assertions and provides possible justifications for the work assignment, I am prohibited from weighing that evidence against the Secretary's evidence when determining whether to grant the application for temporary reinstatement. Accordingly, I find that the Secretary's evidence on Yates's alleged animas toward Torres further establishes that the complaint was not frivolously brought.

The Secretary did not discuss or attempt to establish that Torres was subject to disparate treatment. Nevertheless, I find that the circumstantial evidence discussed above establishes that the application for temporary reinstatement was not frivolously brought and that Torres must be **REINSTATED**.[27] However, for reasons set forth below, I find that Yates's reinstatement obligation is tolled.

---

[26] "The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action." *Sec'y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157, 162 (Apr. 2021) (citing *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000)).

[27] In *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018), Commissioner Althen and former Commissioner Young held that a "Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely." The opinion went on to state:

> Thus, all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding — even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge

(continued…)

B. Immediate Reinstatement is Not an Available Remedy

The present case is rather unusual because Yates was rapidly downsizing prior to Torres' discharge, at the time of his discharge, and after his discharge. Although I cannot weigh the evidence presented by the parties when determining whether to grant the application for temporary reinstatement, I can evaluate undisputed evidence concerning events that occurred at the facility in 2023 to determine whether Yates's reinstatement obligation should be tolled.

The Commission has held that certain types of events affect the availability of relevant work at a mine for the miner at issue and may toll an operator's temporary reinstatement obligation. *Sec'y of Labor on behalf of McGoughran v. Lehigh Cement Company LLC,* 42 FMSHRC 467, 470 (July 2020). For example, "changing circumstances," such as layoffs that result in a reduction of the work force, may toll the obligation. *Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.,* 31 FMSHRC 1050, 1054-56 (Oct. 2009). "Operators bear the burden of showing by a preponderance of the evidence that tolling is justified." *McGoughran* at 470 (citing *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res.*, LLC, 35 FMSHRC 394, 397 (Feb. 2013)). "[I]n order for an operator to establish that temporary reinstatement should be tolled based on a subsequent layoff, the operator must demonstrate that 'the layoff properly included' the miner who filed the complaint of discrimination." *Ratliff* at 397 (citing *Gatlin* at 1055).

---

[27] (…continued)
should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve. It is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.

Id. In addition, the opinion stated:

> We may define a "non-frivolous" case as one that is "viable." At the conclusion of a temporary reinstatement proceeding, the Secretary must have shown *by a preponderance of the evidence the existence a claim of discrimination or interference that is capable of succeeding* — that is, a case which is not foreclosed by the evidence available and one for which there is a reasonable cause to believe the complainant may prevail.

Id. at 48 (emphasis added).

The Secretary objected to the evidence presented by Yates regarding the changed circumstances presented by the layoffs at the facility. I overruled the Secretary's objection and allowed Yates to present all of its evidence on this issue as supported by *Sec'y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 (Apr. 2021) and other decisions. Based on the record as a whole I cannot say that the testimony of Torres was "demonstrably false, patently incredible, or obviously erroneous."

It is undisputed that the work being performed by Yates at the Mountain Pass Mine & Mill was winding down starting in March-April 2023. I credit the undisputed testimony of Hayes and French that work for welders was mostly completed at the time of Torres's termination and that there was no remaining work for structural welders at the time of his termination. Torres had been a structural welder for much of his employment in 2023 and he was listed as a structural welder in Yates's list of laid off employees, Yates Ex. R4, and on a disciplinary form, Yates Ex. R2 p. 2

I also credit the testimony of Hayes and French as to the method used when selecting people for layoff. Most importantly, I credit their testimony that, in any event, Torres would not have been one of the two millwrights that were still working as of the date of the hearing in this case. That is, if Torres had never complained about using the manlift to move the pipe or exercised his "stop work authority," he would have been laid off prior to the date of the hearing. *See Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315 (Feb. 2017) (discussing a judge's "ability to review the totality of the evidence in determining whether the operator carried its burden of proving that the employee would have been included in the layoff for reasons wholly unrelated to protected activity."). I specifically credit Hayes's testimony that Torres lacked the skillset to be performing work at the facility during the testing and commissioning phase. The two millwrights who remained as of the date of the hearing had more experience and possessed the specific type of skills that were necessary during this phase. Further, according to Hayes, none of the remaining millwrights had the absenteeism/tardiness issues that Torres had. Hayes described the millwrights who remained after June 8 as "exceptional." Moreover, it is highly likely the two remaining millwrights will be laid off soon because Yates's work at the facility is almost completed. Indeed, Hayes, the millwright superintendent, became a victim of downsizing at the facility on June 8, 2023.

Finally, I credit the testimony of French that one of the currently employed millwrights would have to be laid off to accommodate Torres's reemployment. The remaining millwrights are working about 20 hours a week on standby in case they are needed during testing and commissioning. The undisputed evidence establishes that Hayes and French honestly believed that Torres was not as qualified to do that work as other employees. Once material from the mine has been successfully processed by the facility and commissioning is complete, Yates will apparently no longer have any presence at the mine. If that work has not been completed by the date of this decision, it will be completed very soon.

In *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, 396 (Feb. 2013), the Commission held that "[w]hile the scope of temporary reinstatement proceedings is limited to determining whether the complaint is frivolously brought, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled." There the Commission "reject[ed] the Secretary's argument that the judge . . . exceeded the scope of the temporary reinstatement hearing by considering whether the layoff tolled . . . [the operator's] obligation to temporarily reinstate" the applicant, and instead held that during a temporary reinstatement hearing a "judge may appropriately consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions or similar conditions." *Id*. at 397.

For the reasons stated above, I find that Yates demonstrated by a preponderance of the evidence, almost all of which was undisputed, that Torres would have been properly included in one of the many rounds of layoffs that occurred after April 13, 2023, even if he did not raise the safety issue involving the manlift or exercise his "stop work authority." Given the rapidly dwindling Yates workforce at the facility, and the undisputed evidence that Torres lacked the skillset to be one of the remaining millwrights at the facility, I find that tolling is justified. I credit the testimony of Hayes and French on these facts. Their testimony was internally consistent, and they projected an honest demeanor.

Consequently, the obligation of Yates to reinstate Torres is **TOLLED**. If Yates recalls one or more journeyman millwrights or structural welders to work at the facility, Torres must be placed at the top of the recall list.[28]

ORDER

For the reasons set forth above, I find that the Secretary established that Torres's complaint of discrimination was "not frivolously brought," as that term is understood in section 105(c)(2) of the Mine Act and, accordingly, the Application for Temporary Reinstatement is **GRANTED**. For the reasons discussed above, Torres's reinstatement is **ORDERED** to be **TOLLED** until further notice. If Yates determines that it needs to rehire one or more journeyman millwrights or structural welders at the facility it **SHALL** give Torres the right of first refusal for the position. Both the Secretary and this court shall be notified if Yates determines that it needs to reinstate anyone to those positions. The Secretary **SHALL COMPLETE** her investigation of the underlying discrimination complaint as quickly as possible.[29] I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R § 2700.45(e)(4).

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[28] There is no evidence that Yates is performing work at any other location that is subject to MSHA jurisdiction.

[29] Under section 105(c)(3), the Secretary is required to complete her investigation within 90 days of receipt of the complaint of discrimination.

Distribution: (Certified Mail and email)

Natasha Magness, Esq., Office of the Solicitor, United States Department of Labor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104 (magness.natasha.a@dol.gov)

McCord Wilson, Esq., Rader and Campbell, 2777 N. Stemmons Freeway, Suite 1125 Dallas, TX 75207 (mwilson@radercampbell.com)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW
JUDGES 1331 PENNSYLVANIA AVENUE,
NW, SUITE 520N WASHINGTON, DC
20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

July 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL MINING COMPANY LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207 Mine: Itmann No. 5

ORDER GRANTING MOTION TO CONTINUE, DEFERRING RULING ON MOTION TO BIFURCATE DOCKET, GRANTING CERTIFICATION OF QUESTION FOR INTERLOCUTORY REVIEW

Respondent moved to continue the hearing scheduled for July 25, 2023, because of issues with witness availability for deposition and pending decisions on docket bifurcation and certification for interlocutory review of issues related to this Court's denial of a proposed partial settlement. *See* Mot. to Continue, Docket No. WEVA 2023-0141, at 1–2 (June 23, 2023). The Secretary has similarly expressed such intent. *See* Email from Robert S. Wilson, Attorney for the Department of Labor, to Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young (June 26, 2023; 8:56 a.m. ET).

The Secretary previously moved to bifurcate two unresolved citations from four proposed for settlement. *See* S. Mot. to Bifurcate Docket, Docket No. WEVA 2023-0141, at 1 (June 12, 2023); *see also* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 2 (May 9, 2023). I denied the proposed settlement, not on the merits of the contentions in support, but on the Secretary's continued misstatement of two cases I previously held inapposite to the Secretary's asserted unfettered authority to remove S&S designations. *See* Order Den. Mot. to Approve Settlement & Striking Material from Mot., Docket No. WEVA 2023-0141, at 1–3 (May 11, 2023).

Acknowledging the parties' discovery issues, and for the reasons set forth below, I hereby **GRANT** Respondent's motion to continue the hearing, **DEFER** ruling on the Secretary's motion to bifurcate the docket pending certification and decision by the Commission on the motion to certify an issue in this case for interlocutory review, and **CERTIFY** for interlocutory review the question impeding consideration of the motion to approve settlement.

I. Continuance of This Matter is Appropriate and Will Best Facilitate the Efficient Resolution of the Issues Before Me.

The Secretary had requested that the citations proposed for settlement be bifurcated from those that appear to be progressing toward a resolution at hearing. The operator has now moved to continue those matters.

I generally disfavor continuance for unresolved discovery, but I have approved an amendment of the gravity and negligence findings, and it is important to ensure that the operator is not prejudiced by that decision. *See* Order Granting S. Mot. to Amend Pet., Docket No. WEVA 2023-0141, at 2 (June 16, 2023). Furthermore, a continuance may allow related matters to be tried together, eventually. I therefore find it appropriate to continue the matter and to defer ruling on the motion to bifurcate until such time as it appears that the issues either must or may not be tried together.

II. Certification of the Settlement Issue for Interlocutory Review is Appropriate.

I am skeptical of the need to certify for interlocutory review an issue that may not even be a question of law, let alone a controlling question. Furthermore, as explained below, there is no reason why the Secretary should not comply with an order to remove material that a tribunal has deemed to be offensive. As has been explained *ad nauseum* to the Secretary, these cases have no bearing on the questions before me and will not be considered. Therefore, their absence will not affect the resolution of any issue before me.

It would seem then that the more appropriate course would be to require the offending materials to be excluded, and to permit the Secretary to appeal the question of a tribunal's authority to govern the proceedings before it *after* a final order has been issued. However, I do not have contempt or other power to enforce such an order.

I further note that the Secretary seems not to care whether a final adverse order is issued or not. In a recent case, she appealed an *approved* settlement, apparently having conflated "adversely affected or aggrieved," in section 113(d)(2)(A)(i) of the Act, with "annoyed." *See* S. Pet. for Discretionary Rev., Docket No. WEVA 2023-0092 (June 9, 2023) ("Pocahontas PDR"). While the Commission certainly does have the authority to grant review of important questions without a finding that a party has been adversely affected by a judge's order, *see* 30 U.S.C. § 823(d)(2)(B) (2023), it is telling that the Secretary sought, again, to impose her priorities on the Commission.

I will therefore **CERTIFY** the following questions to the Commission for interlocutory review, in order to break the impasse and permit this case to proceed toward resolution:

1. Whether a Commission Judge may exclude, strike from the record, and refuse to consider material that is scandalous, impertinent, irrelevant, or otherwise inappropriate; and

2. If so, whether the citations to *Mechanicsville Concrete* and *American Aggregates of Michigan* are excludable on that basis.

The parties are further **ORDERED** to continue coordinating with the Court to schedule a new hearing date and effect discovery as permitted by the procedural posture.

III. The Secretary's Citation to *Mechanicsville Concrete* and *American Aggregates of Michigan* Is Not the Result of a "Good Faith" Disagreement, but Rather a Blatant and Obvious Misstatement of the Law.

While I have certified the question for interlocutory review, it is important for the Commission to understand why I have sanctioned the Secretary in this case. The Secretary has asserted that there is some relationship between *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (Aug. 2020), and the question pending review—i.e. "Whether the Secretary has unreviewable discretion to remove an S&S designation." *See* Pocahontas PDR at 2–3. But the language cherry-picked from those decisions, and relied upon by the Secretary, cannot support this groundless argument.

For example, *Mechanicsville Concrete* noted that there is "no material difference between the Secretary's [unreviewable] discretion on the one hand to vacate a citation . . . and his discretion on the other hand not to designate a citation as S&S." Pocahontas PDR at 4 (citing *Mechanicsville Concrete*, 18 FMSHRC at 879). But as the Secretary well knows, there *is* a material difference here.

This case is not in an enforcement posture, where the Secretary has the discretion conferred by Congress and discussed at length in *Mechanicsville Concrete*. This case is before the Commission. And just as Congress granted the Secretary authority over enforcement, it granted adjudicatory authority to the Commission, not to the Secretary. *See* 30 U.S.C. § 830(k) ("No proposed penalty *which has been contested before the Commission* shall be compromised, mitigated, or settled *except with the approval of the Commission.*") (emphasis added). This is black-letter statutory law.

A close reading of *Mechanicsville Concrete*—not the thoughtless recitation of an out-of- context quote that the Secretary would have us consider as an "argument"—thus reveals a disturbing irony. Congress' choices in crafting the Mine Act, and the Commission's respect for the language and structure ordered by Congress are the very bedrock of that decision.

The respect is obviously not mutual. Just as the Commission affirmed in *Mechanicsville Concrete* that the Secretary's authority to assess S&S in the first instance is an enforcement function, the Commission also has affirmed—in accordance with the clear language of the Act— that the Commission, and not the Secretary, is responsible for approving settlements once a matter has been placed before the Commission. *See The Am. Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal I*"); *The Am. Coal Co.*, 40 FMSHRC

983 (Aug. 2018) ("*AmCoal II*").[1] The Secretary, though, continues to pretend as though this didn't happen—that she had somehow prevailed in a matter that entitles her to cite as authority cases that have nothing to do with the Commission's established standards for the approval of settlements.

The citation to *American Aggregates of Michigan* is even more problematic. The language cited by the Secretary, *see* 42 FMSHRC at 576, is clearly dicta. It appears in a section titled "Commission Review" that begins by reaffirming that "*Congress vested the Commission with authority to approve settlements of contested assessments*," citing the language of the Act in section 110(k) of the Act and the Commission's decision in *AmCoal I*. *Id.* at 575 (emphasis added).

In concluding in the next section of the opinion that the judge erred in not approving the settlement, the Commission led by clearly articulating the applicable legal standard, adopted in *AmCoal I*: "[T]he Commission and its judges consider whether the settlement of a proposed penalty is 'fair, reasonable, appropriate under the facts, and protects the public interest.'" *Id.* At 576. The Commission further noted that its review must ensure that "a judge's approval or rejection of a settlement" must be "'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Id.* (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012)).

The disposition nowhere mentions or relies upon the Secretary's exercise of prosecutorial discretion but concludes instead that the Judge "erred by denying the settlement on the basis of an inappropriate legal determination on S&S based on an undeveloped record and in contravention to the facts presented by the parties in support of the settlement." *Id.* at 577. That is the holding of the case, and any second-semester law student who could not recognize it as such would be well advised to seek another line of work.

There is, of course, more firmament supporting the unmistakable basis for the holding. The Commission noted that the problem was that the Judge's decision was "not supported by the facts presented by the parties" and "misapprehended the correct legal standard" established by the Commission in the *AmCoal* cases. *Id.* at 577.[22]

---

[1] It is worth noting that *Mechanicsville Concrete* was decided decades before the Commission decisions in the *AmCoal* cases, which as explained, *infra*, unquestionably control the review of settlements by the Commission and its judges.

[2] The Commission identified nine distinct factual circumstances related to the proposed gravity and negligence modifications, cited by the parties in the settlement motion, which should have been considered by the Judge, but were not. *See* 40 FMSHRC at 578–79. I concede the possibility that the Commission may find similarly deficient my evaluation of the facts in *Knight Hawk* and/or the other S&S cases I have rejected. But it is beyond question that my analysis will be assessed in accordance with the *AmCoal* standards.

In case there was any doubt about the governing standard applicable to settlements, and the authority for administering that standard, the Commission concluded its disposition by observing, again, that

> Primary authority to approve settlements of contested proposed assessments is vested by Congress to the Commission. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1976. While such authority may be delegated to the Judges, the Commissioners retain such full authority to approve such settlements. Accordingly, we find the proffered penalty to satisfy *AmCoal*.

Id. at 581.

This is all from a case that the Secretary cites as support for her position that she has unreviewable discretion to remove an S&S designation in settling a matter that has been contested before the Commission. Where? *How*? The continued misuse of this authority amounts to a breach of the ethical duty of candor to the tribunal or a woeful ignorance of the law and how it operates, either of which reflects a flagrant disrespect for the law and the tribunals entrusted with its administration.

The operative subtext here is that the Secretary has repeatedly tried to wrest from the Commission its statutory responsibilities under the Act. In addition to challenging the Commission's authority to approve settlements in the *AmCoal* cases, the Secretary proposed a rule requiring the Commission to assess penalties in accordance with 30 C.F.R. Part 100, despite Congress' clear grant of independent authority to assess penalties under the Act. *See* 30 U.S.C. § 820(i); *Criteria and Procedures for Assessment of Civil Penalties*, 79 Fed. Reg. 44,494, 44,510– 11 (July 31, 2014).

The intransigence continues with the offense present in this case. We are at this point because the Secretary has disregarded an order. Told not to include citations to cases that, as fully explained above, are not merely irrelevant to the issue for which they are offered but offensive to constitutional order, she has insisted on citing the cases anyway.[3]

One case, *Mechanicsville Concrete*, stands for the inverse of the Secretary's argument— i.e., the Commission held that Congress' assignment of responsibilities under the Mine Act must be respected. The other case, *American Aggregates of Michigan*, emphatically and unquestionably reinforces the Commission's *AmCoal* standard for reviewing settlements under the Act and cannot be read to support the Secretary's assertion that her authority must instead be unreviewable under any standard.

---

[3] It is not the Secretary's claim of unreviewable discretion itself—which is on review before the Commission—that has offended this Court, but the continued citation to cases I have ordered not be proffered before me because the patently have nothing to do with the issue on review or the issues before me in any proposed settlement. The Secretary need not cite them in support of her position, because they have no persuasive force, but she has nonetheless consciously chosen to disobey my order not to cite them.

Perhaps the Secretary cites these cases because she has no real legal support for her position. A true "good faith argument" in favor of expanding the scope of her unreviewable discretion would rely on the D.C. Circuit's decision in *Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006). Of course, citation to *Twentymile* would spotlight the glaring incongruity between the pure enforcement action there and the settlement review authority present here.

Such review would also be required to concede that far from the absence of standards under which review of purely prosecutorial decisions might be conducted, *see id.* at 155 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)), the Commission has spoken clearly in establishing such standards for the approval of settlements. And the Commission has also provided a standard for determining whether a violation of a mandatory health or safety standard is S&S.[4]

Beyond that, the Commission, and not the Secretary, is entitled to deference in the interpretation and administration of sections 110(i) and (k) of the Act, because Congress vested authority for the administration of those provisions in the Commission. And if ever there was a time when reflexive deference to the Secretary might have held some currency, that hour has passed.

The Supreme Court has narrowed considerably the requirement to defer to the Secretary's interpretation of her regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019).[5] Further, there is a growing recognition of the separation of powers problems inherent with combined prosecutorial and adjudicatory authority. *See Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) ("Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it.").

---

[4] I have not made an S&S determination in rejecting any proposed settlement. Instead, I have affirmed every settlement agreement removing an S&S designation for which the answer to the question, "Would the Secretary be entitled to summary decision on the S&S question based on the facts presented by the parties?" has been, "No."

[5] It should also be noted that section 110(k) was enacted to prevent abuses of discretion by the Secretary, specifically regarding unsupported settlements that did little to enforce the Act and protect miner safety. *AmCoal I*, 38 FMSHRC at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862) ("[T]he Commission reaffirmed in Black Beauty that Congress authorized the Commission to approve the settlement of contested penalties in section 110(k) '[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest."); *id.* (quoting S. Rep. No. 95-181, at 44, *reprinted in Senate Subcommittee* on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978)) ("'By imposing [the] requirements' of section 110(k), it 'intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of the off-the-record negotiations* are avoided.'"). The Secretary should not have the authority to interpret the provision to limit Commission review and enable the offensive settlements Congress intended to prevent.

The Commission does not have the latter problem, because Congress chose to separate enforcement from adjudication under the Act. The sanctity of that choice was recognized in *Mechanicsville Concrete* and its fulfillment has been evinced by the Commission's decisions in the *AmCoal* cases and cases, including *American Aggregates of Michigan,* controlled by the standards enunciated therein.

It is thus abundantly clear that the Secretary's defense of the continued citation to these cases is meritless. Aristotle said, "The law is reason, free from passion." But citations to the law, free from reason, are simple nonsense. Once the lack of any reasonable basis for an asserted legal authority has been pointed out to an attorney *by a judge*, it is incumbent on that attorney to cease engaging in malpractice. The issue presented here is about more than the mere choices made in the citation of cases. While I have certified a question for interlocutory review, an unasked and important question is, "Who determines the appropriate minimum standards of competence and conduct before a tribunal—the tribunal or a party litigant?"

Is there a county magistrate anywhere in the country who would not be offended by the mere suggestion of this inversion of authority? I doubt it, and if the Commission has any self- regard, it will rebuke the Secretary, as I have done, for her disregard for constitutional order and the rule of law, manifested in her continuing contempt for the authority of the Commission and its decisions and orders.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

Attachments:

Appendix A: Secretary of Labor's Motion to Approve Partial Settlement, Docket No. WEVA 2023-0141 (May 9, 2023)

Appendix B: Order Denying Motion to Approve Settlement and Striking Material from Motion, Docket No. WEVA 2023-0141 (May 11, 2023)

Appendix C: Secretary of Labor's Motion to Bifurcate Docket, Docket No. WEVA 2023-0141 (June 12, 2023)

Appendix D: Secretary's Motion for Certification for Interlocutory Review and Stay Pending Review, and Renewed Motion to Bifurcate, Docket No. WEVA 2023-0141 (June 20, 2023)

Appendix D: Motion to Continue, Docket No. WEVA 2023-0141 (June 23, 2023)

Appendix E: Decision Approving Settlement With Significant Reservations, Docket No. WEVA 2023-0092 (May 12, 2023)

Appendix F: Secretary's Petition for Discretionary Review, Docket No. WEVA 2023-0092 (June 9, 2023)

Distribution:

Robert S. Wilson, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450, wilson.robert.s@dol.gov

D. Cass Trent, CLR, U.S. Department of Labor, MSHA, 4499 Appalachian Hwy, Pineville, WV 24874, trent.david@dol.gov

Jim McHugh, Hardy Pence LLC, 10 Hale Street, 4th Floor, P.O. Box 2548, Charleston, WV 25329, jmchugh@hardypence.com

Craig Aaron, CONSOL Energy Inc., 275 Technology Drive, Suite 101, Canonsburg, PA 15317, craigaaron@consolenergy.com

APPENDIX A

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

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2022-0141
Petitioner	:	Assessment Control No. 46-09569-568207
	:	
v.	:	
	:	Mine ID: 46-09569
Consol Mining Company LLC,	:	Mine: Itmann No. 5
Respondent	:	Administrative Law Judge Young

SECRETARY OF LABOR'S MOTION TO APPROVE PARTIAL SETTLEMENT

The Secretary of Labor files this Motion to Approve Partial Settlement, and in support hereof respectfully submits the following.

1. This case involves six 104(a) citations of which four the parties have reached agreement on a settlement. The two remaining citations (Nos. 9590300 and 9590301) are scheduled for hearing July 25, 2023. The Mine Safety and Health Administration ("MSHA") proposed civil penalties for the citations at issue in accordance with the statutory penalty criteria in § 110(i) of the Mine Act, 30 U.S.C. § 820(i). The penalties were regularly assessed pursuant to 30 C.F.R. § 100.3
2. Respondent is the operator of the Itmann mine, Mine ID Number 46-09569, the products of which enter commerce, or the operations or products which affect commerce within the meaning of Section 4 of the Act.
3. Representatives for the parties have considered the alleged violations, the six statutory criteria stated in § 110(i) of the Act, and other non-monetary considerations that fall outside of § 110(i) but that support settlement, and propose to modify the penalties for the settled citations as follows:

Citation	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation
9569452	$1,869	$840	Modify negligence to low
9569457	$563	$133	Modify from reasonably likely to unlikely and from S&S to Not S&S
9569459	$133	$133	Modify negligence to none
9569462	$909	$407	Modify negligence to low
Total	$3,474	$753	

4. 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 983, 987 (Aug. 2018) (citing *American Coal Company*, 38 FMSHRC 1972, 1976 (Aug. 2016)).

5. Consistent with Commission precedent, the Secretary has evaluated the enforcement value of the compromise and is maximizing his prosecutorial impact in partially settling this case on appropriate terms. See *American Coal Company*, 40 FMSHRC 983, 989 (Aug. 2018). Further, the Secretary has considered the deterrent value of the penalty and obtaining a partial resolution to this matter. See *American Coal Company*, 40 FMSHRC 765, 766 n.1 (June 2018). A partial resolution of this matter in which some violations are resolved is of significant enforcement value to the Secretary. The fact that the Secretary modified the citations in this case is immaterial, as the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions and are not subject to potential vacatur or further downward adjustment after a hearing.

6. To assist the Commission in evaluating whether the proposed penalty reductions are fair, reasonable, adequate under the facts, and in the public interest, the Secretary presents the following information. As described more fully below with respect to each citation, and

unless otherwise stated, the parties agree to disagree, and the proposed penalty modifications to these citations are acceptable to the parties in lieu of the hearing process.

A. Citation 9569452 – Respondent argues the condition was likely caused by equipment tramming through the area and could have occurred at any time without management's knowledge. MSHA recognizes that condition could have occurred at any time and without warning. The parties have agreed that the citation shall be modified to low negligence with a recalculation of the penalty from $1,869 to $840 per Part 100.

B. Citation 9569457 – Respondent argues that the cited area was infrequently traveled because it was on the tight side of the belt, between the rib and the belt, and was in an outby area. Respondent also argues that the cited section of rib was not likely to fail, required significant force with a pry bar to pull and disputes the statement that the section of rib was pulled with little effort. Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The parties have agreed that the citation shall be affirmed as otherwise issued and the penalty is recalculated to $133 per Part 100.

C. Citation 9569459 – Respondent would argue at hearing that the citation should be vacated because the cited fire suppression system was in proper working condition and free of any defects. The cited condition was the normal result of mining in the face and the material would have been removed prior to taking the

next cut. The parties have agreed to settle the citation by modifying the negligence to none. The penalty remains at $133.

D. Citation 9569462 – Respondent argues that the cited materials resulted from a combination of spillage, sloughage o the ribs and the scoop cleaning the area creating windrows. The parties agree to modify the citation to low negligence which lowers the penalty to $407 per Part 100.

7. 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 for approval of partial settlement and the entry of the proposed Order Approving Partial Settlement.
8. The parties submit that the foregoing penalty reductions are fair, reasonable, appropriate under the facts, and protect the public interest.
9. The parties agree to bear their own attorney's fees, costs, and other expenses incurred by the parties in connection with any stage of the above referenced proceedings, including attorney's fees which may be available under the Equal Access to Justice Act, as amended.
10. Except for proceedings under the Act, nothing contained herein is intended by Respondent to constitute an admission of a violation of the Act or regulations. Further, except for proceedings under the Act, nothing contained herein is intended by Respondent to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.
11. Within 30 days of an order approving this settlement, the Respondent shall pay a penalty of $753.00 at www.pay.gov or by sending a check made payable to "U.S. Department of

Labor/MSHA" and mailed to the following address: P.O. Box 790390, St. Louis, MO 63179-0390.

WHEREFORE, the parties move the Administrative Law Judge to approve the above partial settlement agreement pursuant to 29 C.F.R. § 2700.31 and to order payment of the proposed penalty of $753.00.

Mailing Address:

Office of the Solicitor
Division of Mine Safety and Health
U.S. Department of Labor
201 12th Street, Suite 401
Arlington, VA 22202-5450

Respectfully submitted,

Seema Nanda
Solicitor of Labor

April E. Nelson
Associate Solicitor for Mine Safety and Health

Jason Grover
Counsel

/s/Robert S. Wilson
Robert S. Wilson
Attorney

UNITED STATES DEPARTMENT OF LABOR

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023, a copy of the foregoing Secretary of Labor's Motion to Approve Partial Settlement was served by Electronic Mail on the following:

James P. McHugh
jmchugh@hardypence.com

Craig Aaron
craigaaron@consolenergy.com

/s/Robert S. Wilson
Robert S. Wilson
Attorney

APPENDIX B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is*. Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing

[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

unless and until a motion that meets the standards of practice before the Commission has been filed.

Michael G. Young
Administrative Law Judge

Distribution:

Robert S. Wilson, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450, wilson.robert.s@dol.gov

D. Cass Trent, CLR, U.S. Department of Labor, MSHA, 4499 Appalachian Hwy, Pineville, WV 24874, trent.david@dol.gov

Jim McHugh, Hardy Pence LLC, 10 Hale Street, 4th Floor, P.O. Box 2548, Charleston, WV 25329, jmchugh@hardypence.com

Craig Aaron, CONSOL Energy Inc., 275 Technology Drive, Suite 101, Canonsburg, PA 15317, craigaaron@consolenergy.com

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR (MSHA) Petitioner, v. CONSOL MINING COMPANY, LLC, Respondent.	)))))))))	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-141 A.C. No. 46-09569-568207 Mine: Itmann No. 5 Mine ID: 46-09569 **The Honorable Judge Michael Young**

SECRETARY OF LABOR'S MOTION TO BIFURCATE DOCKET

The Secretary moves that the Administrative Law Judge issue an Order bifurcating this docket into two dockets so that the case can proceed to hearing on the two unresolved citations in the docket and so the Secretary can pursue an appeal of the May 11, 2023, Order Denying Motion to Approve Partial Settlement and imposing sanctions issued by the ALJ.

1. This docket contains six 104(a) citations. The parties reached a settlement agreement resolving four of the citations. The parties have not reached settlement of the two remaining citations, Nos. 9590300 and 9590301. A hearing is scheduled for July 25, 2023. The parties are engaged in ongoing discovery and hearing preparation for the two unresolved citations. Depositions are scheduled for June 28 and 29. The Secretary recently filed a motion to amend the petition seeking to increase the gravity and negligence findings for the two unresolved citations and to seek correspondingly increased penalties. (See Secretary of Labor's Motion to Amend Petition dated June 6, 2023)

2. The Secretary filed a Motion to Approve Partial Settlement on May 9, 2023, seeking approval of the penalty reductions agreed to by the parties on the four settled citations. The Administrative Law Judge issued an Order Denying Motion to Approve Settlement and Striking

Material from the Motion dated May 11, 2023. That Order denied the motion to approve partial settlement, imposed sanctions on the Secretary and threatened additional more severe sanctions in the future. The purpose of this current motion is to advance the progress and resolution of this case and does not address the merits of the court's May 11 Order. However, the Secretary has filed a Petition for Discretionary Review with the Commission, seeking review of that Order, dated June 9, 2023.

3. Meanwhile, the parties are faced with uncertainty on how to proceed with the matter. The parties continue to prepare for hearing on the two citations that have not been settled but it is unclear how that hearing will proceed. The parties do not want to expend time and resources on the four citations on which the parties agree. On the other hand, the parties do not want to appear at the hearing and be unprepared to address citations that the court expects to be addressed. Additionally, the issues raised and addressed in the Order Denying Partial Settlement do not apply to the two remaining citations in the docket that have not been settled.

4. As a solution to the above stated uncertainty and the conundrum that the parties face, the Secretary moves that the court issue an Order bifurcating Docket WEVA 2023-0141 into two dockets. The newly created docket would contain the two citations not addressed in the Secretary's Motion to Approve Partial Settlement. The four citations that are addressed in that motion would remain in Docket WEVA 2022-411. The Secretary will pursue appropriate appellate remedies to challenge the denial of the motion, the imposition of sanctions and the threat of additional more severe sanctions. The remaining citations, Nos. 9590300 and 9590301, could then be addressed apart from that dispute and would proceed to hearing on July 25.

5. Delaying resolution of the citations not directly involved in the May 11 Order would negatively impact the administration of the Act and would be contrary to the safety promoting

purpose of the Act. A primary purpose of the Act is to protect miners from hazardous conditions. The company has challenged the S&S findings for the two remaining citations. Citation 9590300 involves an inadequately insulated electrical trailing cable exposing miners to an electrical shock or electrocution hazard. Citation 9590301 involves an inadequately supported section of rib which exposed miners to a rib fall hazard. Consol's refusal to acknowledge that these violations contributed to these serious hazards and posed a serious risk of injury raises concerns about Consol's future compliance with the Act. A final resolution of these citations and imposition of an appropriate civil penalty will encourage compliance and will promote protection of Consol's workforce.

6. From the company's perspective, expeditious resolution of the citations is also important. Should Consol prevail on the S&S issues, prompt resolution of those issues is important because the mine's pattern of violations status is based on issued citations and so long as the citations remain unresolved, those violations count towards the mine's POV status.

7. There are additional reasons why prompt finality of the violations at issue promotes the efficient administration of the Act. Pursuant to Part 100.3(c) of the Secretary's penalty regulations, violations are not counted as part of a mine's history of violations until the violation is final. Bifurcating this matter will allow the other citations at issue to become final while the settlement dispute is resolved. Bifurcation and separately addressing the remaining citations will also allow for the timelier imposition of civil penalties for those violations. Prompt assessment and collection of civil penalties for final violations promotes the purpose of the Act and delay in the assessment and collection of those penalties has the opposite effect. Civil penalties are recognized as an important tool in encouraging compliance by mine operators. Allowing these citations to flounder while the settlement issue is resolved will undercut the purpose of the Act

by unnecessarily delaying the finality of those violations and the imposition of civil penalties. Resolution of the issue raised in the court's May 11 Order could conceivably take years pending consideration by the Commission and then possibly a court of appeals.

8. For the above reasons, the Secretary moves that an Order be issued bifurcating Docket WEVA 2023-0141 into two separate dockets, that the hearing scheduled for July 25 proceed and be limited to consideration of Citations 9590300 and 9590301.

9. The undersigned has conferred with counsel for Consol and he has indicated that Consol takes no position on the motion at this time but reserves the right to file a response to the motion pursuant to Commission Rule 10(d).

WHEREFORE, the Secretary moves that an Order be issued bifurcating this docket, creating a new docket, transferring Citation Nos. 9590300 and 9590301to the new docket, and proceeding on those citations as discussed above.

Mailing Address:

Office of the Solicitor
Division of Mine Safety and Health
U. S. Department of Labor
1201 12th Street South
Arlington, VA 22202-5450
(202) 693-9325

Respectfully submitted,

Seema Nanda
Solicitor of Labor

April E. Nelson
Associate Solicitor for Mine Safety and Health

Jason Grover
Counsel for Trial Litigation

/s/Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

Attorneys for Secretary of Labor (MSHA)

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, a true and correct copy of the foregoing Secretary of Labor's Motion to Bifurcate was sent via email attachment to:

James P. McHugh
jmchugh@hardypence.com

/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR (MSHA) Petitioner, v. CONSOL MINING COMPANY, LLC, Respondent.	)))))))))	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-141 A.C. No. 46-09569-568207 Mine: Itmann No. 5 Mine ID: 46-09569 **The Honorable Judge Michael Young**

SECRETARY'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW AND STAY PENDING REVIEW, AND RENEWED MOTION TO BIFURCATE

The Secretary moves that the Administrative Law Judge certify for interlocutory review this question: whether the May 11, 2023, Order Denying Motion To Approve Settlement And Striking Material From Motion is an abuse of discretion. The Secretary also renews her motion to bifurcate and moves for stay of part of the bifurcated docket pending interlocutory review. This will enable the Secretary to appeal the May 11 order while not delaying the resolution of the rest of this case.

Background

1. On May 9, 2023, the Secretary filed a motion to approve partial settlement in this case. The motion explained that the Secretary decided to modify the negligence on three violations in this docket, and on a fourth, to modify the gravity and remove the S&S designation.

2. On May 11, 2023, the Administrative Law Judge issued an order denying that motion and sanctioning the Secretary for articulating her legal position—currently on appeal—that she has unreviewable discretion to remove S&S designations. The order also said that the Secretary should expect increasingly severe sanctions if the Secretary articulates that position in the future.

3. On May 12, 2023, in *Pocahontas Coal Company LLC*, WEVA 2023-0092, the Administrative Law Judge issued an Order Approving Settlement with Significant Reservations in which he put the Secretary's representative on notice that articulating the Secretary's position on S&S removals would result in future sanctions.

4. On June 9, 2023, the Secretary filed a petition for discretionary review of both the May 11 order in this case and the May 12 *Pocahontas* order with the Commission.

5. On June 16, 2023, the Commission granted the Secretary's petition in *Pocahontas* but denied it, without prejudice, in this case. The Commission reasoned that the May 11 order was not a final Administrative Law Judge's order, so interlocutory review was the appropriate way to obtain Commission review. The Commission also noted that the Secretary's motion to bifurcate is pending, and that bifurcating this matter "would both facilitate potential Commission interlocutory review and prevent any unintentional delays leading up to the scheduled hearing on the unresolved citations."

Certification for Interlocutory Review

6. Interlocutory review is appropriate when a ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. 2700.76(a)(1)(i).

7. The May 11 order is based on two legal conclusions: that the Secretary does not have unreviewable discretion to remove S&S designations, and that it is a sanctionable misstatement of law to take the position that she does. If those conclusions are wrong, then the order is an abuse of discretion. *The Am. Coal Co.*, 38 FMSHRC 1972, 1984 (Aug. 2016) ("An abuse of discretion may be found . . . if the decision is based on an improper understanding of the law."). The Secretary seeks certification of questions that will determine whether those conclusions are

wrong. ose questions therefore are controlling, and certification and would materially advance the final disposition of the proceedings. See Wright & Miller, *Federal Practice and Procedure* § 3930 (3d ed.) ("ere is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings.").

8. Certification also is appropriate because the same question—whether it is an abuse of discretion to sanction the Secretary for articulating her legal position on S&S removals—is now pending review in *Pocahontas*. ere is no briefing schedule in that case yet, so certification would not delay the resolution of the issue, and it would be efficient to permit the Commission to resolve this case at the same time as it resolves *Pocahontas*.

Bifurcate

9. e Secretary renews her June 12, 2023, motion to bifurcate. It would be efficient to bifurcate this case for the reasons explained in that motion, and for the reasons contained in the Commission's order denying discretionary review in this case.

Stay Pending Review

10. If the motion to bifurcate is granted, the Secretary moves for a stay of this docket (containing the four settled citations, not the docket containing the two citations to be tried) pending interlocutory review. A stay would allow the underlying legal issues to be resolved, allow the Secretary to preserve her legal position, and allow the parties to preserve the settlement to which they have agreed.

11. e Administrative Law Judge has stayed other similar cases in which settlement denials are pending interlocutory review by the Commission. *See, e.g.*, Order Denying Certification for Interlocutory Review and Staying Proceedings, *Peabody Gateway N. Mining,*

LLC, No. LAKE 2023-0043 (FMSHRC Mar. 8, 2023) (ALJ); Order Denying Mot. to Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Bluestone Oil Corp.*, Nos. WEVA 2022-0176 et al. (FMSHRC Oct. 31, 2022) (ALJ). It would be fair to Consol, and to the Secretary, to take the same approach in this case.

12. The undersigned has conferred with counsel for Consol; it takes no position on the Secretary's motion.

Mailing Address:

Office of the Solicitor
Division of Mine Safety and Health
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202
(202) 693-9325

Respectfully submitted,

Seema Nanda
Solicitor of Labor

April E. Nelson
Associate Solicitor

Jason Grover
Counsel for Trial Litigation

/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

Attorneys for Secretary of Labor (MSHA)

Certificate of Service

I hereby certify that on June 20, 2023, a true and correct copy of the foregoing motion was sent via email attachment to:

James P. McHugh
jmchugh@hardypence.com

/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

APPENDIX E

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

May 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0092 A.C. No. 46-08878-565698
v.	
POCAHONTAS COAL COMPANY LLC, Respondent	Mine: Affinity Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citation at issue was $3,171.00, and the proposed settlement amount is $2,695.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550934	$169.00	$169.00	None.
9550935	$169.00	$169.00	None.
9550936	$169.00	$169.00	None.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550403	$133.00	$133.00	None.
9550937	$169.00	$169.00	None.
9550938	$169.00	$169.00	None.
9550939	$183.00	$183.00	None.
9550940	$169.00	$169.00	None.
9550941	$198.00	$198.00	None.
9550942	$188.00	$188.00	None.
9550943	$169.00	$169.00	None.
9550404	$169.00	$169.00	None.
9557339	$610.00	$134.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S," and negligence from "Moderate" to "Low."
9551135	$169.00	$169.00	None.
9551136	$169.00	$169.00	None.
9551137	$169.00	$169.00	None.
Total	**$3,171.00**	**$2,695.00**	

The parties have set forth the justification for the modifications in the motion filed by the Secretary. 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). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violation has been considered. The negligence and gravity of the violation are addressed in the motion, in the citations, and in the file in general.

Citation 9557339 concerns a failure to conduct a required methane test. The cited provision states:

> A qualified person shall make tests for methane—(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

30 C.F.R. § 75.362(d)(1)(iii) (2023). The citation reads, in part:

> The roof bolt operators installing permanent roof support on the No. 3 active section (005-0 / 002-0 MMU's) in the 5X6 cross-cut exceeded the 20 minute required methane test. The roof bolt operators were being observed installing bolts, when 25 minutes elapsed and no attempted [sic] was made to take the required methane test. Asked the operators what time was the last methane test was [sic] taken, both operators could not say when the methane test was made.

> The roof bolting machine was shut off and an examination was made with an extendable probe and large display CH4 detector. This mine is on a 10 day methane spot.

Citation No. 9557339 (Sept. 8, 2022).

The Secretary submitted a settlement motion on April 19, 2023, but I expressed my reservations caused by the inadequate support for the removal of the S&S designation. *See* Email from Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young, to Douglas W. Johnson, CLR, MSHA (Apr. 20, 2023; 10:25 a.m. ET). In her amended motion, the Secretary provided more thorough Respondent contentions challenging the likelihood of the hazard occurring:

> The Respondent would have argued at hearing that no methane was found on the section during numerous pre and on-shift examinations prior to the issuance of this citation and that this is normal for this mine. Though this mine does liberate substantial amounts of methane and is a "spot" inspection mine, most methane enters the mine's ventilating area from worked out areas where methane enters the mine through cracks in the mine floor from a coal seam below that develop after a panel or area has been mined.
>
> The mine had no prior history of methane inundations from active workings of the mine nor any history of methane ignitions. The Respondent would have argued that a hazardous accumulation of methane in the face area where this bolting machine was operating was highly unlikely and virtually impossible with even a modest quantity of ventilating air. The quantity of ventilating air in this face area where the roof bolter was operating was in compliance with the mine's approved ventilation plan which experience has shown to be more than capable of diluting hazardous gases including methane and dust, rendering them harmless and carrying them away.
>
> The inspector, a roof control specialist, observed the roof bolting crew perform work in this area for approximately twenty-five (25) minutes before issuing this citation. Had the inspector reasonably believed that the cited condition presented a hazard, such that the condition warranted an S&S issuance, then he likely would not have permitted the miners to be unnecessarily exposed to the alleged S&S hazard for an additional five (5) minutes. Additionally, the area was nearly bolted and only a few minutes work remained to complete the bolting cycle. Thus, the miners were near the face area at the time of issuance and no methane was detected at any time.
>
> Both of these roof bolter operators carried properly calibrated multi-gas detectors which would have provided an alarm of elevated methane should it be encountered. Upon issuance of the citation, they backed the roof bolting machine out of the cut and ran the remote "probe", containing a methane detector, up into the face area to take the required 20 minute gas check as part of the abatement

> effort. The probe went just as far as the two miners had been standing moments before with their own multi-gas detectors. No methane was found by the remote probe.

S. Mot. to Approve Settlement, at 3–5 (May 11, 2023).

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

I find the contentions meet the bare minimum standards for relevance and plausibility to support removal of the S&S designation. The Secretary provides multiple Respondent contentions that are precedentially irrelevant to an S&S analysis. The hazard contemplated by the cited provision is the ignition of methane. The following contentions do nothing to challenge the likelihood of the hazard occurring, or any of the other *Mathies* elements.

An S&S analysis assumes the continuation of normal mining operations without abatement of the violative condition. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement of inference that the violative condition will cease.").

Respondent's contentions that no methane was found during pre- and on-shift inspections, that there is no history of methane inundations, and that no methane was found in the test made to abate the violation, are therefore irrelevant. Respondent was conducting roof bolting operations, and methane accumulations have been found to occur without warning—thus requiring compliance with provisions that prevent possible ignition sources, like permissibility requirements. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014) ("[G]iven the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur."). As I assume a methane build up at a gassy mine is reasonably likely to occur suddenly during continued operation, any reference to a lack of methane, past or present, is irrelevant to my evaluation.

Commission judges may not consider redundant safety measures in an S&S evaluation. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028–29 (D.C. Cir. 2013) ("'[C]onsideration of redundant safety measures,'—that is, 'preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely'—'is inconsistent with the language of [Section] 814(d)(1).'"). Multi-gas detectors, both personnel- and equipment-based, are redundant safety measures, on top of the requirement to conduct regular tests, aimed at preventing the hazard. References to such are therefore irrelevant to challenge S&S.

The Secretary, nonetheless, appropriately challenged the likelihood of the hazard by citing the available ventilation and time of violation. While lacking specificity and being minimally persuasive, Respondent contended that the quantity of ventilating air may have been demonstrated as sufficient to prevent ignition. I also recognize, to a miniscule extent, the minimal time Respondent was allegedly in violation.[1]

While I am skeptical of the decision to delete the S&S designation, the explanation in the motion is not facially implausible. It is possible that at hearing, if supported by substantial evidence, the violation might not be proved to be S&S. Applying the *American Coal* factors to the settlement as a whole, I have also considered that all of the other violations have been accepted as issued, and that the reduction in the overall penalty is minimal.

I separately emphasize that the Secretary again inappropriately asserted her authority to remove S&S designations, citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–80 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020). S. Mot. at 5. I have repeatedly explained, as have other Commission judges, that these cases are irrelevant to my evaluation of the proposed removal of S&S designations in settlement. *See*, *e.g.*, Order Accepting Appearance & Denying Mot. to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023).

I made clear to the Secretary that this constitutes misstating the law, and I cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me. *Id.* As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice.

Having considered the representations and documentation submitted, I find that the modifications are minimally reasonable, and concede, with noted concern, that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

It is **ORDERED** that for Citation No. 9557339, the gravity be **MODIFIED** from "Reasonably Likely" to "Unlikely," and the "S&S" designation be removed, and the negligence be **MODIFIED** from "Moderate" to "Low."

[1] I do not accept the contention that the inspector's failure to cite for five minutes demonstrates his belief that the hazard was not likely, nor is that an appropriate consideration. I simply acknowledge that the combination of the purported quantity of ventilating air and the short duration of exposure might demonstrate at hearing that the hazard was unlikely to occur.

It is also **ORDERED** that the Respondent pay the Secretary of Labor the sum of **$2,695.00** within 30 days of the date of this decision.[2]

Michael G. Young
Administrative Law Judge

Distribution (by email):

Douglas W. Johnson, CLR, U.S. Department of Labor, MSHA, 1293 Airport Road, Beaver, WV 25813, johnson.douglas@dol.gov

Jonathan R. Ellis, STEPTOE & JOHNSON PLLC, Chase Tower, Seventeenth Floor, P.O. Box 1588, Charleston, WV 25326, jonathan.ellis@steptoe-johnson.com

[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

APPENDIX F

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Mine Safety and Health Administration (MSHA), Petitioner v. Pocahontas Coal Company LLC, Respondent	Docket No. WEVA 2023-0092

Secretary's Petition for Discretionary Review

The Secretary seeks review of part of the judge's May 12, 2023 order in this case. (A copy is attached as Exhibit A.) The order sanctions the Secretary for articulating the Secretary's legal position about her authority to remove S&S designations—an issue that is on appeal—by putting the Secretary's CLR "on notice" and threatening to bar the CLR from practicing if the CLR articulates that argument again. The Secretary seeks review of the part of the order putting the CLR on notice and threatening future sanctions, because a necessary legal conclusion is erroneous, and because that part of the order is contrary to law and involves substantial questions of law, policy, and discretion. See 30 U.S.C. 823(d)(2)(A)(ii)(II), (III), (IV).

The issue presented for review is: did the judge abuse his discretion by sanctioning the Secretary for articulating the Secretary's legal position, and by threatening to sanction the Secretary for articulating that legal position in the future?

Background

1. The Secretary's position on removing S&S designations

In fall 2021, the Judge Young denied a motion to approve settlement in a case involving three violations. Ord. Denying Mot. to Approve Settlement, *Knight Hawk Coal, LLC*, No. LAKE 2021-0160 (FMSHRC Sept. 30, 2021) (ALJ Young). The operator accepted one violation as issued and decided to pay the proposed penalty; Secretary decided to reduce the gravity from reasonably likely to unlikely, and to remove the S&S designation, on two violations. The Secretary filed a motion to approve settlement, and then in response to the judge's request for more facts, two amended motions. The motions provided facts in support of the gravity reduction and articulated the Secretary's longstanding position that she has unreviewable discretion to remove an S&S designation. The motion cited *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), and *American Agregates of Michigan, Inc.*, 42 FMSHRC 570 (Aug. 2020) to support this position. The judge denied the motion because, in his view, the Secretary had not provided enough facts to justify removing the S&S designation on one violation. *Knight Hawk* Ord. 3-5. The Secretary then filed a motion to certify for interlocutory review the question of whether the Secretary has unreviewable discretion to remove an S&S designation; the judge certified the question, and on April 7, 2022, the Commission directed review.

Later in 2022, the judge denied two other settlements and certified the same question for interlocutory review. Ord. Denying Mot. To Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Bluestone Oil Corp.*, Nos. WEVA 2022-0176, WEVA 2022-0350 (FMSHRC Oct. 31, 2022) (ALJ Young); Ord. Denying Mot.

To Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Greenbrier Minerals, LLC*, Nos. WEVA 2022-0403 (FMSHRC Nov. 22, 2022) (ALJ Young). The Commission directed review in both cases. And in March 2023, the judge stayed another case pending the same issue, but did not certify for interlocutory review; he reasoned that "[c]ertification will not materially advance the proceeding's final disposition—the question has already been pending before the Commission for 11 months, and it seems unlikely that a grant of interlocutory review here will accelerate a decision on the question and may delay one." Ord. Denying Certification for Interlocutory Rev. and Staying Proceedings, *Peabody Gateway N. Mining, LLC*, No. LAKE 2023-0043 (FMSHRC Mar. 8, 2023) (ALJ Young).

While the appeal has been pending, the judge has rejected the Secretary's position but approved settlements in many cases. See, *e.g.*, *Appalachian Res. W. Va.*, Nos. WEVA 2022-0464, WEVA 2022-0590 (FMSHRC Jan. 10, 2023) (ALJ Young); *Casella Constr. Inc.*, No. YORK 2022-0068 (FMSHRC Dec. 5, 2022) (ALJ Young); *Raw Coal Mining Co., Inc.*, No. WEVA 2022-0297 (FMSHRC Oct. 7, 2022) (ALJ Young). Sometimes the judge has approved settlements without remarking on the Secretary's position at all. See, *e.g.*, *Phillips & Jordan, Inc.*, Nos. SE 2022-0092 et al. (FMSHRC Jan. 3, 2023) (ALJ Young); *Prospect Mining & Dev. Co., LLC*, Nos. SE 2022-0034, SE 2022-0035 (FMSHRC Oct. 20, 2022) (ALJ Young).

On appeal, the Secretary has argued that she has unreviewable discretion to remove S&S designations, supporting that argument in part with the Commission's decisions in *Mechanicsville* and *American Agregates*. See Brief for the Sec'y of Lab. at 3-5, *Bluestone Oil*

Corp., Nos. WEVA 2022-0176, WEVA 2022-0350 (Jan. 6, 2023); Brief for the Sec'y of Lab. at 3-5, *Greenbrier Minerals, LLC*, No. WEVA 2022-0403 (Jan. 5, 2023); Brief for the Sec'y of Lab. at 4-5, 11-12, *Knight Hawk Coal, LLC*, No. LAKE 2021-0160 (May 9, 2022). In *Mechanicsville*, the Commission said that there is "no material difference between the Secretary's [unreviewable] discretion on the one hand to vacate a citation . . . and his discretion on the other hand . . . not to designate a citation as S&S." 18 FMSHRC at 879. And in *American Agregates*, the Commission held that the judge abused his discretion by rejecting a settlement in which the Secretary removed an S&S designation because the judge did not believe that removal was justified; the Commission said that "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion," so that "if MSHA does not charge an S&S violation, the Commission cannot make an S&S finding. Commission Judges do not have the discretion to make such elevated finding unless it is asserted in the first instance by MSHA." 42 FMSHRC at 576 (citation to *Mechanicsville* omitted). Since the appeal has been pending, when the Secretary has filed motions to approve settlement in cases in which the Secretary has decided to remove an S&S designation, the Secretary has continued her longstanding practice of articulating that she has discretion to do so, citing *Mechanicsville* and *American Agregates*.

The Commission has not decided the S&S-removal cases. Judges have taken different approaches to settlements in which the Secretary has removed an S&S designation. Sometimes judges do not comment on the Secretary's position. See, *e.g.*, *Knight Hawk Coal, LLC*, No. LAKE 2023-0095 (FMSHRC Apr. 19, 2023) (ALJ Paez); *W.A. Murphy*

Inc., No. WEST 2023-0005 (FMSHRC Apr. 19, 2023) (ALJ Manning); *Quikrete Cos., Inc.*, No. CENT 2023-0003 (FMSHRC Apr. 18, 2023) (ALJ Bulluck); *Twin State Mining, Inc.*, No. WEVA 2022-0391 (FMSHRC Jan. 24, 2023) (ALJ Sullivan); *Continental Cement Co.*, No. CENT 2022-0236 (FMSHRC Jan. 10, 2023) (ALJ Simonton); *Consol Penn. Coal Co. LLC*, No. PENN 2022-0061 (FMSHRC Jan. 10, 2023) (ALJ Lewis). Sometimes judges reject the position but consider the merits of the settlement. See, *e.g.*, *Hibbing Taconite Co.*, No. LAKE 2022-0176 (FMSHRC Jan. 26, 2023) (ALJ McCarthy); *Appalachian Res. W. Va., LLC*, No. WEVA 2022-0554 (FMSHRC Jan. 24, 2023) (ALJ Moran); *Grimes Rock, Inc.*, No. WEST 2022-0336 (FMSHRC Dec. 30, 2022) (ALJ Miller).

2. Recent ALJ orders on S&S removals

On April 25, 2023, Judge Moran issued an "Order Approving Settlement with Significant Reservations." *Consol Pennsylvania Coal Co., LLC*, No. PENN 2022-0129 (FMSHRC Apr. 25, 2023) (ALJ Moran) (Ex. B). In it, Judge Moran said that citing *Mechanicsville*[1] for the S&S-removal position was a violation of an attorney's "obligation not to misstate case law" and told the Secretary to "cease invoking that decision for propositions not supported by it." *Id.* at 6. The judge also asserted that Federal Rule of Civil Procedure 11, which requires attorneys to ensure that the "legal contentions [in a pleading] are warranted by existing law or by a nonfrivolous argument for extending, modifying, or

[1] That motion to approve settlement did not cite *American Agregates*, which may explain why the judge did not discuss it.

reversing existing law or for establishing new law," is implicated by the Secretary's position. Fed. R. Civ. P. 11(b)(2); Ex. B at 6.

About a week later, without reaching the merits of the settlement, Judge Young issued an order denying a settlement that removed two S&S designations. Ord. Accepting Appearance & Ord. Den. Mot. to Approve Settlement, *Extra Enery, Inc.*, No. WEVA 2023-0071 (FMSHRC May 4, 2023) (ALJ Young) (Ex. C). In it, the judge disapproved of the Secretary's position on S&S removals, saying that it is inappropriate to cite *Mechanicsville* and *American Agregates* because "[t]hese cases are known by now to be invalid as authority for the principles they claim to represent." *Id.* at 7. The judge quoted Judge Moran's order, noted that Rule 11 sanctions may be imposed for "misstating" the law, and threatened to impose sanctions:

> There are minimum standards of practice in every tribunal, including this one. Erroneous mischaracterizations of precedent fail to meet those standards and will not be tolerated. A CLR who cites these cases, falsely, in a subsequent motion as they have been cited here may be barred from practice before me. There may be other consequences.

Ibid. (footnote omitted). In a footnote, the judge also said that "Although these cases were included by a pleading drafted by a CLR, I would expect an attorney to know better, and a transgression against the law of this sort by an attorney would be even more egregious." *Ibid.* n.5. The judge also served the Department of Labor's CLR Coordinator, an attorney in the Division of Mine Safety and Health in the Office of the Solicitor, even though the attorney had not entered an appearance. The judge did not acknowledge that the S&S-removal issue is on appeal.

About a week after *Extra Enery*, the judge issued an order denying settlement and sanctioning the Secretary by striking from the record the Secretary's position on S&S removals.[2] Order Denying Mot. to Approve Settlement and Striking Material from Mot., *Consol Mining Co. LLC*, WEVA 2023-0141 (FMSHRC May 11, 2023) (ALJ Young) (Ex. D). Ignoring any review under Section 110(k), the judge discussed his order in *Extra Enery*, then said that this settlement motion contained the same "offending citations," which are "obviously inappropriate" and "impertinent." *Id.* at 2. The judge sanctioned the Secretary's representative by striking from the motion to approve settlement the Secretary's position on S&S removals and threatened to impose more severe sanctions in future cases: "those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued." *Ibid.* Finally, the judge denied the settlement "without reaching the merits." *Ibid.*

3. This case

The day after his order in *Consol*, the judge issued the order in this case. See Ex. A. The case involves 16 violations. The operator accepted 15 as issued and decided to pay the proposed penalties; the Secretary decided to modify one violation by reducing the gravity and negligence and removing the S&S designation. (That was Citation No. 9557339, which alleged a violation of 30 C.F.R. 75.362(d)(1)(iii) for roof bolters that failed to take methane checks every 20 minutes.)

[2] The Secretary filed a petition for discretionary review of this order concurrently with this petition for discretionary review.

Consistent with the Secretary's position on appeal, the motion to approve settlement provided facts supporting the reduction in gravity and negligence and articulated the Secretary's position that she may remove S&S designations without Commission approval, citing *American Agregates* and *Mechanicsville*. Although the judge approved the settlement, the judge "separately emphasize[d] that the Secretary again inappropriately asserted her authority to remove S&S designations," cited his order in *Extra Enery*, and "cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me." Ex. A at 5. The judge said that, "As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice." *Ibid*.

The judge also served the order on the Department of Labor's CLR Coordinator, an attorney in the Division of Mine Safety and Health in the Office of the Solicitor, even though the attorney had not entered an appearance. The judge did not acknowledge that the S&S-removal issue is on appeal.

Argument

1. There is no legal basis for sanctioning, or threatening future sanctions against, the Secretary.

The judge's order is legally wrong, see 30 U.S.C. 823(d)(2)(A)(ii)(II)-(III), because articulating the Secretary's position on S&S removals is not sanctionable conduct.

Commission practitioners "shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. 2700.80(a). Those standards include the obligation to ensure that the "legal contentions [in a pleading] are

warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law " Fed. R. Civ. P. 11(b)(2).

It is not unethical or unprofessional to cite *Mechanicsville* and *American Agregates* for the proposition that the Secretary has discretion to remove an S&S designation. As the Secretary has argued in the cases pending before the Commission, that *is* what those cases mean. But even if those cases did not directly support the Secretary's argument, they certainly support a nonfrivolous argument for extending or modifying existing law. The pending appeal shows as much. See *supra* pp. 2-5. And the Secretary did not have to explain whether her S&S-removal position is warranted by *Mechanicsville* and *American Agregates* or by extending them: "The text of the Rule …does not require that counsel differentiate between a position which is supported by existing law and one that would extend it. The Rule on its face requires that the [position] be either one or the other." *Golden Eagle Distrib. Corp.* v. *Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986).

Commission review is essential because this is not an ordinary legal error. The judge not only has imposed sanctions; he has promised that more sanctions will come. That threat applies to all the Secretary's representatives, so the judge has effectively barred the Secretary from making a non-frivolous legal argument; that would warrant review on its own. But the 's order is especially pernicious because it applies to the Secretary's position about the allocation of authority between the Secretary and the Commission. It is contrary to the Mine Act's split-enforcement scheme to prevent the Secretary from articulating her view about those issues. See *Sec'y of Lab.* v. *Knight Hawk Coal, LLC*, 991 F.3d 1297 (D.C. Cir. 2021); *Mach Mining, LLC* v. *Sec'y of Lab.*, 728 F.3d 643 (7th Cir. 2013); *Speed*

Mining, Inc. v. *FMSHRC*, 528 F.3d 310 (4th Cir. 2008); *Sec'y of Lab.* v. *Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006); *Sec'y ex rel. Wamsley* v. *Mut. Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996); *Sec'y ex rel. Bushnell* v. *Cannelton Indus., Inc.*, 867 F.2d 1432 (D.C. Cir. 1989). And by barring the Secretary from raising those issues at the ALJ level, the judge has effectively barred the Secretary from preserving them for appeal. See 30 U.S.C. 816(a)(1), (b); 823(d)(2)(iii).

2. This order raises significant questions about law, policy, and discretion.

This order raises significant questions of law and policy, 30 U.S.C. 823(d)(2)(A)(ii)(IV), because of its scope. Although this order imposes sanctions in just one case, the judge said—in this order and in others—that he will impose sanctions on any representative who articulates the Secretary's position. Ex. A at 5; Ex.C at 7 & n.5; Ex. D at 2. Simply put, the judge has threatened to sanction everyone who is authorized to represent the Secretary. A baseless order with such sweeping effects requires review. Cf. *United States* v. *Williams*, No. 22-10174, 2023 WL 3516095, at *5 (9th Cir. May 18, 2023) (holding that a district judge's order disqualifying an entire United States Attorney's office is immediately appealable as a collateral order) (collecting cases).

The order also raises significant questions about the judge's exercise of discretion. 30 U.S.C. 823(d)(2)(A)(ii)(IV). Judges certainly can reject legal arguments they disagree with, but disagreeing with an argument does not mean that the argument is sanctionable. And there is no basis for the judge's conclusion that the Secretary's S&S-removal position is a misstatement of the law. *See* supra pp. 2-5.

The judge abused his discretion by sanctioning the Secretary for articulating a position when the issue is unresolved and on appeal, and when the judge *himself* previously found that position not to warrant sanctions. See *supra* p. 3. The judge knows that the S&S-removal issue is on appeal, because in each of the three cases presenting that issue, this judge certified the question for interlocutory review. See *supra* pp. 2-3. It is an abuse of discretion for the judge to impose sanctions on the grounds that the position is a misstatement of law, since he knows that issue is on appeal. See *Peabody Gateway North* Ord. at 2 (acknowledging that the Commission has not decided the S&S issue); *Asai* v. *Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1978) (declining to impose sanctions when the appellate court had not addressed the relevant issue). It is arbitrary and an abuse of discretion for the judge abruptly to begin imposing sanctions for a position that the judge had not sanctioned before. See, *e.g.*, *Sec'y of Lab.* v. *Westfall Agregate & Materials, Inc.*, No. 22-1088, 2023 WL 3830210, at *5 (D.C. Cir. June 6, 2023) (the Commission must engage in reasoned decisionmaking, "especially" when it "has taken a sharp turn from prior holdings") (quoting *Leeco, Inc.* v. *Hays*, 965 F.2d 1081, 1085 (D.C. Cir. 1992)).

Conclusion

The Commission should direct review.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

APRIL E. NELSON
Associate Solicitor

s/ EMILY TOLER SCOTT
Counsel for Appellate Litigation
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th Street South, Suite 401
Arlington, VA 22202
(202) 693-9333
(202) 693-9392 (fax)
scott.emily.t@dol.gov

Attorneys for the Secretary of Labor

Certificate of Service

I certify that on June 9, 2023, a copy of this petition for discretionary review was served by email on:

Jonathan R. Ellis
STEPTOE & JOHNSON PLLC
Chase Tower, Seventeenth Floor
P.O. Box 1588
Charleston, WV 25326
jonathan.ellis@steptoe-johnson.com

s/ Emily Toler Scott

Exhibit A

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

May 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0092 A.C. No. 46-08878-565698
v.	
POCAHONTAS COAL COMPANY LLC, Respondent	Mine: Affinity Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citation at issue was $3,171.00, and the proposed settlement amount is $2,695.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550934	$169.00	$169.00	None.
9550935	$169.00	$169.00	None.
9550936	$169.00	$169.00	None.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550403	$133.00	$133.00	None.
9550937	$169.00	$169.00	None.
9550938	$169.00	$169.00	None.
9550939	$183.00	$183.00	None.
9550940	$169.00	$169.00	None.
9550941	$198.00	$198.00	None.
9550942	$188.00	$188.00	None.
9550943	$169.00	$169.00	None.
9550404	$169.00	$169.00	None.
9557339	$610.00	$134.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S," and negligence from "Moderate" to "Low."
9551135	$169.00	$169.00	None.
9551136	$169.00	$169.00	None.
9551137	$169.00	$169.00	None.
Total	**$3,171.00**	**$2,695.00**	

The parties have set forth the justification for the modifications in the motion filed by the Secretary. 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). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violation has been considered. The negligence and gravity of the violation are addressed in the motion, in the citations, and in the file in general.

Citation 9557339 concerns a failure to conduct a required methane test. The cited provision states:

> A qualified person shall make tests for methane—(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

30 C.F.R. § 75.362(d)(1)(iii) (2023). The citation reads, in part:

> The roof bolt operators installing permanent roof support on the No. 3 active section (005-0 / 002-0 MMU's) in the 5X6 cross-cut exceeded the 20 minute required methane test. The roof bolt operators were being observed installing bolts, when 25 minutes elapsed and no attempted [sic] was made to take the required methane test. Asked the operators what time was the last methane test was [sic] taken, both operators could not say when the methane test was made.

> The roof bolting machine was shut off and an examination was made with an extendable probe and large display CH4 detector. This mine is on a 10 day methane spot.

Citation No. 9557339 (Sept. 8, 2022).

The Secretary submitted a settlement motion on April 19, 2023, but I expressed my reservations caused by the inadequate support for the removal of the S&S designation. *See* Email from Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young, to Douglas W. Johnson, CLR, MSHA (Apr. 20, 2023; 10:25 a.m. ET). In her amended motion, the Secretary provided more thorough Respondent contentions challenging the likelihood of the hazard occurring:

> The Respondent would have argued at hearing that no methane was found on the section during numerous pre and on-shift examinations prior to the issuance of this citation and that this is normal for this mine. Though this mine does liberate substantial amounts of methane and is a "spot" inspection mine, most methane enters the mine's ventilating area from worked out areas where methane enters the mine through cracks in the mine floor from a coal seam below that develop after a panel or area has been mined.
>
> The mine had no prior history of methane inundations from active workings of the mine nor any history of methane ignitions. The Respondent would have argued that a hazardous accumulation of methane in the face area where this bolting machine was operating was highly unlikely and virtually impossible with even a modest quantity of ventilating air. The quantity of ventilating air in this face area where the roof bolter was operating was in compliance with the mine's approved ventilation plan which experience has shown to be more than capable of diluting hazardous gases including methane and dust, rendering them harmless and carrying them away.
>
> The inspector, a roof control specialist, observed the roof bolting crew perform work in this area for approximately twenty-five (25) minutes before issuing this citation. Had the inspector reasonably believed that the cited condition presented a hazard, such that the condition warranted an S&S issuance, then he likely would not have permitted the miners to be unnecessarily exposed to the alleged S&S hazard for an additional five (5) minutes. Additionally, the area was nearly bolted and only a few minutes work remained to complete the bolting cycle. Thus, the miners were near the face area at the time of issuance and no methane was detected at any time.
>
> Both of these roof bolter operators carried properly calibrated multi-gas detectors which would have provided an alarm of elevated methane should it be encountered. Upon issuance of the citation, they backed the roof bolting machine out of the cut and ran the remote "probe", containing a methane detector, up into the face area to take the required 20 minute gas check as part of the abatement

> effort. The probe went just as far as the two miners had been standing moments before with their own multi-gas detectors. No methane was found by the remote probe.

S. Mot. to Approve Settlement, at 3–5 (May 11, 2023).

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

I find the contentions meet the bare minimum standards for relevance and plausibility to support removal of the S&S designation. The Secretary provides multiple Respondent contentions that are precedentially irrelevant to an S&S analysis. The hazard contemplated by the cited provision is the ignition of methane. The following contentions do nothing to challenge the likelihood of the hazard occurring, or any of the other *Mathies* elements.

An S&S analysis assumes the continuation of normal mining operations without abatement of the violative condition. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement of inference that the violative condition will cease.").

Respondent's contentions that no methane was found during pre- and on-shift inspections, that there is no history of methane inundations, and that no methane was found in the test made to abate the violation, are therefore irrelevant. Respondent was conducting roof bolting operations, and methane accumulations have been found to occur without warning—thus requiring compliance with provisions that prevent possible ignition sources, like permissibility requirements. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014) ("[G]iven the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur."). As I assume a methane build up at a gassy mine is reasonably likely to occur suddenly during continued operation, any reference to a lack of methane, past or present, is irrelevant to my evaluation.

Commission judges may not consider redundant safety measures in an S&S evaluation. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028–29 (D.C. Cir. 2013) ("'[C]onsideration of redundant safety measures,'—that is, 'preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely'—'is inconsistent with the language of [Section] 814(d)(1).'"). Multi-gas detectors, both personnel- and equipment-based, are redundant safety measures, on top of the requirement to conduct regular tests, aimed at preventing the hazard. References to such are therefore irrelevant to challenge S&S.

The Secretary, nonetheless, appropriately challenged the likelihood of the hazard by citing the available ventilation and time of violation. While lacking specificity and being minimally persuasive, Respondent contended that the quantity of ventilating air may have been demonstrated as sufficient to prevent ignition. I also recognize, to a miniscule extent, the minimal time Respondent was allegedly in violation.[1]

While I am skeptical of the decision to delete the S&S designation, the explanation in the motion is not facially implausible. It is possible that at hearing, if supported by substantial evidence, the violation might not be proved to be S&S. Applying the *American Coal* factors to the settlement as a whole, I have also considered that all of the other violations have been accepted as issued, and that the reduction in the overall penalty is minimal.

I separately emphasize that the Secretary again inappropriately asserted her authority to remove S&S designations, citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–80 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020). S. Mot. at 5. I have repeatedly explained, as have other Commission judges, that these cases are irrelevant to my evaluation of the proposed removal of S&S designations in settlement. *See*, *e.g.*, Order Accepting Appearance & Denying Mot. to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023).

I made clear to the Secretary that this constitutes misstating the law, and I cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me. *Id.* As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice.

Having considered the representations and documentation submitted, I find that the modifications are minimally reasonable, and concede, with noted concern, that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

It is **ORDERED** that for Citation No. 9557339, the gravity be **MODIFIED** from "Reasonably Likely" to "Unlikely," and the "S&S" designation be removed, and the negligence be **MODIFIED** from "Moderate" to "Low."

[1] I do not accept the contention that the inspector's failure to cite for five minutes demonstrates his belief that the hazard was not likely, nor is that an appropriate consideration. I simply acknowledge that the combination of the purported quantity of ventilating air and the short duration of exposure might demonstrate at hearing that the hazard was unlikely to occur.

It is also **ORDERED** that the Respondent pay the Secretary of Labor the sum of **$2,695.00** within 30 days of the date of this decision.[2]

Michael G. Young
Administrative Law Judge

Distribution (by email):

Douglas W. Johnson, CLR, U.S. Department of Labor, MSHA, 1293 Airport Road, Beaver, WV 25813, johnson.douglas@dol.gov

Jonathan R. Ellis, STEPTOE & JOHNSON PLLC, Chase Tower, Seventeenth Floor, P.O. Box 1588, Charleston, WV 25326, jonathan.ellis@steptoe-johnson.com

[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Exhibit B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

April 25, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	: : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0129 A.C. No. 36-07230-561904
v.		
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent		Mine: Bailey Mine

DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed settlement. The originally assessed total amount for the citations at issue was **$9,036.00** and the proposed total settlement amount is **$1,897.00, reflecting a 79% (seventy-nine percent)** overall reduction, as reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9205312	$6,898	$1,393	Citation modified to moderate negligence; **80% reduction in penalty**
9204928	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
9205356	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
TOTAL REVISED PENALTY	**Original total: $9,036.00**	**Revised total: $1,897.00**	**79% overall reduction in penalty**

The Citations in issue

Citation No. 9205312

This citation invoked 30 U.S.C. §876(b), pertaining to "**Communication facilities; locations and emergency response plans**." The section addresses telephone service or equivalent two-way communication facilities, which are to be approved by the Secretary or his authorized representative. Such communication facilities shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal. The cited subsection addresses the plan requirements.

The section 104(a) citation for this now-admitted violation stated:

> The Mine Operator failed to comply with their Approved Emergency Response Plan (Approved 9-11-2020), in that, there were no leaky feeder line (communication) or tracking tags installed in the 2-K Working Section (009-0 MMU) Alternate Escapeway (number 3 entry of 2-K) from the loading point inby 8 crosscut outby to the 5 South Mains Right (K) Track at the number 80 crosscut (2420 feet in length). Therefore **there was no redundant communication between the Primary or Alternate Escapeways** and **no communication or tracking at all in the alternate escapeway** or **at the Working Section refuge alternative/SCSR cache from the alternate escapeway**. After issuance of this citation, the Operator removed the persons from the working faces to outby the loading point until the condition can be corrected.
>
> The Following statements are from the Approved Mine Emergency Response Plan and have not been complied with:
>
> 1. Page 1, Communication, 2. Coverage Area, line b.,- The system will also generally provide continuous coverage along escapeways and a coverage zone approximately 200' feet inby and outby strategic areas of the mine. Strategic Areas are fixed work locations where miners are normally required to work, section SCSR caches, working section power centers and manned belt transfers.
>
> 2. Page 2., 6.,- Survivability, a. The post accident communication system will generally provide redundant signal pathways to the surface component. b.- Redundancy will be achieved by two or more systems installed in two or more entries, or one system with two or more pathways to the surface; provided that a failure in one system or pathway does not affect the other system or pathway. c.,- Redundancy means that the system can maintain communication with the surface when a single pathway is disrupted. Disruptions can include major events in an entry or component failure.
>
> 3. Page 3, Tracking System, 1. Performance, aiii.,- Locate Miners in escape-way at intervals not to exceed 2000 feet. iv.,- Locate miners within 200 feet of

strategic areas. Strategic Areas are fixed work locations where miners are normally required to work, section mass SCSR caches, working section power centers and manned belt transfers. vii.,- Locate miners at the key junction in the escape-ways. viii.,- Locate miners within 200 feet of refuge alternatives. d.- The electronic tracking system will be installed in active daily traveled areas of the mine Primary and Secondary escapeways.

4. Page 5, 8. Maintenance, d. In the event of system or component failures, the miners will be notified of the problem. The affected miners will begin manual zone tracking and continue to advise the surface communication facility of their travel until the system is repaired. Repairs will start immediately if there is a loss in tracking capabilities. e.- The system will be examined weekly to verify that it is maintained in proper operating condition and the results of the examination will be entered in a record book.

5. Page 5, 9. Purchase and Installation,- b. If there is system failure the mine will revert to manual tracking system that was previously used.

Petition for Civil Penalty at 11-13.

The citation was terminated the following day, with the inspector noting:

Through a visual observation after traveling the 2K MMU 009-0 #3 entry (return) (Alternate Escapeway) in its entirety and having communication throughout and verifying through the tracking software on the Mine's surface of this inspectors locations, this citation is hereby terminated. The system is working in the previously mentioned entry/area. Secondly, the Mine Operator is carrying a record/ledger (weekly exam) to show the systems functioning properly.

Id. at 13.

The issuing inspector, who diligently recorded the aspects of the Approved Mine Emergency Response Plan provisions which were not complied with, listed the "Gravity" of the injury or illness as 'Unlikely,' but listed such injury or illness as "Fatal" if it were to occur. Marked as non-significant and substantial, nine miners would be affected. Given the multiple subjects of non-compliance, the inspector listed the negligence as "High." *Id.*

Analysis for Citation No. 9205312

The penalty, which was *regularly* assessed at $6,898.00, is now proposed to be settled at $1,393.00, representing **an 80% reduction**. This figure is apparently derived by designating the negligence from 'High' to "Moderate.' Motion at 3. The justification for this is short, the Motion relating that the "Respondent has represented to the Secretary that it had assigned miners to install the missing equipment that is the subject of the citation, but that the work was not timely completed because of supply problems." Undercutting this claim is that the inspector found *five* instances of non-compliance, yet all five violative conditions were somehow corrected

the next day, the supply problems apparently having vanished rapidly. This is the sole basis presented in the motion for listing the negligence as moderate.

In support of the Secretary's contention, the Solicitor's attorney looks to *Vindex Energy Corporation*, 34 FMSHRC 223, 224 (Jan. 2012) (ALJ) ("*Vindex*"), asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." Motion at 3. The Solicitor's attorney is apparently unaware that an administrative law judge's decision is not precedential. Commission Procedural Rule 69(d) provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). *Rain for Rent,* 40 FMSHRC 976, 980 (July 2018), *Tilden Mining,* 36 FMSHRC 1965 (Aug. 2014). The Secretary also errs in asserting that there is an evidentiary dispute regarding the appropriate level of negligence but offers nothing to support the notion that the negligence should be deemed "Moderate," other than the vague remark about the short-lived claim of 'supply problems.' Merely asserting 'supply problems' is apparently sufficient to carry the day.

Citation No. 9204928

This section 104(a) citation, invokes 30 C.F.R. § 75.1403, well known as the 'safeguard standard.' It is also a statutory provision which requires that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

For this now-admitted violation, on July 8, 2022 the inspector identified multiple violations of the provision, noting that "[t]he 2K section (MMU 009-0) #2 entry track from 0xc - 9.5xc has failed to be properly maintained as identified by the safeguards for the Bailey Mine in the aspect: **39 loose track bolts**, a **loose fish plate and a missing bolt** are allowed to exist on this track. Also, at the #8 crosscut **the rail is out of alignment** by 1/4 inch at the time of the exam.

Petition for Civil Penalty at 15 (emphasis added).

The citation noted that the safeguard standard had been cited **59 times in two years** at the mine. *Id.*

The citation was terminated four days later, on July 12, 2022, after the identified violations were corrected with the inspector stating that the "operator was able to tighten the loose bolts with approved means, and properly adjust the rail at #8 crosscut, however will need to burn a hole in the rail to install the missing bolt on the right side of the track at #8 crosscut. Because the mine is currently operating on shutdown and minimal people are working, additional time is granted to get specialized manpower to this location to cut the rail to install the bolt. *Id.* at 16.

Analysis for Citation No. 9204928

The Secretary's attorney cites an administrative law judge decision as precedent, misconstrues the Commission's decision in *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, (June 1996), and does not provide 'facts' to support the requirements for settlement, per

the Commission's *AmCoal* decisions: 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

If the basis for the 80% penalty reduction regarding the previously discussed Citation, No. 9205312, is arguably justified, the same cannot be said for Citation No. 9204928. This is so because the offering by the Secretary does not even meet the Commission's requirements for settlement motions. The justification, *in its entirety*, provides only that:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

The Secretary's attorney cites once again to the ALJ decision in *Vindex*, asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." *Id*. The inapplicability of ALJ decisions as precedent has been discussed above.

The Secretary then adds that she "possesses unreviewable discretion to withdraw an S&S designation," citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879 (June 1996) ("*Mechanicsville*") (finding "no material difference between the Secretary's discretion on the one hand to vacate a citation [pursuant to *RBK Construction, Inc*., 15 FMSHRC 2099, 2101 (Oct. 1993)] and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S."[1] Motion at 4 ("*RBK*").

The Secretary continues to inappropriately cite *Mechanicsville* as authority. This Court and other judges have noted that *Mechanicsville* does not support the Secretary's claim that she possesses unreviewable discretion to withdraw an S&S designation. Yet, the Secretary continues to assert otherwise. It's time to be clear about the Commission's holding in *Mechanicsville.*

At the outset of its decision in *Mechanicsville*, the Commission very plainly set forth the issue before it, stating that it "raises the issues of *whether a judge on his own initiative* can designate a violation of a mandatory safety standard to be significant and substantial." 18 FMSHRC 877. The Commission's answer to the issue was equally plain, stating that it "agree[d] with the Secretary that the judge erred in determining *on his own initiative* that the violation was S&S." *Id.* at 879 (emphasis added). Thus, the decision was expressly limited to the Commission's holding *that the judge erred* "*by adding a new finding and conclusion*, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." *Id.* at 880 (emphasis added). The Commission's decision

[1] *RBK* holds only that the Secretary has the authority to *vacate* the citations. 15 FMSHRC at 2101

added nothing more to that holding.

That the Commission's decision in *Mechanicsville* did not go beyond the very words it employed in that decision was made additionally clear in *Spartan Mining*, 30 FMSHRC 699 (August 2008). There, Spartan tried to expand *Mechanicsville* but the Commission would have nothing of it, informing that it "*reject[ed]* Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. … Spartan unpersuasively relies on *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. *However, Mechanicsville is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not.*" *Spartan* at *22 (emphasis added).

Accordingly, there is *no* basis for the Secretary's habitual citation to *Mechanicsville* as authority for the claim that she possesses unreviewable discretion to *withdraw* an S&S designation. It is one thing for the Secretary *to argue* that the Commission's holding in *Mechanicsville* should be *expanded* beyond that holding, but to assert that the decision affords the Secretary with unreviewable discretion to withdraw such a finding is beyond the pale. Here, the Secretary does not present its contention as an argument. Instead, the Secretary's attorney presents his position as the state of the law. It is not.

Attorneys have an obligation not to misstate case law. *Teamsters Local No. 579 v. B & M Transit, Inc.,* 882 F.2d 274, 280 (7th Cir.1989). Rule 11 of the Federal Rules of Civil Procedure requires attorneys to inquire about the … law before filing pleadings. … an attorney who submits a pleading must certify that: 'to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry [the pleading] is … warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Dzwonkoski,* 2008 WL 2163916 (May 16, 2008) (S.D. Ala. 2008) citing *Howard v. Liberty Memorial Hosp*., 752 F.Supp. 1074, 1080 (S.D.Ga.1990).

Therefore, unless and until the Commission revises its holding in *Mechanicsville*, the Secretary, both her attorneys and her non-attorney representatives, (Conference and litigation representative, "CLRs,") should cease invoking that decision for propositions not supported by it.

REVISITING PRESENT COMMISSION LAW FOR SETTLEMENT MOTIONS AS APPLIED TO THIS MATTER.

Fundamentally, the Secretary's Motion in this matter does not meet the Commission's test for settlement approvals, as set forth in *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

Once past the obvious preliminaries – that a motion for settlement must state the penalty amount originally proposed by the Secretary and the new amount the parties have agreed to pay,

the Commission's decision in *AmCoal II* sets forth the present requirements deemed sufficient for its judges in carrying out their "front line oversight of the settlement process" in order "to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 985, 987.

The Commission repeatedly spoke of the need for 'factual support' for penalty reduction. *Id*. at 989, 990. Though the Commission advised that such 'facts' "are not limited to facts related to the section 110(i) penalty criteria or to the alleged violations," the Commission still required that facts be presented. *Id.* at 986. Accordingly, it has "required parties *to submit facts* supporting a penalty amount agreed to in settlement." *Id.* at 987. It noted, "[i]n particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation "the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, *and facts* in support of the penalty agreed to by the parties." *Id.*

The Commission rejected the need for a respondent to present *legitimate* questions of fact which can only be resolved through the hearing process and also rejected that there is a need to show any *legitimate* factual disagreement. *Id*. at 991. As such, the Commission stated that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement. Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id.*

Despite the above, the Commission's *AmCoal II* decision still requires the submission of 'facts.' Such facts must be "mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 991. Here, no facts have been presented.

It is not an exaggeration to describe the basis for the Secretary's justification as essentially '*because we can*.' Though set forth above, it is worth repeating what the Secretary presented here, to wit:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

None of this amounts to mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, *appropriate under the facts*, and protects the public interest.

Citation No. 9205356

This citation also invokes 30 C.F.R. § 75.1403. Issued on July 20, 2022, the inspector's Condition or Practice section of the citation states:

> The Mine Operator failed to maintain an unobstructed travelway of at least 24 inches in width on walk side of the 11-L Conveyor Belt between the outby end of the storage unit andthe bottom step of the 6 south Mains Left Track overcast stairs for a distance of 30 feet in length. Old pieces of conveyor belt were humped up in the air, there were 2 small rolls of conveyor belt, splicing nail buckets, splices, a conveyor belt cutter and splicing template filling most of the required walkway in the cited area. The walkways in this area was wet, muddy and very slippery without having to traverse this extraneous materials. The Operator immediately started to clear the extraneous materials after the issuance of this citation. **Standard 75.1403 was cited 61 times** in two years at mine 3607230 (60 to the operator, 1 to a contractor).

Petition for Civil Penalty at 18 (emphasis added).

The citation was terminated on July 21, 2022, with the inspectors remarking that "[a]ll of the extraneous materials have been cleaned out of the cited travelway/walkway. There is now at least 24 inches of clear, unobstructed travelway, therefore this citation is terminated. *Id.* at 19.

Analysis for Citation No. 9205356

As the Secretary's attorney seeks the same modifications to this citation as he did for Citation No. 9204928 and offers the same justification, the Court's previous analysis applies.

Summary:

As discussed above, the Secretary has cited to inapplicable precedent, by relying upon an administrative law judge decision, inappropriately cited to *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, (June 1996), for a proposition that case does not support, and failed to meet the Commission's standards for an acceptable motion to approve settlement, per its decisions in *AmCoal I* and *AmCoal II*.

That said, because the Commission has, to the best of this Court's understanding, a 100% approval rate for settlement motions, it has decided to approve the settlement in this instance because the Commission examines all settlement determinations made by its judges, and has the authority, per 29 C.F.R. §2700.71, to review a judge's decision on its own motion.[2]

[2] 29 C.F.R. § 2700.71, titled, "Review by the Commission on its own motion," provides "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented.

The Court has considered the Secretary's Motion and approves it solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. As noted, under those decisions, reasonable inquiry by the Court is not permitted.

Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is GRANTED. Citation No. 9205312 is modified to moderate negligence, Citation No. 9204928 is modified to unlikely and non-S&S, Citation No. 9205356 is modified to unlikely and non-S&S.

It is ORDERED that the Respondent pay the agreed-upon civil penalty of $1,897.00 within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Attorney Kyle D. Stelmack, U.S. Department of Labor, Office of the Regional Solicitor
1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19104
Stelmack.kyle.d@dol.gov

Craig S. Aaron, CONSOL Energy, Inc., 275 Technology Drive, Suite 101
Canonsburg, PA 15317 craigaaron@consolenergy.com

The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

[3] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is vital to include Docket and A.C. Numbers when remitting payments.

Exhibit C

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 1400
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX 202 434-9949

May 4, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EXTRA ENERGY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0071 A.C. No. 46-09395-565851 Mine: Dry Branch Surface Mine

ORDER ACCEPTING APPEARANCE
ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Joint Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount was $6,548.00, and the proposed settlement amount is $1,324.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes the following modifications:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9565489	$3,274.00	$662.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S."
9565490	$3,274.00	$662.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S."
Total	**$6,548.00**	**$1,324.00**	**80% Reduction**

The motion proposes to remove the S&S designation from each citation. These violations were for failure to maintain berms of adequate height on an elevated roadway. The provision reads, "Berms or guards shall be provided on the outer bank of elevated roadways." 30 C.F.R. § 77.1605(k) (2023).

The citations alleged the presence of three berm sections measuring 24–44 inches, 30 inches, and 42–55 inches, for varying distances (from 100 feet to .2 miles) abutting a 50-foot drop, where the largest equipment used on the road had a mid-axle height of 63 inches. *See* Citation No. 9565489 at 1 (Sept. 7, 2022); Citation No. 9565490 at 1 (Sept. 7, 2022).

The motion provided substantively the same explanation for the modification of each. The Secretary accepted Respondent's contentions that (1) "while not at the full required height" the berms were "substantially built," "wide," and "capable of restraining a vehicle," and (2) the affected area [road] was wide with good visibility. S. Mot. to Approve Settlement, at 3 (Mar. 23, 2023). These explanations are inadequate to support removal of an S&S designation.

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

Before addressing the S&S issue, I note a regulatory anomaly that is susceptible to only one reasonable resolution. The regulations governing metal and nonmetal surface mines require that, where required, "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b), 57.9300(b).[1] In contrast, the cited provision of Part 77 requiring berms for elevated roadways at surface coal mines and the surface areas of underground coal mines merely defines berm as "a pile or mound of material capable of restraining a vehicle." 30 C.F.R. § 77.2.

Part 77 therefore does not include a mid-axle height standard. That language has been in place since the Coal Act. *See Final Rule*, 36 Fed. Reg. 9,364, 9,380 (May 22, 1971). The Part 56 mid-axle language, however, was established later. See *Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines*, 53 Fed. Red. 32,496, 32,520–21 (Aug. 25, 1988).

The parties appear to implicitly accept that Part 77 requires the minimum height of the cited berms in this case to be 63 inches, the mid-axle height of the largest vehicle regularly traveling the roadway. *See* Citations 9565489, 9565490, § 8 (Sept. 7, 2022) (citing inadequate berms and noting mid-axle height of largest equipment as 63 inches); Mot. at 3 (providing Respondent's argument conceding that berms were not at the required height at some areas). But

[1] Part 56 applies to surface metal and non-metal mines, while Part 57 governs the surface areas of underground metal and non-metal mines. The language in the two cited provisions is identical.

it is important for the Commission to recognize the mid-axle standard as binding upon the operators of surface and underground coal mines.

The Commission has not yet done so directly. But it has affirmed a judge's finding that mid-axle height was that which a reasonably prudent person would have recognized as required to prevent this provision's contemplated hazard. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735, 1748 (Aug. 2012).[2]

The Commission had previously applied the reasonably prudent person standard to this provision. *See U.S. Steel Corp.*, 5 FMSHRC 3, 7 (Jan. 1983) (requiring evidence as to what type of berm a reasonably prudent person would install under the circumstances); *The Hanna Mining Co.*, 3 FMSHRC 2045, 2045–46 (Sept. 1981) (finding substantial evidence supporting that a two-to-three-foot berm was inadequate to prevent overtravel).[3]

There is of course no substantive difference between roadways and trucks at coal mines and those at metal or nonmetal mines. In both contexts, berms have been deemed necessary to prevent overtravel and fall from an elevated roadway.

It has been the Secretary's litigation position that inadequate berm violations exist where they are not mid-axle height, and that they should be S&S where there exists the risk of a significant fall. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2044, 2045 (Oct. 1994) (affirming a Part 56 violation where an inadequate berm abutted a 25-foot drop, and reversing the judge's non-S&S finding).

Having made a formal determination in notice and comment rulemaking, and an informal determination in litigation, that the mid-axle height standard is necessary to protect miner health and safety, the Secretary is bound to uphold it now and should formalize the standard by regulation. In the absence of such action, the Commission should make clear that this standard is a binding norm.

The Secretary has gone to great lengths in the past to claim her litigation position is entitled to deference as an exercise of delegated rulemaking authority. *See Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)) ("But because 'in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as the Secretary's promulgation of a . . . health and safety standard..... ");

---

[2] *See also id.* at 1748 n.19 (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)) ("[T]he adequacy of an operator's . . . guards [is] evaluated in each case by reference to an objective standard or a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute.").

[3] I note that both decisions were published before the 1988 addition of the mid-axle language to Part 56, and *U.S. Steel* acknowledged the need for reform if the Secretary intended to apply a minimum height standard. *See* 5 FMSHRC at 5 n.7 ("The Secretary is privileged under the Mine Act to write a more specific berm standard setting forth more detailed specifications for construction of safe berms and guards.").

Adam Whitt, 35 FMSHRC 3487, 3490 (Nov. 2013); *BHP Copper, Inc.*, 21 FMSHRC 758, 764 n.11 (citing *Martin v. OSHRC*, 499 U.S. 144, 156–57 (1991)).

Such authority is based on "technical expertise and political authority to carry out statutory mandates." *Morton Int'l, Inc., Morton Salt*, 18 FMSHRC 533, 452 (Apr. 1996) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995)); *see also Sec'y of Labor on behalf of Wamsley v. Mut. Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) (quoting *Martin*, 499 U.S. at 152) (emphasizing that the Secretary's promulgation and enforcement of standards brings her into "constant contact with the daily operations of the mines," endowing her with the "'historical familiarity and policymaking expertise' . . . that are the basis for judicial deference to agencies").

The Secretary cannot legitimately assert that citation for a berm standard in a metal or nonmetal mine is a violation, and S&S due to likely injury from a fall from the elevated roadway, and simultaneously claim that the same situation—likely hazard and injury—are not S&S, or not even a violation. If the Secretary has decided that mid-axle height is the standard for berm size to prevent overtravel on an elevated road in a metal or nonmetal mine, and the protective purpose of the provision is to prevent injury from such a hazard, then that must be the standard for the same situation, even if in a different type of mine.

The Secretary cannot apply a different standard for coal mines and metal/nonmetal mines because there is no principled distinction. The laws of gravity and physics certainly will not recognize one, and a truck overtraveling an inadequate berm between a road and a long drop will produce the same tragic consequences in either case.

I also would point out that if the Secretary's litigation position is in effect an exercise of her delegated rulemaking authority, then a failure to adopt the mid-axle standard in litigation would be contrary to the Act's requirement that "[n]o mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. § 811(a)(9).

That is what makes the abdication of responsibility in this settlement so disturbing. While the inspector in this case appropriately detailed the failure to meet the mid-axle height requirement, the proposed settlement disregards what must be effectively considered to be the applicable health and safety standard and the attendant consequences of that failure.

The motion betrays an abject disregard of the Commission's S&S standards and the safety of miners imperiled by the hazard described in this case. There is no consideration of the degree or extent of the deficiency here. I thus reject Respondent's second contention and the Secretary's acceptance of it as one whose proof at hearing would "lessen[] the likelihood of an accident or injury," S. Mot. at 3, as contrary to the law and the safety purposes of the Act.

First, the limited facts that have been provided establish beyond debate that the hazard existed as described in the citation and would do nothing to make the case that an injury would not be reasonably likely to occur.

The motion's contention and the posited facts are insufficient to challenge the likelihood of the contemplated hazard's occurrence because the provision requiring berms is not qualified by roadway or environmental conditions. It does not say that berms are required *only if* the road is narrower than a designated, minimum width or when minimum visibility conditions are not met.

Nonetheless, the motion asserts that the berms are "capable of restraining a vehicle" based on undefined "substantial construction" and "width," two things that are not contemplated by the only standard the Secretary has applied to berms—*height*.

Nor does the motion suggest that this is not a roadway "usually traveled" by the largest vehicles at the mine. We cannot assume miner precaution, abatement, or other intervention. In sum, there is nothing to support the notion that this violation will not present a hazard of overtravel to the miners using this road.

Once the hazard has been found to be reasonably likely to materialize, it is an assumed fact binding on the remainder of the analysis, and the likelihood of injury is evaluated based on the occurrence of that hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2013). If I therefore reach the conclusion that the hazard—a vehicle falling from an elevated roadway due to inadequate berm height—is reasonably likely, then a contention regarding the width of the road or visibility would have no effect on the likelihood of injury.

The provision cited here does not expressly require berms to be "mid-axle height," but both the Secretary and Respondent appear to have accepted it as a standard in their own agreement: "while not at the full required height . . . ." And as noted above, I must apply that standard because any other approach would be inconsistent with the Act and the Secretary's now-binding interpretations of her own regulations.

Therefore, the applicable mandatory safety standard here, accepted by the parties and enshrined in the law, is the mid-axle height for the largest vehicle that usually travels this roadway. The motion does not challenge the inspector's determination that this *minimum* height is 63 inches.

There are thus only two possible means of avoiding an S&S determination in this case. Either the violation would not significantly and substantially contribute to a hazard of overtraveling the inadequate berms, or the consequences of the overtravel would not be reasonably likely to result in serious injury or death.

The second contention is readily dispensed with. Any serious argument would have required some qualification or dispute of the inspector's observation that the drop-off beyond the inadequate berms was *50 feet.* The motion does not challenge the inspector's observation. We therefore must accept as fact that a truck traveling over or through the berms would plummet or roll uncontrolled for that distance. Miners who know the consequences of serious overtravel have been seriously injured or killed trying to escape a truck that has encountered this hazard. *See Solar Sources Mining, LLC*, 43 FMSHRC 367, 382 n.1 (Aug. 2021) (Traynor, Chair, dissenting) ("Here, due to the deficiency in the berm, the dump truck's back wheel over-traveled

the ledge of the dump site, fell and flipped upside down into the slurry pit approximately 48 feet below. The driver escaped almost certain death by leaping from the truck's cab before it descended over the ledge. The jump and fall resulted in a broken foot that required multiple surgeries to reconstruct using donated bone, steel and screws.").

That leaves only the possibility that there was no reasonable likelihood that the trucks would overtravel the substandard berms. This, too, is logically untenable under the facts presented.

Worth noting is the extent of the violations. The berms failed to meet the height deemed necessary to protect miners for lengths ranging from one hundred to more than one thousand feet. Nowhere does the motion address the effect the extensive nature of the violation might have on the likelihood of a truck encountering a berm that was not constructed as required to prevent overtravel.

It is also important to note that the berm heights were not cited because they technically failed to meet the Secretary's standards or were marginally deficient. When measured, the height of some of the berms was between 24 and 30 inches—less than half (and perhaps as little as 40 percent) of the required height.

It is possible to make a principled, cogent argument questioning whether the degree of a violation would be sufficient to support an S&S designation. *See ICG Illinois, LLC*, 38 FMSHRC 2473, 2483–92 (Oct. 2016) (Althen, Comm'r, dissenting) (noting the lack of record evidence showing that an 11-percent exceedance in distance of refuge chamber from working face would impair the ability of miners to reach and use the chamber in an emergency). The motion completely fails to note any deficiency in the facts they have chosen to present, which establish these violations as S&S.

Commission precedent also forecloses the motion's assertion that these violations might not be found to be S&S at hearing. The berms here were similar to those in *The Hanna Mining Co.*, and the drop-off was significantly higher than that found sufficient for S&S in *Buffalo Crushed Stone, Inc*. Indeed, degree of danger, *as described in the facts the parties have chosen to present*, is extraordinary, and there is no rational basis upon which one might conclude that these violations, as defined in the citation and affirmed by the facts presented in support of the motion, are not S&S.

Rather than adequately challenging any of the *Mathies* elements, the facts provided instead abundantly support the conclusion that the violations must be affirmed as S&S. The cited berm heights were inadequate, sufficient for a finding of violation; overtravel and a substantial fall was reasonably likely due to that inadequacy, because the reasoned judgment of the Secretary has determined what must be provided, and the cited berms are woefully short of that standard; an injury was self-evidently likely to result from the 50-foot fall in heavy equipment; and permanent disability or death was the foreseeable consequence of that fall. The

facts presented therefore do not enable me to conclude that the Secretary has not abused her discretion in removing the designation; I would abuse mine if I approved the settlement.[4]

The Secretary also continues to incorrectly assert the ability to exercise discretion to remove an S&S designation as part of a settlement, citing *American Aggregates of Michigan, Inc.* and *Mechanicsville Concrete, Inc.* to claim this unfettered discretion. S. Mot. at 3–4. These cases are known by now to be invalid as authority for the principles they claim to represent.

Mechanicsville stated that a judge may not *add* an S&S designation on his or her own initiative. 18 FMSHRC 877, 880, 882 (June 1996). This action involves a proposal to *delete* one in settlement. *American Aggregates* stated, "Commission Judges do not have the discretion to make [an S&S finding] unless it is asserted in the first instance by MSHA." 42 FMSHRC 570, 576 (Aug. 2020). Here, the finding was asserted by MSHA in the first instance. Further, that decision reversed a judge's settlement denial because he ignored multiple provided facts relevant to the proposed modifications. *Id.* at 577, 581. The motion here does not provide facts that challenge the S&S designation. Neither, therefore, is applicable to the situation here.

Commission judges have repeatedly criticized the Secretary's use of *Mechanicsville Concrete* and *American Aggregates of Michigan* in this context as a blatant misstatement of the law. As one such order recently noted, "Attorneys have an obligation not to misstate case law." *Decision Approving Settlement with Significant Reservations*, Docket No. PENN 20222-0129, at 6 (Apr. 25, 2023) (ALJ) (citing *Teamsters Local No. 579 v. B&M Transit Co.*, 882 F2d. 274, 280 (7th Cir. 1989)). The court in *Teamsters Local No. 579* approved the imposition of Rule 11 sanctions for the transgression.

There are minimum standards of practice in every tribunal, including this one. Erroneous mischaracterizations of precedent fail to meet those standards and will not be tolerated. A CLR who cites these cases, falsely, in a subsequent motion as they have been cited here may be barred from practice before me.[5] There may be other consequences.

IT IS ORDERED that the motion to approve settlement is **DENIED**.

Michael G. Young
Administrative Law Judge

[4] This does not constitute a finding of violation or S&S; I have not required the Secretary to establish such. I merely note that the limited facts the parties have chosen to provide would preclude a non-S&S finding for this violation.

[5] Although these cases were included by a pleading drafted by a CLR, I would expect an attorney to know better, and a transgression against the law of this sort by an attorney would be even more egregious.

Distribution (by email):

Bruce H. Jakubauskas, CLR, U.S. Department of Labor, MSHA, Thorn Hill Industrial Park, 178 Thorn Hill Road, Suite 100, Warrendale, PA 15086, jakubauskas.bruce@dol.gov

Jonathan R. Ellis, STEPTOE & JOHNSON PLLC, Chase Tower, Seventeenth Floor, P.O. Box 1588, Charleston, WV 25326, jonathan.ellis@steptoe-johnson.com

Dana L. Ferguson, Office of the Solicitor, U.S. Dep't of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202, ferguson.dana@dol.gov

Exhibit D

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is*. Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing

[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

unless and until a motion that meets the standards of practice before the Commission has been filed.

Michael G. Young
Administrative Law Judge

Distribution:

Robert S. Wilson, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450, wilson.robert.s@dol.gov

D. Cass Trent, CLR, U.S. Department of Labor, MSHA, 4499 Appalachian Hwy, Pineville, WV 24874, trent.david@dol.gov

Jim McHugh, Hardy Pence LLC, 10 Hale Street, 4th Floor, P.O. Box 2548, Charleston, WV 25329, jmchugh@hardypence.com

Craig Aaron, CONSOL Energy Inc., 275 Technology Drive, Suite 101, Canonsburg, PA 15317, craigaaron@consolenergy.com