January 2023

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ADMINISTRATIVE LAW JUDGE ORDERS

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(Judge Young, 12/01/2022)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 20, 2023

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

ORDER

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. The cases are hereby consolidated.

The Secretary shall file his opening brief no later than **February 21, 2023**. Vulcan and the Complainant may file response briefs by **March 23, 2023,** if they desire. The Secretary may file a reply brief no later than **April 12, 2023**.

Vulcan shall file its opening brief no later than **February 21, 2023**. The Secretary and the Complainant may file response briefs by **March 23, 2023,** if they desire. Vulcan may file a reply brief no later than **April 12, 2023**.

The Complainant shall file his opening brief no later than **February 21, 2023**. Vulcan and the Secretary may file response briefs by **March 23, 2023,** if they desire. The Complainant may file a reply brief no later than **April 12, 2023**.

Any party may elect to consolidate their response briefs to any opening briefs and any reply briefs in accordance with this briefing schedule.

/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

Melanie Garris
U.S. Department of Labor
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@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

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

January 11, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0301 AC No. 46-08930-551112 Mine: Grapevine South Surface Mine

DECISION APPROVING SETTLEMENT

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement for the citations and orders involved in this matter. The parties move to modify the citations and orders, as stated below.[1] The total penalty would be reduced accordingly, from the original assessed amount of **$29,668.00** to **$23,365.00.** Although the overall reduction for the docket is 21%, two of the citations each received a penalty reduction of **80%**.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9563136 (Associated 104(b) Order No. 9563148)	$626.00	$626.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 777D Caterpillar Haulage Truck Sustained as Issued- No penalty reduction
9563137 (Associated 104 (b) Order No. 9563147)	$453.00	$453.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning signal and brake lights, audible warning alarm. Sustained as Issued - No penalty reduction

[1] This docket originally consisted of 33 citations/orders, until 16 of the citations/orders were reallocated into WEVA 2022-0428. Order for Docket Reallocation, June 29, 2022.

9563138 (Associated 104(b) Order No. 9563177)	$934.00	$934.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on D10R Caterpillar Dozer Co. No. D007. Sustained as Issued- No penalty reduction
9563139	$407.00	$407.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning lights on D10R Caterpillar Dozer Co. No. D007. Sustained as Issued- No penalty reduction
9563140	$296.00	$296.00	Violation of 30 C.F.R. § 77.1605(k), no berm provided on three sumps along elevated haulroad. Sustained as Issued-No penalty reduction
9563141 (Associated 104(b) Order No. 9563182)	$11,149.00	$9,918.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning signal, brake, and high beam lights, non-functioning horn. **Penalty Reduction of 11%**
9563142 (Associated 104(b) Order No. 9563181)	$1,393.00	$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785D Caterpillar Haulage Truck Co. No. RT111. Sustained as Issued- No penalty reduction
9563143 (Associated 104(b) Order No. 4563178)	$1,393.00	$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785C Caterpillar Haulage Truck Co. No. RT269. Sustained as Issued- No penalty reduction
9563144	$1,471.00	$296.00	Violation of 30 C.F.R. § 77.1001, spoilbank not stripped for a safe distance from top of the pit, not sloped to the angle of repose, toe of spoilbank has been dug out, is not bermed off to prevent unauthorized access. Modify the gravity from "reasonably likely" to "unlikely" and from "S&S" to "non-S&S" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 80%.**
9563145	$1,253.00	$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 980G Caterpillar Front-End Loader Co. No. 1893.

			Sustained as Issued- No penalty reduction
9563146 (Associated 104(b) Order No. 9563180)	$1,393.00	$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785D Caterpillar Haulage Truck Co. No. RT112. Sustained as Issued- No penalty reduction
9563149	$1,253.00	$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 992G Caterpillar Front-End Loader Co. No. L001. Sustained as Issued- No penalty reduction
9563150	$133.00	$133.00	Violation of 30 C.F.R. § 77.1110, no permanent tag on portable fire extinguisher on 992G Caterpillar Front-End Loader Co. No. L001. Sustained as Issued- No penalty reduction
9563151	$1,253.00	$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on Mack Fuel and Oil Service Truck Co. No. GT400. Sustained as Issued- No penalty reduction
9563152	$4,884.00	$987.00	Violation of 30 C.F.R. § 77.1004(b), Modify the gravity from "reasonably likely" to "unlikely" and from "S&S" to "non-S&S" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 80%.**
9563153	$716.00	$716.00	Violation of 30 C.F.R. § 77.1605(d), reverse lights, horn in operator's cab of White Dodge Blasting Truck not functioning properly. Sustained as Issued- No penalty reduction
9563154	$661.00	$661.00	Violation of 30 C.F.R. § 77.410(c), reverse warning alarm on 993K Caterpillar Front-End Loader Co. No. L465 not maintained in functional condition. Sustained as Issued- No penalty reduction
TOTAL	**$29,668.00**	**$23,365.00**	**Total penalty reduction of 21%**

Section 104(a) citations were issued for citation Nos. 9563136, 9563137, 9563138, 9563141, 9563142, 9563143, and 9563146. These were followed up with section 104(b) orders. As the Commission has noted:

> **[t]he purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. … The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply**. See 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

Hopkins County Coal, 38 FMSHRC 1317, 1335-1336 (June 2016) (emphasis added).

For reasons not discernable to the Court, it cannot find a legitimate basis to support the Secretary's decision to hide the duly issued 104(b) orders associated with seven citations in this docket, all as identified above.[2]

The 104(a) citations, together with the associated (b) orders, are discussed here and will be followed by a summary analysis.

Citation No. 9563136

Citation No. 9563136 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

The citation stated:

> The following defects affecting safety existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:
> 1. A large knot existed on the side wall area of the left rear outside tire.
> 2. Oil was leaking from the right rear inside wheel area.
> This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the

[2] Citation Nos. 9563139, 9563140, 9563144, 9563145, 9563149, 9563150, 9563151, 9563152, 9563153, and 9563154 were issued as 104(a) citations, and received a 10% penalty reduction for good faith. All citations and orders in this docket were regularly assessed.

operator, 0 to a contractor).

Pet. for a Civil Penalty at 19.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low."

Section 104 (b) Order No. 9563148 was issued in association with this citation on January 13, 2022. The (b) Order was provided by the Respondent's attorney. The Court appreciates that cooperation. The order read:

> **An apparent effort was not made by the operator to correct all the conditions that were cited by MSHA on the 777D Caterpillar Haulage Truck Co. No. M03-546. This truck was being operated in the Grapevine North Pit Area with oil still leaking from the right rear inside wheel area.**
> Standard 77.1606(c) was cited **50 times** in two years at mine 4608930 (50 to the operator, 0 to a contractor).

104(b) Order Addendum at 3 (emphasis added). The order was terminated on January 19, 2022, with the justification that

> The following actions have been taken to correct the following conditions:
> 1. A new tire has been installed
> 2. Tighten up the bolts and steam cleaned.

Id. at 4.

Thus, this (b) order reflects serious non-compliance with the underlying 104(a) citation, with the truck continuing to be operated in the Grapevine North Pit Area with one of the cited defects still uncorrected. It is noteworthy that the cited standard was cited 50 times, all to the mine operator in the past two years.

Citation No. 9563137

Citation No. 9563137 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1605(d). Titled "Loading and haulage equipment," the standard specifies that "[m]obile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required." 30 C.F.R. § 77.1605(d).

The citation stated:

> The following conditions existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:
> 1. Both front marker/signal lights were not functioning when tested.
> 2. Both rear brake lights were not functioning when tested.
> 3. The left rear signal light was not functioning when tested.

4. The Level 3 audi[b]le warning alarm which is located inside the operators cab was not functioning when tested.
This truck was being operated in the Grapevine North Pit Area. This truck is operated before and after daylight hours. Mobile equipment shall be provided with audible warning devices.
Lights shall be provided on both ends when required
Standard 77.1605(d) was cited 16 times in two years at mine 4608930 (16 to the operator, 0 to a contractor).

Petition at 20.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low." *Id*.

Section 104(b) Order No. 9563147 was issued as a 104(b) order in connection with Citation No. 9563137 on January 13, 2022. The order read:

No apparent effort was made by the operator to correct all the conditions that were cited by MSHA on the 777D Caterpillar Haulage Truck Co. No. M03-546. This truck was being operated in the Grapevine North Pit Area with all the conditions still existing.
Standard 77.1605(d) was cited 19 times in two years at mine 4608930 (19 to the operator, 0 to a contractor).

104(b) Order Addendum at 1.

The order was terminated on January 19, 2022, with the justification that:

The following actions have been taken to correct the following conditions:
1. A new light has been installed and the wiring repaired.
2. New lights have been installed and the wiring repaired.

3. A new light has been installed and the wiring repaired.
4. The wiring has been repaired.

Id. at 2.

In the Court's estimation this continued failure to correct multiple lighting defects along with a defective non-audible warning alarm is worse than the failure discussed just above because *none* of the cited defects had been corrected at the time the (b) order was issued and the truck continued being operated in the Grapevine North Pit Area.

Citation No. 9563138

Citation No. 9563138 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

> The following defects affecting safety existed on the D10R Caterpillar Dozer Co. No. D007:
> 1. A gap existed in the top corner of the right hand door to the operators cab. With the door closed completely the outside of the cab was still visible.
> 2. Bolts were missing in the floor board allowing the floor board to be loose and not properly sealed.
> 3. Oil was leaking out the right side final drive.
> 4. Oil could be seen leaking on the right side out of the frame of the dozer.
> 5. The seat in the operators cab is bottomed out.
> This dozer was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the operator, 0 to a contractor).

Petition at 21.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "permanently disabling," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low." *Id*. The citation was continued on January 13, 2022, with the justification that:

> Repairs are still being conducted at this time. Most of the repairs have been completed. The mine operator removed the dozer from service until the repairs could be completed, so more time has been granted.

Id. at 22.

The citation was continued again on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited

personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 23.

The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. The following repairs have been completed 1, 2, 4, and 5. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 24.

Section 104(b) Order No. **9563177** was issued on February 1, 2022, in association with Citation No. 9563138.

The citation read:

A reasonable effort was not made by the mine operator to insure all conditions were corrected on the D10R Caterpillar Dozer Co. No. D007. Oil was still leaking from the right side of the dozer. Oil could be seen coming out the right side frame of the dozer. This dozer was being operated in the Grapevine North Pit Area with this condition still existing.
Standard 77.1606(c) was cited 56 times in two years at mine 4608930 (56 to the operator, 0 to a contractor).

104(b) Order Addendum at 5.

The order was terminated on February 3, 2022, with the justification that:

The following actions have been taken to correct the following conditions:
1. New door striker and door seals have been installed.
2. All of the bolts have been installed and is now securely in place.
3. New final drive has been installed.

4. New hoses and O-rings have been installed.
5. A new seat has been installed.

Id. at 6.

Despite generous forbearance on the part of the MSHA inspector, after issuing multiple continuances allowing additional time to correct the five separate defects found on a Caterpillar dozer, the inspector was compelled to issue a 104(b) order after <u>three weeks</u> had passed without *all* the defects having been corrected. As with the two previous orders discussed above, the vehicle continued to be operated in the Grapevine North Pit Area. For

one keeping score, that means *three* pieces of equipment with defects were all operating in the same area. The Order contradicts claims that the equipment had been taken out of service until the repairs were completed.

Citation No. 9563141

Citation No. 9563141 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1605(d), *supra*. The citation read:

> The following conditions existed on the 785D Caterpillar Haulage Truck Co. No. RT111:
> 1. The left and right side front signal/marker lights are not functioning when tested.
> 2. The left side high beam light is not functioning when tested.
> 3. The left and right side rear signal lights are not functioning when tested.
> 4. The left and right side brake lights are not functioning when tested.
> 5. The horn was not functioning when tested.
> This truck was being operated in the Mill Seat Pit Area (Alma). This truck operates before and after daylight hours. Mobile equipment shall be provided with audible warning devices,
> Lights shall be provided on both ends when required. These conditions have been recorded on the Pre-Operational Examinations and reported to the mine operator. Standard 77.1605(d) was cited 18 times in two years at mine 4608930 (18 to the operator, 0 to a contractor).
>
> Petition at 29.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "fatal," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "high." *Id*. The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.
>
> *Id*. at 30.

The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited

personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 31.

Section 104 (b) Order No. 9563182 was issued on February 1, 2022, in association with Citation No. 9563141. The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785D Caterpillar Haulage Truck Co. No. RT111. 5 of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed
Standard 77.1605(d) was cited 21 times in two years at mine 4608930 (21 to the operator, 0 to a contractor).

104(b) Order Addendum at 15. The citation was terminated on February 8, 2022, with the justification that:

The following actions have been taken to correct the conditions:
1. Repaired the wiring to the lights.
2. Repaired the wiring to the lights.
3. Repaired the wiring to the lights.
4. Repaired the wiring to the lights.
5. Installed a new steering column and hooked up horn to new column.

Id. at 16.

The Secretary moves to keep the citation as issued but reduces the penalty, offering the following in support:

Citation #9563141 will remain as issued with a reduction in penalty.
The Respondent contends that the gravity of the citation was overevaluated and should not have been issued as "fatal". Respondent would argue at hearing that the cited conditions would not cause fatal injuries to miners. Respondent contends that the cited truck still had numerous lights on both ends to indicate the location at low light. The few sporadic lights that were inoperative would not hinder the safe operations while in production. Secretary recognizes that the ALJ may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to reduce the penalty for Citation #9563141 from $11,149 to $9,918, and the Respondent has agreed to pay the reduced penalty.

Mot. to Approve Settlement at 3-4.

Citation No. 9563141, which involves an 11% (eleven percent) reduction in the penalty, is one of the internally inconsistent settlements about which the Secretary

frequently partakes. Standing by the inspector's evaluation is the easy part of the arrangement because the issuing inspector found five, yes five, defects with the mine's 785D Caterpillar Haulage Truck Co. No. RT111, four of them related to inoperative lights and one for a horn that could not sound. Worse, if possible, *the defects were all recorded on the pre-op exams, but thereafter still ignored by the operator*. While one might guess that with all those defects and the operator not acting upon them, though informed of them, the Secretary would adhere to the proposed penalty, that guess would be wrong, as the Secretary agreed to knock 11% off the regularly assessed penalty. Thus, in the face of the 104(b) order the Secretary did want to be disclosed, the Secretary, by the 11% reduction, in effect monetarily awarded the 10% good faith reduction, which the initial assessment had declined.

On this record, which is all that the Court presently is permitted to have before it, there is no way that the Court could find merit, as the Secretary suggests, in the arguments presented. In fact, the Secretary finds no merit either, as it does not alter the inspector's evaluation. The inspector's (b) order related that *five* of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed. As with an earlier-discussed order, 20 days had elapsed since the citation was issued, with the result that on the 21st day, the (b) order was issued. Further, the only claim is that a fatality would not result, but support for that claim is not presented and the Respondent does not state the lesser degree of injury to be expected. No mention is made about the non-functioning horn, which itself is a significant safety defect.

Citation No. 9563142

Citation No. 9563142 was issued on January 11, 2022, for a violation of 30 C.F.R. §77.1606(c), *supra*.

The citation read:

> The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT111:
> 1. Right front strut is leaking oil.
> 2. Right rear strut is leaking oil.
> 3. Oil is leaking from the right rear inside wheel area.
> 4. Oil is leaking from the right rear outside wheel area.
> 5. Oil is leaking from the left rear inside wheel area.
> 6. Excessive slack existed in the rear stabilizer bar (dogbone).
> 7. Excessive slack existed in the center arm pin.
> 8. The left front strut is leaking oil.
> 9. Oil is leaking from the right front brake caliber area.
> 10. Oil is leaking excessively from the steering oil tank onto the deck and down onto the right side of the engine compartment area.
> 11. Oil is leaking excessively from the area located behind the hydraulic tank.
> 12. Three gussets located on the right side of the truck was cracked and separated.
> 13. The right rear inside tire has excessive damage to the tire.

This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).

Petition at 32-33.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 32. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 34.

The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 35.

Section 104 (b) Order No. **9563181** was issued on February 1, 2022, in association with Citation No. 9563142.

The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785D Caterpillar Haulage Truck Co. No. RT111. 4 of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed
Standard 77.1606(c) was cited 60 times in two years at mine 4608930 (60 to the operator, 0 to a contractor).

104(b) Order Addendum at 13. The order was terminated on February 8, 2022, with the justification that:

The following actions have been taken to correct the conditions:
1. Installed a new strut.
2. Installed a new strut.
3. Installed new cooler seals.
4. Installed new wheel seals on axle cover.
5. Installed new cooler seals.
6. Installed new bearings.
7. Installed new bearing and pin.
8. Installed a new seal.
9. Installed new cooler seals.
10. Resealed the steering tank.
11. Resealed the back of the hydraulic tank.
12. Welded the gussets up securely.
13. Installed a new tire.

Id. at 14.

Breaking previous records for the citations in this docket, for this citation 13 (thirteen) separate defects were identified, none of which, in the Court's estimation, could be viewed as inconsequential. Part of what could only be described as a pattern for these citations, the (b) order was issued after some 20 days had elapsed with the order being issued on the 21st day. Three weeks is, undeniably, a long period of time for the repairs to have been accomplished. The inspector's order stated that a reasonable effort had not been made to correct all of the cited conditions within a reasonable amount of time. Having gained the operator's attention through the (b) order, the defects were then all corrected a week later.

Citation No. 9563143

Citation No. 9563143 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the 785C Caterpillar Haulage Truck Co. No. RT269:
1. The mud flap located underneath the operators cab is bent down, allowing mud to get on the drivers side rear view mirror and onto the window glass of the drivers side door.
2. The truck frame is cracked across the bottom and back side of the frame. The crack is located on the rear of the truck above where the stabilizer bar (dogbane) is located.
3. The right rear strut is leaking oil.
4. The right side rear wheel is leaking oil on the inside area of the wheel.
5. The left side rear wheel is leaking oil on the inside area of the wheel.

6. Oil is leaking from the steering oil tank area which is located on the top deck above the engine compartment. The oil is leaking down onto the right side of the engine compartment area.
7. Excessive slack existed in the right side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
8. Excessive slack existed in the left side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
9. The front brake canister is over stroked. There is no warning alarm or warning light on inside the operators cab.
10. The handrail located on the front bumper to the right side step is bent and missing a bolt.
11. The hood is broke near the offside door to the operators cab. This hood is also used as a walkway (deck) to access the offside door to the operators cab.
12. The fuel gauge located inside the operators cab was not functioning when tested.
13. Paper towels are wrapped around the door striker to the drivers side door to the operators cab.
14. Paper towels are installed around the top corner to the drivers side door to the operators cab.
This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment tis used.

Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).

Petition at 36-37.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably result in "lost workdays or restricted duty," affecting one person. *Id*. at 36. The violation was found not to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*.

The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 38. The citation was continued again on January 24, 2022, with the same justification. *Id*. at 39.

Section 104 (b) Order No. **9563178** was issued on February 1, 2022, in association with Citation No. 9563143. The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT269. 6 conditions

have not been corrected in a reasonable amount of time based on the conditions that existed.
Standard 77.1606(c) was cited 57 times in two years at mine 4608930 (57 to the operator, 0 to a contractor).

104(b) Order Addendum at 7. The order was terminated on February 10, 2022, with the justification that "All defects affecting safety, on the 785C Caterpillar Haulage Truck, Co. No. RT269, that is operated on the Mill Seat Pit Area (Alma), have been corrected by a qualified person." *Id*. at 8.

The previous record for multiple defects, as just discussed, did not last long, as Citation No. 9563143 recorded 14 (fourteen) defects on yet another Caterpillar haulage truck. As with the other 104(a) citations, some three weeks passed before the inspector refused to grant additional continuations, issuing a (b) order. In a similar time frame, nine days later, the defects were finally corrected.

Citation No. 9563146

Citation No. 9563146 was issued on January 12, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT112:
1. An excessive oil leak existed on a hose located on the right front area of the truck. Oil was spraying out the hose.
2. An excessive oil leak existed in the area behind the hydraulic tank area. A steady streams of oil was coming from this area.
3. Oil was leaking from the right rear wheel. The inside area of the wheel was covered in oil and running down the sidewall of the tire.
4. The mud flap is missing from underneath the drivers side of the operators cab. The mirror and window glass of the drivers side door was covered in mud.
5. Oil was leaking from the filter area of the steering oil tank and running down onto the right side of the engine compartment.
6. Left rear brake temperature error indicator is coming on inside the operator's cab.
7. The warning light located next to the digital display is taped over.
8. The action warning light located on the dash board is staying on at all times.
9. Excessive slack existed on the right side steering jack inside ball stud. This slack was visible when the truck was steered in either direction.
10. The right side fender is damaged where the front head lights are located causing the lights to not face forwards completely.
This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 48 times in two years at mine 4608930 (48 to the operator, 0 to a contractor).

Petition at 44-45.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 44. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 46. The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. Repairs to items 1, 2, 4, 6, 7, 9 and 10 have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 47.

Section 104 (b) Order No. **9563180** was issued on February 1, 2022, in association with Citation No. 9563146.

The order read:

> A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT112. 1 of the conditions has not been corrected in a reasonable amount of time based on the conditions that existed.
> Standard 77.1606(c) was cited 59 times in two years at mine 4608930 (59 to the operator, 0 to a contractor).

104(b) Order Addendum at 11. The order was terminated on February 2, 2022, with the justification that:

> The following actions have been taken to correct the following conditions:
> 1. A new metal tube and O-rings have been installed. Steamed cleaned the area.
> 2. Resealed the hydraulic tank, installed several hoses and O-rings. Steamed cleaned the area.
> 3. Resealed wheel unit and coolant brake tube. Also installed new wheel group. Steamed cleaned the area.

4. Installed a new mud flap. Cleaned the mirror and window glass.
5. Resealed the filter on the tank. Steamed cleaned the area.
6. A new brake sensor has been installed.
7. Repaired the wiring and downloaded the system. Also removed the tape.
8. Repaired the wiring and downloaded the system.
9. Installed a new ball stud.
10. Repaired the fender by bending the fender back into place.

Id. at 12.

With Citation No. 9563146, we return to multiple defects on another vehicle, this time 10 (ten) defects on Caterpillar haulage truck. Among the 10 were four instances of excessive oil leaks. Several of the other defects were significant matters such as: the left rear brake temperature error indicator is coming on inside the operator's cab; the warning light located next to the digital display was taped over; the action warning light located on the dashboard was staying on at all times; and there was excessive slack present on the right side steering jack inside ball stud. It cannot be denied that these constituted a significant number of defects. The truck was being operated in the Mill Seat Pit area at the time of 104(a) citation's issuance. With the passage of some 18 (eighteen) days and matters still not all corrected, the inspector understandably issued a (b) order.

Further Analysis of the hidden (b) orders.

Presented with the Secretary's contention that the Commission has no business viewing section 104(b) orders where a citation is affirmed as issued and the proposed penalty is paid in full, the Court posits "Why stop there?"

There is no logical reason or distinction for the Secretary not to expand its 104(b) order ban to also prevent any and all 104(a) citations from the Commission's eyes post the filing of its civil penalty petition, blocking their review where a citation is paid in full with no changes to the inspector's evaluation. If that doesn't make sense, and the Court agrees it does not, there is similarly no rational basis to block review of (b) orders. Such orders are as much a part of the enforcement record as 104(a) citations.

One might also ask, "what's the harm?" The answer is that anyone reading the motion would be seriously misled about the enforcement history for these citations. On the face of the motion, one would not learn that the elevated enforcement step, issuance of section 104(b) orders, was required. This does a disservice to miners and the public. The Commission, in this Court's view, should not be a party to the incomplete recounting. To allow it is analogous to issuing a book with the last chapter missing, but with no alert to the reader that there was more to the story.

As discussed above, the 7 (seven) section 104(a) citations and the associated 104(b) orders each reflect important contextual information about these, now-admitted violations. In particular, the 104(b) orders each reflect that the mine operator took an undue period of time in

correcting the numerous and consequential violations, so much so that the issuing inspector understandably had no reasonable option but to issue the orders. It is noteworthy that, for several of the orders, the inspector noted that the equipment continued to be operated in its defective condition. It is perplexing that the Secretary, acting through MSHA would take this recalcitrant attitude and that the mine operator, through its cooperative legal counsel, would be the source for the relevant information.

It is this Court's position that once a matter is contested, it is before the Commission. That means *all of it*, not selected portions of enforcement actions ensuing after issuance of citations. Full stop.

In its December 13, 2022, Order Certifying Case for Interlocutory Review, the Court noted the importance of (b) orders:

The structure of the Mine Act underscores the importance of 104(b) orders. As the Court noted in its June 22, 2022 Order in *Perry County Resources*, 44 FMSHRC 501 (June 2022),

> The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. [The Citation in issue] is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.
>
> A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:
>
> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein … and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area

until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent 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) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty…. 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and **miners' representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]*. The notice of proposed **penalty** to operators in such cases shall state that a [**104**(**b**)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.').

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: "[t]he notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.*" *Id.* at 593. (emphases in original Order).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners' representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court's review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the

inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example*, *Argus v. U.S. Dept Agriculture,* 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, *5 U.S.C. § 552.* To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).

Id. at 503-506 (footnotes omitted).

Analysis for the settlement matters not involving the Secretary's failure to supply the Section 104(b) orders

Two citations in the motion involve penalty reductions with modifications to the issuing inspector's evaluations. They are discussed here.

Citation No. 9563144 Penalty Reduction of 80%

Citation No. 9563144 was issued as a 104(a) citation on January 11, 2022, for a violation of 30 C.F.R. § 77.1001. Titled "Stripping; loose material," this standard specifies that "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection." 30 C.F.R. § 77.1001.

The citation read:

The spoilbank located in the Grapevine North Pit Area (Alma) was not stripped for a safe distance from the top of the pit. The spoil bank was not sloped to the angle of repose. The toe of the spoilbank has been dug out. The spoilbank is not at the angle of repose in the pit and is 30 to 35 feet high. A coal loader was removing coal along the base of the spoilbank. The area along the toe of the spoil bank was not bermed off to prevent unauthorized access.

This condition exposes the person working underneath the spoilbank to the hazards that existed. It is reasoanbly likey of this condition continues to exist an accident will occur.

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.
> Standard 77.1001 was cited 1 time in two years at mine 4608930 (1 to the operator, 0 to a contractor).
>
> Petition at 40.

For gravity, likelihood of injury was found to be "reasonably likely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on January 13, 2022, with the justification that "[m]aterial has been dumped back into the pit to correct the hazardous spoilbank. The spoilbank is now at the angle of repose." *Id*. at 41.

The Secretary moves to modify the citation, reducing likelihood to "unlikely" and removing the significant and substantial designation, offering the following in support:

> Citation #9563144 will be modified to "unlikely" and "non S&S" gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that the spoilbank was compacted in the cited area because of a previous haulroad overhead. Respondent further contends that the highwall did not show any indications of adverse conditions or failure at the present time and it was not currently raining.
>
> The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563144. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "reasonably likely" to "unlikely" and deleting the "S&S" finding, and reduce the penalty for citation #9563144 from $1,471 to $296, and the Respondent has agreed to pay the reduced penalty.
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> Motion at 4.

For Citation No. 9563144, involving a now-admitted violation of 30 C.F.R. § 77.1001 the Secretary's Motion seeks to modify the likelihood of the injury from the inspector's designation of 'reasonably likely' to 'unlikely.' The standard requires that loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose. Neither of these methods of compliance were present. To the contrary, and not contested, the inspector found that the spoil

bank located in the Grapevine North Pit Area was not stripped for a safe distance from the top of the pit, nor was it sloped to the angle of repose. Aggravating matters, the toe of the spoil bank has been dug out and was not bermed off to prevent unauthorized access. Further, a coal loader was removing coal along the base of the spoilbank.

Addressing the basis for the unlikely designation, the Respondent contends that the spoil bank was compacted in the cited area because of a previous haul road overhead and that the highwall did not show any indications of adverse conditions or failure at the present time and it was not currently raining. None of these claimed justifications support the unlikely designation. Instead, they are of the alternative safety conditions which the federal courts of appeals have rejected when analyzing the significant and substantial designation.[3] This is especially the case for the claim that adverse conditions or failure *at the present time* and that it *was not currently raining*. The Commission has made it clear that analysis of the likelihood is measured by continued normal mining operations.

In the face of all this, the Secretary has agreed to change the inspector's evaluation of the gravity to unlikely, and by that change, the violation becomes redesignated as non-S&S. No

[3] Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration 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)." *Id.* at 1028–1029.

Id. at 118-119.

word whether the Secretary sought input from the issuing inspector about the legitimacy of these changes. As for the S&S change to non-S&S, it is the Secretary's position that it is justified simply because he can do so, with no rationale needed, as if it can be made apart from any gravity modification. The Court does not agree. In making the claim that the Secretary has independent discretion to remove the inspector's 'significant and substantial' designation, the Motion asserts such discretion, citing inapplicable Commission decisions. This is incorrect, the removal of the 'significant and substantial' designation comes about only by virtue of the redesignation of the likelihood of occurrence, not apart from that.

To support the change that the injury is unlikely to occur, the Respondent asserts that the spoil bank was compacted in the cited area because of a previous haul road overhead and that the highwall did not show any indications of adverse conditions or failure *at the present time*. With no embarrassment, Respondent also adds that *it was not currently raining*. None of the assertions put forward by the Respondent speak to likelihood. The standard does not offer passes when no adverse conditions or failure exist *at the present time*, nor is there a 'no *current* rain' exception. The Secretary has overlooked that the test for evaluation is to assume 'continued normal mining operations.' *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

However, given the Commission's test for a judge's review of settlement motions and the Court's understanding of the application of that test, this motion, as with virtually all such motions, passes muster. Therefore, the Court leaves it to the Commission if it determines that the Court misapprehends the review test in this instance.

Citation No. 9563152 Penalty Reduction of 80%

Citation No. 9563152 was issued on January 19, 2022, as a 104(a) citation, for a violation of 30 C.F.R. § 77.1004(b). Titled "Ground control; inspection and maintenance; general," this standard specifies that "[o]verhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted." 30 C.F.R. § 77.1004(b).

The citation read:

> The mine operator drilled 90 foot pre-line holes and blasted these holes in the Grapevine North Pit Area. The mine operator then stepped out away from the pre-line a considerable distance and drilled a 30 foot break down shot. *After the breakdown shot was removed this created another highwall that was in front of the pre-line that was already shot creating a false highwall. The mine operator was in the process of drilling another 30 foot breakdown next to the area that the false highwall existed.* This condition creates an unsafe ground condition. Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall

be corrected promptly, or the area shall be posted. It is reasonably likely if these conditions continue to exist an accident will occur.

Petition at 69 (emphasis added).

For gravity, likelihood of injury was found to be "reasonably likely," and injury could reasonably be expected to be "fatal," affecting one person. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was continued on January 24, 2022, with the justification that "A shot has been put off and that material has been ramped back up towards the upper bench. Another shot is being blasted today to have more material to complete[] the ramp to be able to safely access the upper bench to start drilling. More time is needed to construct the ramp, drill the shot and blast." *Id*. at 70. The citation was terminated on February 1, 2022, with the justification that "The highwall has been scotched by pushing material back up along the highwall. A road has also been completed to access the upper bench. Drilling has already commenced on the upper bench to shoot back to the existing pre-lined highwall. The mine operator will not remove the material that is scotching the highwall until the upper bench has been shot back to the existing pre-lined highwall." *Id*. at 71.

The Secretary moves to modify the citation, reducing gravity likelihood to "unlikely" and removing the significant and substantial designation, offering the following in support:

> Citation #9563152 will be modified to "unlikely" and "non S&S" gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that the top safety bench measured in excess of 60 feet. The highwall only measured 30 feet, so therefore it is highly unlikely that a highwall failure would occur from this ground control issue. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563152. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "reasonably likely" to "unlikely" and deleting the "S&S" finding, and reduce the penalty for citation #9563152 from $4,884 to $987, and the Respondent has agreed to pay the reduced penalty.
>
> Motion at 4-5.

Here, for this second ground control hazard, the Respondent asserts only that the top safety bench measured in excess of 60 feet while the highwall measured 30 feet. From this, the Respondent contends that it is highly unlikely that a highwall failure would occur from the admitted ground control issue. There is no explanation how those two distances correlate to support the assertion, and the Court, under current Commission decisional law, is precluded from making reasonable inquiries about this. Further, neither the Respondent nor the Secretary

address the inspector's remark that after the breakdown shot was removed that act created another highwall that was in front of the pre-line that was already shot, creating a false highwall, nor do they speak to the inspector's uncontested statement that the mine operator was in the process of drilling another 30-foot breakdown next to the area that the false highwall existed.

Of a severity on a par with the other ground support violation just described, this time the now-admitted violation involved the requirement for overhanging highwalls and banks to be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted. None of those prophylactic steps were taken.

The Secretary does not inform whether he consulted with the issuing inspector about the operator's brief assertion to support the unlikely characterization based on the claim that there was a top safety bench in excess of 60 feet and that the highwall was only 30 feet. The inspector of course is the only person for the Secretary who had a "eyes on" to view the situation. Further, to the Court, a 30-foot high wall is not negligible. But, that is where things are – the Court is not permitted to make inquiries about these issues, and so, absent intervention by the Commission, the motion is to be approved.

These serious questions by the Court do not operate to reject the Motion as the Commission's test for approval of such motions is satisfied. However, given the Commission's test for a judge's review of settlement motions and the Court's understanding of the application of that test, this motion, as with virtually all such motions, passes muster. Therefore, the Court again leaves it to the Commission if it determines that the Court misapprehends the review test.

Reasonable Inquiry is not Permitted

Despite the Court's analyses and expressed concerns for Citation Nos. 9563144 and 9563152, 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 *AmCoal* and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

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

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

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

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

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

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

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

In the context of settlement motions, "facts" have an atypical meaning.[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).

[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.

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

Typically found in the Secretary's motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties' settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has "considered the representations and documentation submitted, f[ound] that the assessment is reasonable and . . . conclude[d] that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act" Draft Order at 3. The Court cannot subscribe to such language.[5] 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).

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it meets that decision's standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$23,365.00** within 30 days of this decision.[6]

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

[5] Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary's motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary.* Motion at 3 (emphasis added). Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

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

Distribution:

K. Brad Oakley, Esq., Jackson Kelly PLLC, 100 W. Main Street, Suite 700
Lexington, KY 40507 kboakley@jacksonkelly.com

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

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

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

January 11, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0428[1] AC No. 46-08930-551112 Mine: Grapevine South Surface Mine

DECISION APPROVING SETTLEMENT[2]

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 Secretary has filed a Motion to Approve Settlement for the citations and order involved in this matter.[3] The parties move to modify the citations and order, as stated below. The penalty would be reduced accordingly, from the original assessed amount of **$28,246.00** to **$20,070.00.**

All citations were regularly assessed. Citation Nos. 9563155, 9563156, 9563158, 9563159, 9563160, 9563161, 9563171, 9563172, 9563173, 9563174, 9563175, 9563176, 9563183, 9563188, and 9563189 were issued as 104(a) citations, with a 10% penalty reduction for good faith. The one exception to the good faith reductions was Section 104(a) Citation No. 9563157, which was issued on January 18, 2022. Thirteen (13) days later, the cited conditions not having been corrected, the inspector issued a 104(b) order. The proposed penalty for that citation was issued without the 10% penalty reduction for "good faith" abatement efforts.

[1] This docket was created when 16 citations (including one 104(a) citation with an associated 104(b) order) from WEVA 2022-0301 were reallocated into this new docket. Order for Docket Reallocation, June 29, 2022.

[2] This Decision Approving Settlement is being issued simultaneously with the Court's Decision Approving Settlement in WEVA 2022-0301 and the Court's Decision regarding the Secretary's December 20, 2022 Motion to Strike and to Approve Settlement for both dockets.

[3] In spite of the Chief Judge's Order for Docket Reallocation, the Secretary elected, in effect, to re-consolidate the dockets into a single Motion, though it was filed on eCMS for each docket. The Court, consistent with the Reallocation Order, continues to treat the dockets separately.

Citation	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9563155	$407.00	$407.00	Violation of 30 C.F.R. § 77.205(a), safe means of access not provided and maintained on 993K Caterpillar Front-End Loader Co. No. L465. Sustained as Issued- No penalty reduction
9563156	$661.00	$661.00	Violation of 30 C.F.R. § 77.404(a), 993K Caterpillar Front-End Loader Co. No. L465 not maintained in safe operating condition. Sustained as Issued- No penalty reduction
9563157 (Associated 104(b) order No. 9563179)	$4,624.00	$4,624.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety existed on 785C Caterpillar Haulage Truck Co. No. RT263. Sustained as Issued- No penalty reduction
9563158	$296.00	$296.00	Violation of 30 C.F.R. § 77.1605(k), rocks located along elevated roadway with no berms or guards to prevent equipment or vehicle from traveling into sump. Sustained as Issued- No penalty reduction
9563159	$252.00	$252.00	Violation of 30 C.F.R. § 77.1605(b), park brake on white Dodge Blasting Truck not functioning properly when tested. Sustained as Issued- No penalty reduction
9563160	$252.00	$252.00	Violation of 30 C.F.R. § 77.1606(a), failure to record and report defects affecting safety after pre-operational examination of white Dodge Blasting Truck. Sustained as Issued- No penalty reduction
9563161	$4,161.00	$1,869.00	Violation of 30 C.F.R. § 77.1303(h), certified blaster did not sure all persons were cleared from blast area or sheltered. Modify the negligence from "moderate" to "low." **Penalty reduction of 55%.**
9563171	$1,471.00	$1,471.00	Violation of 30 C.F.R. § 77.1001, loose hazardous material not stripped for a

			safe distance along the highwall in the Sustained as Issued- No penalty reduction
9563172	$1,156.00	$1,156.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety in D11R Caterpillar Dozer Co. No. DZ040. Sustained as Issued- No penalty reduction
9563173	$407.00	$407.00	Violation of 30 C.F.R. § 77.205(a), safe means of access not provided and maintained on 785D Caterpillar Haulage Truck Co. NO. MSY113. Sustained as Issued-No penalty reduction
9563174	$1,156.00	$1,156.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785C Caterpillar Haulage Truck Co. No. RT001. Sustained as Issued- No penalty reduction
9563175	$4,884.00	$4,884.00	Violation of 30 C.F.R. § 77.1000, failure to follow established ground control plan. Sustained as Issued- No penalty reduction
9563176	$296.00	$296.00	Violation of 30 C.F.R. § 77.1713(c), failure to record nature and location of hazardous conditions after examination. Sustained as Issued- No penalty reduction
9563183	$442.00	$442.00	Violation of 30 C.F.R. § 77.1606(c), damage to driver's seat belt on Freightliner Mechanic Truck Co. No. MT-665. Sustained as Issued- No penalty reduction
9563188	$4,507.00	$910.00	Violation of 30 C.F.R. § 48.26, independent contract mechanics working on the property not provided Experienced Miner Training. Modify the gravity from "reasonably likely" to "unlikely" and from "S&S" to "non-S&S" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 80%.**
9563189	$3,274.00	$987.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on Volvo Fuel

			and Oil Service Truck Co. No. 900. Modify the gravity from "fatal" to "lost workdays or restricted duty" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 70%**
TOTAL	**$28,246.00**	**$20,070.00**	**Total penalty reduction of 29%**

Citation No. 9563157 and Associated 104(b) Order No. 9563179

Citation No. 9563157 was issued on January 18, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

The citation read:

> The following defects affecting safety existed on the 785C Caterpillar Haulage Truck co. No. RT263:
> 1. The left rear strut is bottoming out.
> 2. The bed gusset located near the left side of the bed hinge pin area is cracked.
> 3. The bed gusset located near the right side of the bed hinge pin area is cracked.
> 4. Excessive slack existed from the right side top hoist cylinder. This is where the cylinder connects to the truck bed.
> 5. An excessive antifreeze leak existed from the left side are of the engine. Steady streams of antifreeze could been seen running down from the left side.
> 6. The left side front strut is bottoming out.
> 7. The right front strut is leaking oil.
> 8. A wire was disconnected front he right rear brake canister over stroke switch.
> 9. The drivers side window would not roll up when tested.
> 10. Drivers side door seal was damaged and paper towels were stuffed in areas to seal the door in the back corner. Also the door striker is taped up to keep the door closed completely.
> This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be correct before the equipment is used.
>
> Standard 77.1606(c) was cited 53 times in two years at mine 4608930 (53 to the operator, 0 to a contractor).

Pet. for a Civil Penalty at 66-67.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 66. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "high." *Id*. The citation was continued on January 24, 2022, when

> Repair work has been hampered by limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.
>
> *Id*. at 68.

The Secretary moves to keep the citation as issued, with no reduction in penalty. Mot. to Approve Settlement at 3.

Order No. 9563179 was issued on February 1, 2022, as a 104(b) order in connection with Citation No. 9563157. The Secretary refused to supply the Court with the (b) order. The mine operator, through its counsel, provided the document. The Court has entered the document in eCMS for this docket. The order read:

> A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT263. 8 conditions have not been corrected in a reasonable amount of time based on the conditions that existed.
> **Standard 77.1606(c) was cited 58 times in two years at mine 4608930 (58 to the operator, 0 to a contractor).**
>
> 104(b) Orders Addendum at 9 (emphasis added).

The order was terminated on February 10, 2022, when "[a]ll defects affecting safety, on the 785C Caterpillar Haulage Truck, Co. No. RT263, that is operated on the Grapevine North Pit, have been corrected by a qualified person." *Id*. at 10.

Analysis of Section 104(a) Citation No. 9563157 with its associated 104(b) Order No. 9563179

Citation No. 9563157 has settled for the full amount proposed under the regular assessment calculation. The 10% reduction for good faith attempt to achieve rapid compliance was denied. This is not surprising as the Respondent failed to achieve compliance for the violation only after a section 104(b) order was issued 13 days after the 104(a) citation was issued. The Secretary refused to provide the Court with the 104(b) order, even though it is undeniably an important and vital part of the enforcement record for the violation. Ironically, the mine operator's attorney stepped forward and provided the Court with the (b) order.

The Citation reflects both the significant nature and extent of the transgressions for the defects affecting safety subsection cited at 30 C.F.R. § 77.1606(c). Ten independent defects, all of them conceded, were involved. Worse, and underscoring the importance of the associated (b) order, thirteen days later eight (8) of the defects remained uncorrected. This great delay in abating the many defects is an important part of the story associated with this violation, and therefore while the Secretary's hiding it is inappropriate in all instances, it is particularly so in this instance. **When a matter is before the Commission, as it is in this instance by the filing**

of a petition for the assessment of a civil penalty, it is before the Commission. All of it. Not just those parts the Secretary unilaterally wishes to reveal.

As the Commission has noted:

> **[t]he purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. … The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations kijuland refuses to comply**. See 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

Hopkins County Coal, 38 FMSHRC 1317, 1335-1336 (June 2016) (emphasis added).

Presented with the Secretary's contention that the Commission has no business viewing section 104(b) orders where a citation is affirmed as issued and the proposed penalty is paid in full, the Court posits "Why stop there?"

There is no logical reason or distinction for the Secretary not to expand its 104(b) order ban to also prevent any and all 104(a) citations from the Commission's eyes post the filing of its civil penalty petition, blocking their review where a citation is paid in full with no changes to the inspector's evaluation. If that doesn't make sense, and the Court agrees it does not, there is similarly no rational basis to block review of (b) orders. Such orders are as much a part of the enforcement record as 104(a) citations.

One might also ask, "what's the harm?" The answer is that anyone reading the motion would be seriously misled about the enforcement history for these citations. On the face of the motion, one would not learn that the elevated enforcement step, issuance of section 104(b) orders, was required. This does a disservice to miners and the public. The Commission, in this Court's view, should not be a party to the incomplete recounting. To allow it is analogous to issuing a book with the last chapter missing, but with no alert to the reader that there was more to the story.

It is perplexing that the Secretary, acting through MSHA would take this recalcitrant attitude and that the mine operator, through its cooperative legal counsel, would be the source for the relevant information.

In its December 13, 2022, Order Certifying Case for Interlocutory Review, the Court noted the importance of (b) orders:

The structure of the Mine Act underscores the importance of 104(b) orders. As the Court noted in its June 22, 2022 Order in *Perry County Resources*, 44 FMSHRC 501 (June 2022),

> The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. § 820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. [The Citation in issue] is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.
>
> A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:
>
> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein … and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> 30 U.S.C. § 814(b).
>
> As the Commission has noted, such orders have significance in their own right. It has observed that:
>
> First, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.
>
> Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent 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) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty…. 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and **miners' representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]*. The notice of proposed **penalty** to operators in such cases shall state that a [**104(b)**] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.').

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section

104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: "[t]he notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.*" *Id.* at 593. (emphases in original Order).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners' representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court's review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example*, *Argus v. U.S. Dept Agriculture,* 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, *5 U.S.C. § 552.* To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).

Id. at 503-506 (footnotes omitted).

Analysis of the Citations involving the Secretary's modifications of the inspector's evaluations with accompanying significant penalty reductions.

Citation No. 9563161

Citation No. 9563161 was issued on April 19, 2022, for a violation of 30 C.F.R. § 77.1303(h). Titled "Explosives, handling and use," the standard specifies that "Ample warning shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting." 30 C.F.R. § 77.1303(h).

The citation read:

> The certified blaster did not ensure that all persons were cleared from the blast area or that all persons were in suitable blasting shelter to protect persons endangered by flyrock from blasting. A front-end loader was hit by flyrock from blasting. The loader operator was setting inside the operators cab when the flyrock hit the loader. The rock hit the left side tilt cylinder in front of the cab where the pin is located. It is reasoanbly likey if this condition continues to exist an accident will occur. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

Pet. for a Civil Penalty at 82.

For gravity, likelihood of injury was found to be "reasonably likely," and that the injury could reasonably be expected to be "fatal," affecting one person. *Id*. Accordingly, the violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on January 24, 2022, when "[t]he mine operator ha[d] retrained the blaster and blaster helpers on the Blasting Safety Precautions in the Acknowledge[d] Ground Control Plan. The training has been documented. Also observed the loading and blasting cycle." *Id*. at 83.

The Secretary moves to modify the citation, changing the negligence finding from "moderate" to "low," offering the following in support:

> Citation #9563161 will be modified to "low" negligence, with a reduction in penalty in accordance with the 30 CFR part 100.3. The Respondent contends that the negligence of the citation was overevaluated and should not have been issued as "moderate". Respondent would argue at hearing that the company was in compliance with their approved plan at the time of the accident. Additionally, no adverse conditions were observed by the certified blaster prior to the shot. The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the negligence from "moderate" to "low", and reduce the penalty for citation #9563161 from $4,161 to $1,869, and the Respondent has agreed to pay the reduced penalty.

Mot. to Approve Settlement at 3-4.

Analysis for Citation No. 9563161

Citation No. 9563161. The Secretary has agreed to a **55% reduction in the penalty** for this now-admitted violation. In pursuit of the very large reduction in the regularly assessed penalty and the accompanying redesignation of the negligence from moderate to low, the Secretary asserts that *the judge* "might find merit in the facts and arguments presented by the Respondent," but does not reveal his own evaluation of the merits of those assertions. Given the presented facts, these changes do not appear to be warranted.

The standard, now admitted as having been violated, presents no exceptions to its requirement that "[a]ll persons shall be cleared and removed from the blasting area …to protect men endangered by concussion or flyrock from blasting." 30 C.F.R. § 77.1303(h). Here, the uncontested facts are that a "front-end loader was hit by flyrock *from blasting*. The loader operator was s[i]tting inside the operators cab when the flyrock hit the loader." Pet. for a Civil Penalty at 82 (emphasis added). Obviously, as the loader was hit by flyrock and the operator was in the loader at that time, the standard was violated.

The justification for designating the negligence as low, with low meaning the presence of *considerable* mitigating circumstances, is without merit. This is because the company's claim that it was in compliance with their approved plan at the time of the accident and that no adverse conditions were observed by the certified blaster prior to the shot are of the 'other safety measures taken' ilk. These excuses do not cut it, per decisions by the U.S. Courts of Appeals.[4]

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[4] Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that

(continued…)

It is undeniable that all persons were not cleared and removed from the blasting area. Thus, the harm the standard addresses occurred.

The Court also notes that the issuing inspector had marked the negligence associated with the citation as "moderate." That means the inspector had already determined there were mitigating circumstances. However, qualifying for "low negligence" requires the presence of "**considerable** mitigating circumstances." 30 C.F.R. §100.3, Table X- Negligence (emphasis added). The provision states: "When applying this criterion, **MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices**." *Id*. at 100.3(d) (emphasis added). Clearly, no actions taken by the operator to prevent or correct hazardous conditions or practices have been identified. In the absence of "considerable mitigation," it is especially disconcerting that the Secretary would agree to reclassifying the negligence to "low" where the operator occupied front-end loader was hit by flyrock from a blast.

The standard, for which strict liability applies, was violated as all persons were not cleared and removed from the blasting area. The claim that the operator was in compliance with its approved plan is beside the point, as is the contention that the certified blaster did not observe any adverse conditions. Neither of these arguments reduce the negligence involved and certainly do not constitute *considerable* mitigation. If flyrock from a blast hitting a miner occupied front-end loader can satisfy a low negligence designation for the reasons presented by the operator, then it is hard to conjure what would constitute moderate negligence. Undermining the operator's claims, the inspector noted that the blaster and the blaster operators were retrained on the blasting safety precautions in the acknowledged ground control plan. Pet. for a Civil Penalty at 83.

In the Court's opinion, based on this record, the Secretary should not have acceded to this $2,292.00 reduction in the regularly assessed penalty. Were it permitted, the Court would have asked several questions seeking the basis for the claimed "considerable" mitigation.

Citation No. 9563188

Citation No. 9563188 was issued on February 2, 2022, for a violation of 30 C.F.R. § 48.26. For this now-admitted violation, titled "Experienced miner training," in relevant part, the standard specifies that:

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[4] (…continued)

> "consideration 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)." *Id.* at 1028–1029.

Id. at 118-119.

(b) Experienced miners must complete the training prescribed in this section before beginning work duties. Each experienced miner returning to mining following an absence of 5 years or more, must receive at least 8 hours of training. The training must include the following instruction:

(1) ***Introduction to work environment.*** The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.

(2) ***Mandatory health and safety standards.*** The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.

(3) ***Authority and responsibility of supervisors and miners' representatives.*** The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(4) ***Transportation controls and communication systems.*** The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) ***Escape and emergency evacuation plans; firewarning and firefighting.*** The course must include a review of the mine escape system and the escape and emergency evacuation plans in effect at the mine, and instruction in the firewarning signals and firefighting procedures in effect at the mine.

(6) ***Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.*** The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) ***Hazard recognition.*** The course must include the recognition and avoidance of hazards present in the mine.

(8) ***Prevention of accidents.*** The course must include a review of the general causes of accidents applicable to the mine environment, causes of specific accidents at the mine, and instruction in accident prevention in the work environment.

(9) ***Emergency medical procedures.*** The course must include instruction on the mine's emergency medical arrangements and the location of the mine's first aid equipment and supplies.

(10) ***Health.*** The course must include instruction on the purpose of taking dust, noise, and other health measurements, where applicable; must review the health provisions of the Act; and must explain warning labels and any health control plan in effect at the mine.

(11) ***Health and safety aspects of the tasks to which the experienced miner is assigned.*** The course must include instruction in the health and safety aspects of the tasks assigned, including the safe work procedures of such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of

> the mine's HazCom program. Experienced miners who must complete new task training under § 48.27 do not need to take training under this paragraph.
> (12) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

30 C.F.R. § 48.26.

The citation read:

> **The independent contract mechanics that work throughout mine property on a daily bas[i]s were not provided Experience[d] Miner Training**. The operator must withdraw both mechanics from the property until the required training is received. **The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to themselves and others.**

Petition at 103 (emphasis added).

For gravity, likelihood of injury was found to be "reasonably likely," with the injury reasonably be expected to be "fatal," affecting two persons. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on February 2, 2022, when "Both mechanics have been provided with the required Experience Miner Training and the training has been documented on a MSHA Form 5000-23." *Id*. at 104.

The Secretary moves to modify the citation, reducing gravity from "reasonably likely" to "unlikely" and removing the significant and substantial designation, offering the following in support:

> Citation #9563188 will be modified to "unlikely" and "non S&S" gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that the independent contractors were experienced miners and had been working on mine property for several weeks. Additionally, all workers had been verbally informed of any and all hazards on mine property. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563188. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "reasonably likely" to "unlikely" and deleting the "S&S" finding, and reduce the penalty for citation #9563188 from $4,507 to $910, and the Respondent has agreed to pay the reduced penalty.

Motion at 4.

Analysis for Citation No. 9563188

Citation No. 9563188 states that "[t]he independent contract mechanics that work throughout mine property on a daily bas[i]s were not provided Experience[d] Miner Training." Petition at 103. The mechanics were withdrawn from the mine until the required training was received. That event occurred later that day, at which point the citation was terminated. For this now-admitted violation, the Secretary has agreed to redesignate the violation from reasonably likely to 'unlikely.' Motion at 4. The recharacterization of gravity to 'unlikely' destroys the significant and substantial designation.

The reasons advanced by the Respondent are, in the Court's estimation, suspect. Those reasons – that that the independent contractors were experienced miners and had been working on mine property for several weeks and that all workers had been verbally informed of any and all hazards on mine property – if endorsed, effectively emasculates the standard. As the inspector noted, the Mine Act itself declares an untrained miner to be a hazard to himself and others. 30 U.S.C. §814(g)(1). By accepting the assertion that the mechanics were experienced and they'd been working on the mine for several weeks and they had been told *verbally* of 'any and all hazards' on the mine property," the Secretary has discarded his own safety training standard. There is no exception in the standard for the excuses advanced by the mine operator. To the contrary, that the mechanics had been working, without the required training, is an aggravating factor. Asserting that the mechanics had been verbally apprised of all hazards, an outlandish claim, is no substitute either. In the Court's opinion, on this record the Secretary has eviscerated the standard's statutory and regulatory requirement by adopting the operator's excuses as grounds for characterizing the gravity as unlikely.

Thus, the Court believes that the Secretary's agreement to reclassify the likelihood of an injury or illness occurring to "unlikely" makes a mockery of the standard's requirements. It is, after all, described as "experienced" miner training. Because it addresses such *experienced miners*, the idea that because the independent contractors were experienced miners by background, but not by the MSHA required training and the remark that they had been working on mine property for several weeks suffices, neuters the standard. The latter argument amounts to a claim that by continuing to work without the MSHA required training, that training requirement evaporates. **The agreement for an 80% (eighty percent) reduction in the penalty confirms this observation.** The standard does not speak of 'experience' in a vacuum. Instead, it spells out, in detail, the required subjects of *required* training. Additionally, the idea that because the contractors had been on the job "for several weeks," (an indisputably short period of time), makes the hazard unlikely, is another instance of effectively negating the force of the standard. Last, the standard, detailed as it is, does not endorse the idea that *verbally* informing all miners of "any and all hazards" is a substitute. The Court believes that the Secretary should not be in the business of emasculating MSHA's training requirements.

Citation No. 9563189

Citation No. 9563189 was issued on February 2, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that

> (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.
> (b) Carriers on aerial tramways, including loading and unloading mechanisms, shall be inspected each shift; brakes shall be inspected daily; ropes and supports shall be inspected as recommended by the manufacturer or as physical conditions warrant. Equipment defects affecting safety shall be reported to the mine operator.
> (c) Equipment defects affecting safety shall be corrected before the equipment is used.
>
> 30 C.F.R. § 77.1606.

The citation read:

> The following defects affecting safety existed on the Volvo Fuel & Oil Service Truck Co. No. 900:
> 1. An air leak existed on the fuel line switch which was causing the air to drop from both the primary and secondary tanks.
> 2. The regulator on the air compressor was not functioning properly when tested.
> This truck is operated throughout mine proper to service equipment. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 63 times in two years at mine 4608930 (62 to the operator, 1 to a contractor).

Petition at 105.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "fatal," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on February 8, 2022, with the justification that

> The following actions have been taken to correct the conditions:
> 1. Installed a new air line on fuel valve and a air line under the rear of the truck.
> 2. Installed a new fitting on the air compressor.

Id. at 106.

The Secretary moves to modify the citation, changing the gravity from "fatal" to "lost workdays or restricted duty," offering the following in support:

> Citation #9563189 will be modified to "lost workdays or restricted duty" gravity, injury or illness expected, with a reduction in penalty in accordance with the 30 CFR part 100.3. The Respondent contends that the gravity of the citation was over-evaluated and should not have been issued as "fatal". Respondent would argue at hearing that the cited conditions would not cause fatal injuries to miners. The cited truck is only used to fuel, oil, and grease equipment on level loads at slow speeds. Additionally, all brakes worked properly when tested. The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "fatal" to "lost workdays or restricted duty," and reduce the penalty for citation #9563189 from $3,274 to $987, and the Respondent has agreed to pay the reduced penalty.
>
> Motion at 5.

Analysis for Citation No. 9563189

This Citation involves not one, but two, safety defects on a fuel and oil service truck. For this now-admitted violation, the inspector found both an air leak on the fuel line switch, causing the air to drop from both the primary and secondary tanks, and additionally that the regulator on the air compressor was not functioning properly upon being tested. Further, the corrections demonstrated that the admitted hazards required significant actions as new air lines had to be installed on the fuel valve and on the rear of the truck, plus the air compressor required a new fitting. To arrive at the Secretary's 70% reduction in the penalty, the gravity was reduced to lost workdays or restricted duty. The Secretary, per his customary approach, does not inform whether he consulted with the issuing inspector's view regarding this new assessment of the reasonably expected injury. The assertion that the cited truck is only used to fuel, oil, and grease equipment on level loads at slow speeds does not speak to the claim that lost workdays or restricted duty would result. Those claims do not translate to demonstrate that hazards from a fuel line leak and the improperly functioning air compressor would result in such diminished injuries. Nor is the association between the assertion that the brakes were properly working and the twin conceded defects explained.

Further, examining the particulars in claimed support that an injury would not be fatal, the Respondent's offering does not explain the relevance of the information, nor does the motion present the alternative injury that would result. Would the injury be permanently disabling, result in lost workdays, or no lost workdays at all? No explanation is offered, merely the bald assertion that it would not be fatal. Certainly the assertion that the cited truck is only used to fuel, oil, and grease equipment on level loads at slow speed does not explain the claim that no fatality would result. Nor does the claim that all brakes worked properly when tested, as both are of the alternative putative safety considerations not to considered. The Court, were it permitted, would have several questions to ask of the Respondent regarding its claim. Finally, it is noted that the Secretary remains mum regarding the Respondent's claims, preferring once again to state only that *the Court* might find merit in them.

Last, it is noted that the standard cited for this now-admitted violation requiring that equipment defects affecting safety shall be corrected before the equipment is used, has been cited **63 times** in the two years at this mine, a fact which should give pause by itself. Even within the original parent docket, WEVA 2022-0301, which entailed 33 citations, before 16 of them were reallocated to this docket, 12 (twelve) of the original 33 (thirty-three) citations involved violations of the cited *subsection* for this standard, 30 C.F.R. § 77.1606**(c).** Those numbers alone should make one blanch when the Secretary has agreed to a **70% (seventy percent)** reduction in the penalty for this violation, producing a $2,287.00 (two-thousand two-hundred eighty-seven dollars) penalty reduction from the regularly proposed assessment.

Reasonable Inquiry is not Permitted

Despite the Court's analysis and concerns, regarding the three citations with significant penalty reductions, 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 *AmCoal* and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

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

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

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

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

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

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

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

> In the context of settlement motions, "facts" have an atypical meaning.[5] 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).

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

Typically found in the Secretary's motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties' settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has "considered the representations and documentation submitted, f[ound] that the assessment is reasonable and . . . conclude[d] that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act." Draft Order at 3. The Court cannot subscribe to such

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[5] 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.

language.[6] 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).

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it meets that decision's standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$20,070.00** within 30 days of this decision.[7]

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

[6] Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary's motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary.* Neither does the Court endorse or agree with the Secretary's claim that *the modifications to the citations are immaterial,* nor with the accompanying claim that *the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions.* The Court has never been informed of any such value. Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

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

Distribution:

K. Brad Oakley, Esq., Jackson Kelly PLLC, 100 W. Main Street, Suite 700
Lexington, KY 40507 kboakley@jacksonkelly.com

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

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

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

January 17, 2023

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. IRON CUMBERLAND, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0084 A.C. No. 36-05018-555460 Mine: Cumberland Mine

DECISION APPROVING SETTLEMENT

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

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

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

Background

This following background is being presented to preserve the relevant historical record regarding the Cumberland Mine's recent violation history for violations of 30 C.F.R. § 75.400.

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

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

The order read:

> The operator allowed accumulations of combustible materials to exist in the following locations and in various forms on the 75 Headgate development section (MMU 002) [Area or Equipment impacted: from the Tailpiece inby in all 3 entries].
>
> 1 - Accumulations of float coal dust, dark grey to black in color has been deposited on the mine roof and ribs from 22 1/2 block to 25 block in the number 3 entry, which is the Return. These accumulations were approximately 1/16 of an inch in depth.
>
> 2 - Accumulations of loose coal and coal fines were found in the number 2 entry at 25 ¾ block, along the left rib. These accumulations measured up to 40 feet in length, 25 inches in depth and 28 inches in width.
>
> 3 - Accumulations of loose coal and coal fines were found just inby the 26 block crosscut in the number 2 entry face area that measured 20 feet in width, 14 feet in length and up to 4 feet in depth.
>
> 4 - Accumulations of float coal dust, black in color were found to be deposited on both ribs in the number 1 entry from just inby the 24 block crosscut to 25 3/4 block.
>
> 5 - There was 21 cardboard boxes (roof bolt resin boxes) found to be piled up along the solid rib at the 26 block crosscut in the number 1 entry.
>
> The [conditions] were obvious and extensive and should have been evident to even a casual observer, much less a certified person. If these conditions were left unnoticed, and therefore uncorrected, and normal mining operations were to continue, it would be reasonably likely that an accident would occur due to the

exposure to the conditions. Also, a confluence of factors exists as there was also a citation issued for 24 cutting bits being excessively worn (completely missing carbide tips or more) and 4 cutting bits being completely missing on the company number 1022 Continuous Mining Machine.

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

Petition for a Civil Penalty at 11-12.

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

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

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

The inspector referenced worn cutting bits on the continuous mining machine as an ignition source for the cited materials. The Respondent contends that the material in the first area mentioned, which MSHA cited for accumulations of float coal dust on the mine roof and ribs in the No. 3 entry, was rather a mixture of coal and rock dust of unknown combustible content. The Respondent further contends that this affected area was located outby the last open crosscut approximately 200 feet from the working face and therefore removed from the referenced ignition source. The second area mentioned, which MSHA cited for accumulations of loose coal and coal fines in the No. 2 entry, the Respondent contends consisted of extremely wet material that resulted from rib sloughage, which was also located outby the last open crosscut away from the referenced ignition source. The Respondent contends that the material in the third area, which MSHA cited for coal accumulations inby the last open crosscut at the working face of the No. 2 entry, were contained in a mud hole, fully saturated with water, and therefore would not contribute to an explosion or fire. The material in the fourth area, which MSHA cited for float coal dust in the No. 1 entry, was, argues the Respondent, in the intake air course and did not extend up to the working face and therefore was not near the referenced ignition source. Finally, the fifth area, which MSHA cited for the placement of cardboard boxes adjacent to the last open crosscut in the No. 1 entry, would not have been

readily ignited by the referenced ignition source, and were awaiting immediate removal prior to the resumption of mining in the No. 1 entry. In consideration of this and the risks inherent in litigation, the Secretary agrees to modify the likelihood of injury from "reasonably likely" to "unlikely", which changes the order to non-S&S, and reduces the penalty to $2,493.00, the minimum for a Section 104(d)(1) order.

Motion to Approve Settlement at 3-5.

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

As the Court noted in its review of this citation:

> At the outset it is important to note that the inspector identified five (5) distinct areas of accumulations of combustible materials in this highly gassy mine. Two of these involved accumulations of float coal dust, with one location describing them as dark grey to black and the other as black. Two other, separate, areas involved accumulations of loose coal and coal fines. The fifth area, also in a distinct location, involved 21 cardboard boxes. Cardboard is combustible material. As the inspector stated and the information in his Order reflects, the conditions were obvious and extensive and should have been evident to even a casual observer, much less a certified person.
>
> The issuing inspector also applied the correct Commission test for these multiple accumulations, namely that assuming continuation of normal mining operations, he found that it would be reasonably likely that an accident would occur due to the exposure to the conditions.
>
> Though not a requirement to support his evaluation, the inspector also stated that there was a confluence of factors existing as there was also a citation issued for 24 cutting bits being excessively worn (completely missing carbide tips or more) and 4 cutting bits being completely missing on the company number 1022 Continuous Mining Machine. This appears to be a reference to Citation No. 9253300, which describes such worn or missing bits on the 1022 Continuous Mining Machine. PENN 2021-0112 Pet. for a Civil Penalty at 12.
>
> Further, the operator was no stranger to the accumulation of combustible materials standard, 30 C.F.R. § 75.400, with it being cited 57 (fifty-seven) times in two years at mine.
>
> In the context of these five distinct areas of combustible accumulations and its very frequent occurrence, Respondent makes, as it must, various arguments in an attempt to show that the likelihood of an injury occurring was unlikely. These contentions have been set forth above and need not be repeated here. A tall task,

the Respondent tries to diminish the seriousness of each of five distinct areas with various claims. They consist of various claims – that the combustible accumulations were some distances from the working face or were otherwise located so as to diminish the likelihood of occurrence or, an irrelevant consideration, the inspector didn't analyze the combustible content of the coal dust, which is not a requirement to establish a violation, or they were wet or, in the case of the 21 boxes, they were awaiting immediate removal before mining resumed. However, at some point, the array of accumulations and the operator's habitually being cited for such accumulations cannot be explained away. It is noteworthy, that per its motion, the Secretary recounts the claims without comment.

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

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

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

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

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

For the first, second, fourth, and fifth areas, Respondent claims the identified combustible material in question – accumulated lose coal and coal fines, float coal dust, or cardboard boxes – was too far away from the working face. This contention ignores the plain language of the standard, which requires that

> combustible materials shall be cleaned up and not be permitted to accumulate in active workings. The accumulations cited by the inspector were all in active workings. Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel.

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

December 2021

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

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

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

30 C.F.R. § 75.400.

The order read:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. On the 6 Mains West #1 Belt accumulations of combustible material in the form of coal, coal fines and float coal dust has been allowed to exist at the following locations:
> 1.) 11 Mains West transfer (11 block), coal accumulations in the form of coal and coal fines is present on the off side of the transfer measuring 12 inches wide by 12 foot long and 4 feet to 16 inches in depth. In addition there is coal fines present in the walkway measuring 3 feet wide by 15 feet long and 2 to 4 inches in depth.
> 2.) 12 ¼ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller creating frictional heat. Smoke was being imitted from the accumulations. The accumulations measured 40 inches long by 24 inches wide and 10 inches deep.
> 3.) 15 ¼ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 24 inches wide and 12 inches deep.
> 4.) 15 ½ block, coal accumulaions in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 22 inches wide and 8 inches deep.

5.) 15 ½ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 48 inches long by 26 inches wide and 10 inches deep.
6.) 15 ¾ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 32 inches long by 24 inches wide and 10 inches deep.
7.) 15 ¾ block, coal accumulatios in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 40 inches long by 20 inches wide and 10 inches deep.
8.) 16 ½ block, coal accumulations in the form of loose coal and coal fines is present in contact with a turning bottom roller. The accumulations measured 30 inches long by 20 inches wide and 8 inches deep.
9.) 11 to 17 block, coal accumulations in the form of coal float dust is present on mine floor, roof, ribs, structure and water pipe. The accumulations measured approximately 1200 feet and 16 feet wide.
10.) 11 to 17 block, coal accumulations in the form of loose coal and coal fines is present on the offside of the belt under every bottom roller.

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

Petition for a Civil Penalty at 10-11.

For gravity, likelihood of injury was found to be "reasonably likely," and injury could reasonably be expected to result in "lost workdays or restricted duty"[1] affecting one person. *Id*. at 10. The violation was found to be significant and substantial. *Id*. Negligence was found to be "high." *Id*.

The order was terminated on December 20, 2021, when "Seven Hourly miners, two supervisors and three rock dusters worked to correct conditions for 3 hours for total of **36**

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

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

Id. at 12.

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

man hours to remove[] all accumulations and rock dust the area. All conditions have been corrected." *Id*. at 10 (emphasis added).

Order No. 92457810

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

The order read:

> Accumulation of combustible materials. Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. On the 6 Mains West #1 belt there is accumulations present at the following locations on previous rock dusted surfaces:
>
> 1.) 6 Mains West #2 Transfer at 35 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 72 inches long by 32 inches wide and 14 inches deep.
> 2.) 34 to 28 block on the offside of belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 1500 feet long.
> 3.) 32 block, there is accumulations present in the form of loose coal, coal fines, and coal dust in contact with a bottom roller. The accumulations measured 2 foot long by 4 foot wide and 10 inches deep.
> 4.) 31 ½ block, there is accumulations present in the form of loose coal, coal fines, and coal dust in contact with a bottom roller. The accumulations measured 2 foot long by 3 foot wide and 10 inches deep.
> 5.) 26 to 23 block on the off side of the belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 750 feet long.
> 6.) 22 ½ to 20 ½ block on the off side of the belt, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 8 foot wide by 500 feet long.
> 7.) 20 ½ block, there is accumulations present on the offside of the belt in the form of loose coal, coal fines and coal dust. The accumulations measured 10 foot long by 32 inches wide and 16 inches deep.
> 8.) 19 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 2 foot wide and 12 inches deep.

9.) 19 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 2 foot wide and 10 inches deep.
10.) 18 ¾ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 4 foot long by 2 foot wide and 6 inches deep.
11.) 17 ¼ to 17 block, there is accumulations present in the form of loose coal and coal fines on mine floor. The accumulations measured 20 foot long by 16 foot wide and 1 to 2 inches deep. There is also coal dust accumulations present on the mine floor, roof, ribs, structure and water line.
12.) 15 ¼ there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 2 foot long by 3 foot wide and 12 inches deep.
13.) 14 ¾ there is accumulations present in the form of loose coal and coal fines in contact with two bottom sets of rollers. The accumulations measured 9 inches long by 1 foot wide and 16 inches deep and 6 inches long by 12 inches wide and 12 inches deep respectively.
14.) 11 to 11 ½ bloc, there is accumulations present in the form of coal dust on previous rock dusted surfaces on the mine roof, mine floor, mine ribs, belt structure and water line. The accumulations measured 16 foot wide by 125 feet long.
15.) 11 Mains transfer at 11 block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 16 foot long by 72 inches wide and 16 inches deep. The accumulations are in contact with the bottom belt of 6 Mains West #1 belt and a bottom roller.
16.) 10 ¾ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 24 inches long by 12 inches wide and 12 inches deep.
17.) 8 ½ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 27 inches long by 30 inches wide and 8 inches deep.
18.) 8 ½ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 48 inches long by 27 inches wide and 8 inches deep.
19.) 6 ¾ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 42 inches long by 30 inches wide and 12 inches deep.
20.) 6 ¾ block, there is accumulations present in the form of loose coal and coal fines in contact with a bottom roller. The accumulations measured 6 foot long by 3 foot wide and 12 inches deep.
21.) 6 block Langley, there is accumulations present in the form of loose coal, coal fines and coal dust present. The accumulations measured 50 foot long by 16 foot wide and 2 to 3 inches deep.
22.) 6 Mains West #1 transfer, there is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact

with the 79 North Mains belt. The accumulations measured 16 foot long by 8 foot wide and 12 inches deep.

23.) 79 North Mains tailpiece, There is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact with the 79 North Mains belt and tail roller. The accumulations measured 14 foot long by 24 inches wide and 14 to 16 inches deep.

24.) 79 North Mains tailpiece off side, There is accumulations present in the form of loose coal, coal fines, and coal dust present. The accumulations are in contact with the 79 North Mains belt. The accumulations measured 6 foot long by 28 inches wide and 36 inches deep.

25.) 6 Mains West #1 belt transfer adjacent crosscut inline with 6 Mains West Belt, There is accumulations present in the form of loose coal, coal fines, and coal dust. The accumulations measured 9 foot long by 4 foot wide and 32 inches deep.

26.) 11 block to 6 Mains West #1 Transfer, there is accumulations of coal dust present on the offside of the belt. Accumulations are present on mine floor, roof, ribs, structure and water line on previous rock dusted surfaces. The accumulations measured 10 foot wide by 2750 feet long.

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

Petition at 13-15.

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

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

Id. at 16.

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

000555460
Assessment Control Number

Narrative Findings for a Special Assessment

Civil monetary penalties for violations of the Federal Mine Safety and Health Act of 1977 (the Mine Act) and mine safety and health standards are determined using the six criteria set forth in 30 C.F.R. Part 100. The Mine Safety and Health

Administration (MSHA) may elect to waive the regular assessment formula contained in § 100.3 if the conditions concerning the violation warrant a special assessment under § 100.5.

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

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

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

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

Petition at 7.

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

Order 9257780

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

> 104(d)(2) Order 9257780 was issued for an alleged violation of §75.400. The Secretary has proposed a civil penalty of $21,100.00 for this violation. Gravity was evaluated as: Reasonably Likely, Lost Workdays or Restricted Duty, 1 Person Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as high and amounted to an unwarrantable failure to adhere to the cited standard. Respondent argues that the specially assessed proposed penalty is excessive. As shown on the Special Assessment Narrative Form in Exhibit A of the penalty petition, the special assessment was derived by increasing the penalty points for likelihood, severity, and negligence (including three unwarrantable failure points). However, were the matter to go to hearing, **Respondent would argue that the facts and evidence would not support the high negligence or unwarrantable failure findings. Specifically, Respondent would argue that the conditions could have occurred or worsened over a short period of time due to the quantity and velocity of air on the belt and that the evidence would not prove that the conditions observed by the inspector were indicative of the conditions at the time of the most recent examination.** In consideration of the facts, the available evidence, Respondent's arguments, the risks inherent in litigation and Respondent's agreement to accept the order as issued, the Secretary agrees to settle this matter by affirming the order as issued and agreeing to a reduced penalty of $14,172.00. The regular assessment amount for the order as issued would have been $5,293.00 and, had the violation been cited as a moderate negligence 104(a) citation, the Part 100 penalty would have been $1,421.00. Thus, the agreed upon compromised amount of $14,172.00 is a fair and reasonable amount.
>
> Mot. to Approve Settlement at 3-4 (emphasis added).

Order No. 92457810

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

> 104(d)(2) Order 9257810 was issued for an alleged violation of §75.400. The Secretary has proposed a civil penalty of $59,100.00 for this violation. Gravity was evaluated as: Reasonably Likely, Lost Workdays or Restricted Duty, 8 Persons Affected. Consequently, the violation was designated as S&S. Negligence was evaluated as high and amounted to an unwarrantable failure to adhere to the cited standard. Respondent argues that the specially assessed proposed penalty is excessive. As shown on the Special Assessment Narrative Form in Exhibit A of the penalty petition, the special assessment was derived by increasing the penalty

> points for likelihood, severity, and negligence (including three unwarrantable failure points). However, Respondent would argue at hearing that the high negligence and unwarrantable failure findings are not supported. **Specifically, Respondent argues that miners were working on the cited conditions when the order was issued and that the examination books show that corrective actions were being taken on an ongoing basis. Furthermore, because a large portion of the mine had recently been sealed, increased air velocity on the belt caused coal fines to be blown off the belt and the conditions would change significantly over a short period of time**. In consideration of the facts, the available evidence, Respondent's arguments, the risks inherent in litigation and Respondent's agreement to accept the order as issued, the Secretary agrees to settle this matter by affirming the order as issued and agreeing to a reduced penalty of $34,166.00. The regular assessment amount for the order as issued would have been $14,172.00 and, had the violation been cited as a moderate negligence 104(a) citation, the Part 100 penalty would have been $4,268.00. Thus, the agreed upon compromised amount of $34,166.00 is a fair and reasonable amount.
>
> Motion at 4-5 (emphasis added).

Analysis

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

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

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

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

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

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

Notable aspects of Order No. 927780

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

This claim is hard to believe, and the Secretary apparently takes the same view, as he is unwilling to walk away from the issuing inspector's negligence and unwarrantable failure designations. There are several reasons to look askance at the Respondent's claim. **For starters, there is the inspector's undisputed finding of ten separate instances of 75.400 violations for this Order alone**. Any one of the conditions would have justified issuance of a violation of the standard. Then too, among the ten instances, seven (7) involved bottom rollers turning in loose coal and coal fines. These accumulations were not restricted to bottom rollers; the inspector noted that "[a]ccumulations [we]re present on mine floor, roof, ribs, structure and water line on previous rock dusted surfaces" at the 11 block to 6 Mains West #1 Transfer, and that those "**accumulations measured 10 foot wide by 2750 feet long."** Petition at 13-15 (emphasis added).

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

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

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

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

Notable aspects of Order No. 92457810

Barely a month after the same MSHA inspector issued his Order, No. 927780, he issued another order for violations of the same safety standard, 30 C.F.R. § 75.400, addressing accumulations of combustible materials. This time the inspector found, **not 10, but 26 (twenty-six)** separate instances of the standard being violated. More dramatic than the effort required to abate the violative accumulations found for Order No. 9257780, it "took approximately 10 men per shift and 24 hours to correct [the accumulations] **for a total of 720 man hours**." Petition for a Civil Penalty at 16 (emphasis added).

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

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

A disaster waiting to happen?[2]

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

> Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. Amax Coal Co., 19 FMSHRC 846, 851 (May 1997); see also Consol, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted). The purpose of

[2] A mining disaster is defined as an incident with 5 or more fatalities.

https://wwwn.cdc.gov/NIOSH-Mining/MMWC/MineDisasters/Count

> evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious accumulation problem." Mid-Continent Res., Inc., 16 FMSHRC 1226, 1232 (June 1994); see also Consol, 23 FMSHRC at 595. The Commission has also recognized that 'past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.'" Consol, 23 FMSHRC at 595 (citations omitted).

Id. at 131.

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

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

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

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

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

Given the disquieting number of 30 C.F.R § 75.400 violations issued over the past two years at this high methane producing mine, 78 times, not to mention that 26 of those occurred

within a month of these two Orders, it is difficult to appreciate the justification for the 40% (forty percent) reduction in this instance.

Reasonable Inquiry is not Permitted

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

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

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

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

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

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

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

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

> In the context of settlement motions, "facts" have an atypical meaning.[3] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *AmCoal* at 990. The only associated requirement with such *"facts"* is that *"there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*" *Id.* (emphasis added).

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

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

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

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

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

such language.[4] 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).

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

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

[4] Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary's motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary.* Neither does the Court endorse or agree with the Secretary's claim that *the modifications to the citations are immaterial,* nor with the accompanying claim that *the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions.* The Court has never been informed of any such value. Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

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

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, Division of Mine Safety and Health
201 12th Street South, Suite 500, Arlington, Virginia 22202-5450
wilson.robert.s@dol.gov

R. Henry Moore, Esq., Fisher Phillips, Six PPG Place, Suite 830, Pittsburgh, Pennsylvania 15222
hmoore@fisherphillips.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / Fax 202-434-9949

January 24, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0554 AC No. 46-08626-560349 Mine: Tug Fork Preparation Plant

DECISION APPROVING SETTLEMENT

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement for the citations and orders involved in this matter. The parties move to modify one citation, as stated below. The total penalty would be reduced from the original assessed amount of **$1,365.00** to **$511.00.** This represents a **63%** reduction in the overall penalty for this docket.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9566748	$1,069.00	$215.00	Violation of 30 C.F.R. § 77.1606 (c). **Penalty reduction of 80%**
9566745	$296.00	$296.00	Violation of 30 C.F.R. § Sustained as Issued - No penalty reduction
TOTAL	**$1,365.00**	**$511.00**	**Total penalty reduction of 63%**

Citation No. 9566748 was *regularly* assessed at $1,069.00. It involved a now-admitted violation of 30 C.F.R. § 77.1606(c). That standard pertains to loading and haulage equipment and its inspection and maintenance. The cited subsection (c) provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used."

The citation described the condition as follows: "The Co. No. 541, 733D Caterpillar haul truck, is not being maintained free of defects affecting safety, as required. When checked, the offside railing at the top of the ladder is broke free in all but one spot, allowing the railing to move back and forth. This truck is operated 5 days per week, 12 hours per day. Left uncorrected, this condition, will expose the miner(s) to hazards associ[iat]ed with

falling from elevated heights, causing permanently disabling injury[] to the miner(s). From the ground to the landing where the railing is broke free is approx. 8-9 feet. The operator immediately removed the truck from service until repairs are made."

Petit. for civil penalty at 10.

Evaluating the violation, the inspector marked the injury as reasonably likely to occur with permanently disabling injuries. Accordingly, the inspector listed the violation as "significant and substantial." Negligence was marked as 'low.' *Id.*

The violation was terminated the same day with the inspector stating that "[a] qualified person has replaced/corrected the condition, the railing now appears to be secure to the machine." *Id.*

In support of the **80% (eighty percent) reduction in the penalty**, resulting in a penalty of $215.00, from the original regular assessment of $1,069.00, the Secretary offers the following:

> The Respondent contends that the gravity was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that the condition cited is not a discrete safety hazard to miners. Respondent contends that the equipment operator is not routinely exposed to the off-side railing, which is not in the access path to the operator's cab. Additionally, the Respondent would argue that the railing was loose, but still intact and would still perform the necessary duties to prevent a miner from falling from the elevated platform. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9566748 and to modify the penalty per part 100.3 accordingly.

Motion at 3.

The Court is dismayed that the Secretary has bought into the Respondent's argument that the hazard is unlikely to occur. Given all the attendant conditions associated with this violation: that the offside railing at the top of the ladder was *broken free in all but one spot*, allowing the railing to move back and forth and given that *the truck is operated 5 days per week, 12 hours per day* and given *that a fall involved 8 to 9 feet*, a height which presumptively would result in a permanently disabling injury, the Secretary's agreement is hard to understand. Not one of the conditions noted by the inspector is disputed.

The Court notes that if the inspector had taken a photograph of the hazardous condition he found, the Secretary might have been foreclosed from agreeing to this de minimis penalty.

That agreement is coupled with the Secretary's oft-claimed assertion that he can remove a significant and substantial designation with impunity. That is incorrect. In a motion, the Secretary can assert that a violation was unlikely to occur, but it is only by that redesignation

that a non-significant and substantial violation may follow. As the Court has informed many times before, the cases cited by the non-attorney representative do not stand for the notion that he can independently drop a significant and substantial designation, as if by an edict.

The two cases continually cited by the Secretary, *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996)) do not support the claim that the Secretary may peremptorily delete a significant and substantial finding. Such a modification can only occur upon determining that at least one of the two elements of such a finding is missing: that a reasonably likelihood of reasonably serious injury was not present.

A seemingly impenetrable wall, as noted above, CLRs continue to assert that "[t]he Secretary has exercised [the] discretion to modify the significant and substantial designation associated with citation #9566748 and to modify the penalty per part 100.3 accordingly. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996))." Motion at 3.

Mechanicsville only holds that *the judge* may not essentially make a prosecutorial decision to designate a citation as S&S *in the first instance*, as that is an exercise of enforcement authority reserved for the Secretary. Thus, presented with a citation with no significant and substantial designation, a judge may not add that designation on his or her own.[1] *Am. Aggregates* simply echoes *Mechanicsville*, holding "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the particular expertise of MSHA in judging whether a violation is S&S. Indeed, *if MSHA does not charge an S&S violation*, the Commission cannot make an S&S finding. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996). Commission Judges do not have the discretion to make such elevated finding <u>*unless it is asserted in the first instance by MSHA*</u>." *Am. Aggregates* at 576 (emphasis added).

Make no mistake, here *both* citations in this Appalachian Resource docket *were* designated by the MSHA inspector as significant and substantial. Thus, clearly, *Am. Aggregates* and *Mechanicsville* do not apply. The Court does not criticize the CLRs for habitually inserting this claim; no doubt they do it at the behest of attorneys for the Secretary, as the CLRs are not attorneys, and it is unlikely that they all developed an analysis of the cases cited on their own. That the Secretary may have this position on its *wish list* is not the same thing, as Commission decisions have not, up to this point, agreed with that claim. The Court has pointed this out

[1] In *Mechanicsville*, 18 FMSHRC 877, (June 1996), the Commission held that it agreed "with the Secretary that the judge erred in determining on his own initiative that the violation was S&S. … [Referring to another of its decisions the] Commission reasoned that the modification was not appropriate because the judge *added new findings* to create a section 104(b) order. ... Here, the judge similarly 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 *879-880.* (citations omitted).

several times before, but no doubt the CLRs will continue to cite those inapposite holdings, because they are told to do so.

The unsafe railing violation must also be viewed in context.

Earlier on the same day as the defective railing violation was found, the inspector found a second, significant, violation *on the same piece of equipment*. The inspector found that the equipment operator of this haul truck was not wearing the seat belt, citing 30 C.F.R. §77.403-1(g), with its requirement that "[s]eat belts required by § 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped with ROPS by § 77.403-1."

As with the other violation associated with this truck, the inspector marked an injury occurrence as 'reasonably likely' to occur, producing lost workdays or restricted duty, although in his evaluation he stated that the "condition will cause and or contribute to an accident of a reasonably serious nature, when the driver will receive fractures and lacerations, resulting in at least lost workdays or restricted duty." Petit at 9.

Thus, two noteworthy hazards were at play with the same truck, hazards which were not divorced from one another. Both, at least by the view of the issuing inspector, were significant and substantial. To the Court, the distinguishing feature is that the seatbelt violation only involved $296.00, while the railing violation was assessed at $1,069.00. As the Court has remarked in numerous cases, it does appear that the larger assessments are the ones most often subjected to significant penalty reductions, with the minimal penalties more often paid as assessed. Whether this frequent result is mere happenstance is unknown.

Reasonable Inquiry is not Permitted

Despite the Court's analyses and expressed concerns for Citation No. 9566748, 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 *AmCoal* and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

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

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

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

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

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(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.[2] 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).

As the motion meets the Commission's standard for approving settlement motions and as the Court is duty-bound to faithfully apply the Commission's present decisional holdings

[2] 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.

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

Typically found in the Secretary's motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties' settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has "considered the representations and documentation submitted, f[ound] that the assessment is reasonable and . . . conclude[d] that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act" Draft Order at 3. The Court cannot subscribe to such language.[3] 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).

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it meets that decision's standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, Citation No. 9566748 is **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$511.00, as opposed to the initial total proposed penalty of $1,365.00,** within 30 days of this decision.[4]

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

[3] Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary's motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary.* Motion at 2 (emphasis added). Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

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Distribution:

K. Brad Oakley, Esq., Jackson Kelly PLLC, 100 W. Main Street, Suite 700
Lexington KY 40507, kboakley@jacksonkelly.com

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

January 6, 2023

SECRETARY OF LABOR, MINE SAFETY AN D HEALTH ADMINISTRATION (MSHA) obo GEORGE PORTER Complainant, v. PACER MINERALS, LLC, Respondent	TEMPORARY REINSTATEMENT Docket No. CENT 2023-0058 MSHA No.: DENV-CD-2023-01 Mine: Pink Monster Mine ID: 39-01653

ORDER GRANTING TEMPORARY REINSTATEMENT OF GEORGE PORTER

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor ("Secretary") on December 15, 2022, filed an Application for Temporary Reinstatement of miner Frank George Porter ("Complainant") to his former position as a heavy equipment operator with Pacer Minerals, LLC, ("Respondent") at Respondent's mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Application for Temporary Reinstatement was served on Respondent by electronic mail on December 14, 2022. The Respondent has not filed a timely Request for Hearing.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c) of the Act, the temporary reinstatement of George Porter is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that "if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate

reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought,[1] shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the Complaint filed by Complainant (Exhibit "2" to the Application) and the Declaration of Special Investigator Daniel Scherer indicating that this was done (Exhibit "1.")

Mr. Scherer's Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought:

1. My investigation of this case, which included witness interviews and a review of documents that Pacer provided, disclosed the following:

[1] The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

[2] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

A. At all relevant times, Pacer operated the Pink Monster Mine near Pringle, S.D. (the "Mine"). MSHA has inspected Pacer's operations on numerous occasions and Pacer is an "operator" under Section 3(d) of the Mine Act.
B. Pacer's products, which include feldspar and mica, enter commerce, or its operations or the Mine's products affect commerce.
C. Porter was, at all relevant times, employed as a heavy equipment operator by Pacer and was, therefore, a "miner" under Section 3(g) of the Mine Act.
D. On October 24, 2022, Porter timely filed a discrimination complaint with MSHA alleging that Pacer discharged him in violation of section 105(c) of the Mine Act.

2. Porter's discrimination complaint arose from the following circumstances:

A. Porter worked for Pacer as a safety manager beginning in August 2021. At the time of his discharge, he worked 40 hours per week and earned $25.00 per hour as a heavy equipment operator.
B. In the fall of 2022, Pacer assigned Porter to work at the Mine after he had worked at another of the company's mines, the White Elephant, that Pacer subsequently closed.
C. On September 15, 2022, Porter and a colleague, Mark Hughes ("Hughes"), used heavy equipment to clear blasted overburden out of the Mine's pit. Unbeknownst to them, they worked near where Pacer's blasting contractor, Century Blasting Service, LLC ("Century"), had set explosives in six holes for blasting. Mine Manager Tony Boggs ("Boggs") knew that the explosives were present but did not tell Porter. Instead, he directed them to work away from the explosives' location without explaining why. Porter unwittingly worked near undetonated charges for several hours.
D. The explosives remained from an earlier blast on Pink Monster's upper level. Century drilled and loaded holes for two shots, one above the other. However, the lower level holes – near where Porter and Hughes worked – were not tied into the blast sequence of the upper level holes. Neither Pacer nor Century noticed that this had occurred.
E. Porter reported this incident to Pacer General Manager Ryan Fredsall ("Fredsall") on September 22, 2022.
F. Fredsall and the company's human resources director/accountant, Tamera Sutherland, investigated the incident but did not discipline anyone.
G. On September 30, 2022, Pacer laid off Porter.
H. Porter did not work at the Mine again.

Dec. of Daniel Scherer, December 14, 2022 (Ex. "1" to App. For Temp. Reinst.)

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected

activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant George Porter is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **George Porter** be **immediately TEMPORARILY REINSTATED** to the position he held on the date of his discharge from Pacer Minerals, LLC, or a comparable position within the same commuting area and at the same rate of pay and benefits he received prior to his discharge.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Ryan Fredsall, General Manager, Pacer Minerals, 25429 U.S. Highway 385 Custer, S.D. 57730 (ryan@pacerminerals.com)

Matthew B. Finnigan. Esq., Office of the Solicitor, 1244 Speer Blvd., Suite 515 Denver, CO 80204-3516 (finnigan.matthew@dol.gov)

George Porter, 12066 Hoover Court, Custer, SD 57730, (georgeporter502@yahoo.com)