November 2022

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 28, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY MIDWEST MINING, LLC	Docket No. LAKE 2017-0450

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

ORDER

BY THE COMMISSION:

On September 17, 2020, the Petition for Discretionary Review filed by the Secretary of Labor in the above-referenced case was granted. The Commission hereby VACATES that Direction for Review. The Administrative Law Judge's Decision is final.

/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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

November 8, 2022

HASKELL ADDINGTON, Complainant, v. XMV, INC., and DEBRA VAUGHAN, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2022-0114-D MSHA No. PINE CD 2021-06 Mine No. 39 Mine ID 46-09261

DECISION GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Chief Administrative Law Judge Glynn F. Voisin assigned me this case on January 3, 2022. On January 27, 2022, I set this case to be heard on June 14–15, 2022, in Beckley, West Virginia. On April 5, 2022, the parties filed a Joint Motion to Continue Hearing Date, which I granted and thus rescheduled the hearing for September 13–15, 2022. Due to a delay in completing discovery the parties asked for, and I agreed to, a revision of the prehearing order deadlines.

On August 26, 2022, Respondents filed their Motion for Summary Decision.[1] I issued an order on August 31, 2022, continuing the hearing to allow time to consider the extensive documentary evidence provided in Respondents' motion, as well as any opposition filed by the Complainant. (Order to Continue Hr'g Pending Determination on Resp'ts' Mot. for Summ. Decision at 1–2.) My order also permitted Addington time to file an opposition without simultaneously preparing for hearing. On September 7, 2022, Complainant filed his Response in Opposition to the Motion for Summary Decision. Thereafter, on September 15, 2022, Respondents filed a Motion for Leave to File Reply, which I do not consider.[2]

[1] In this decision, the Memorandum of Law in Support of Respondents' Motion for Summary Decision that accompanies their two-page motion for summary decision is cited as "Mot. Mem. at __" with references to its Exhibits A–T. Complainant's Response in Opposition to Motion for Summary Decision is cited as "Opp'n at __," with references to its Exhibits 1–3.

[2] Pursuant to Commission Procedural Rule 67 no reply brief is contemplated after an opposition is filed to a motion for summary decision. 29 C.F.R. § 2700.67. Respondents had an opportunity to lay out their view of the case in their motion for summary decision with its voluminous attachments. Although Complainant filed no response to the Motion for Leave to File Reply, Respondents are not entitled to the proverbial "second bite at the apple," and their motion is hereby **DENIED**.

Based on the entire record, I determine Addington alleges no genuine issue as to any material fact and conclude that Respondents are entitled to summary decision as a matter of law.[3]

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Addington's Complaints Filed with MSHA and the Commission

On August 30, 2021, Addington filed a discrimination complaint with MSHA using the agency's standard form and naming as the violators Respondents XMV, Inc. ("XMV") and Debra Vaughan, the company's human resources manager. (Compl., Ex. A; Mot. Mem., Ex. A at 1–2.) In MSHA Forms 2000-123 and 2000-124 Addington alleges that XMV and Vaughan discriminated and retaliated against him and interfered with the assertion of his Part 90 rights by "refusing to afford [him] access to benefits or a reasonable accommodation for [his] breathing impairment . . . due to [his B]lack [L]ung [D]isease" (coal workers' pneumoconiosis) after Respondents became aware that his chest X-ray under the Coal Workers' Health Surveillance Program showed complicated Black Lung Disease. (Compl., Ex. A; Mot. Mem., Ex. A at 1–2.) In his statement to the MSHA investigator, Addington acknowledges he received a June 19, 2020, letter as part of this health surveillance program regarding a free chest X-ray, which he took on October 30, 2020. (Mot. Mem., Ex. D at 5–6.) On October 27, 2021, MSHA notified Addington of its investigation into his discrimination claim and its determination that a violation of section 105(c) of the Mine Act had not occurred.[4] (Compl., Ex. B; Mot. Mem., Ex. S.)

Thereafter, on November 26, 2021, Addington filed a complaint with the Commission pursuant to section 105(c)(3) of the Mine Act. Addington's section 105(c)(3) complaint alleges that XMV and Vaughan engaged in wrongful discrimination, retaliation, and interference when they "improperly accessed information about" Addington's Part 90 eligibility "and then withheld that information" from Addington, "preventing him from availing himself of his Part 90 rights to remove himself from dusty coal environments until after his [B]lack [L]ung [D]isease had

[3] Per Commission Procedural Rule 67(b), a motion for summary decision is granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

[4] The Mine Act provides that upon receipt of a discrimination complaint, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . ." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that if the Secretary determines no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3).

progressed to the point of respiratory failure, causing him to lose wages and benefits."[5] (Compl. at 1.) Addington also alleges that Respondents refused to provide requested accommodations or any ongoing assistance with healthcare premiums while Addington was unable to work due to his Black Lung Disease. (Compl. at 1.) Addington claims that after he expressed concerns about his Black Lung Disease, Respondents took away his customary Saturday work hours and reduced his pay by $10,000, whereby according to Addington's Prehearing Statement "beginning in 2017" XMV departed from an arrangement of "agreeing to keep him in non-dusty areas of the mines" and "require[ed] him to work underground shoveling belts . . . that increased his exposure to coal mine dust. . . . [and] began reducing his wages repeatedly" from a top salary of "$125,000 annually." (Complainant's Pre-hr'g Statement at 2–3.)

The documentary evidence, including Addington's statement to the MSHA investigator, reveals he lost $10,000 off his salary around December 2016 (Mot. Mem., Ex. D at 4), and Addington's deposition testimony (Mot. Mem., Ex. B at 139) establishes that the last of these $10,000 salary cuts occurred on April 26, 2020, before Addington applied for Part 90 status "in the fall of 2020." (Complainant's Pre-hr'g Statement at 1; Compl. at 2; Mot. Mem., Exs. D at 4–5, G.) In his September 3, 2021, statement to the MSHA investigator Addington does not allege any changes in his salary or work environment after applying for his chest X-ray, which was taken on October 30, 2020. (Mot. Mem., Ex. D at 5–6.) Addington's last transfer at work occurred on September 22, 2020, when he transferred from Mine 43 (working on the surface areas of that mine) to Mine 39 (also on the surface areas of the mine) with the same title of "Foreman Projects" and doing "the same work that [he] had been doing at [Mine] 43" at the same payrate of "$105,000 + $800 VAP." (Opp'n, Ex. 2 at 23; Mot. Mem., Exs. B at 23, 139, D at 5, H.) Addington told the MSHA investigator that "on January 18, 2021[,] I had acute respiratory failure and that was my last day of work at [Mine] 39," whereafter "I got set up on short term disability benefits in January [2021]." (Mot. Mem., Ex. D at 6.)

B. Respondents' Allegations

In their motion for summary decision Respondents argue, among other things, primarily: (1) section 105(c) of the Mine Act is an inappropriate vehicle for Addington's generalized claims of discrimination and failure to accommodate based on his Black Lung Disease; (2) Addington's claims are unsupported by the record because XMV did not and could not have discriminated against him given the timeline of events; (3) Addington's claims are procedurally improper and

[5] Addington seeks the following remedies—an injunction barring Respondents from engaging in further retaliation and discrimination, back pay with interest for his reduced hours and work allegedly missed for failure to move him to a less dusty area, retention of his current healthcare coverage without paying for healthcare premiums beginning October 2021 to assist with the costs of his lung transplant, retention of his life insurance benefits, and attorney costs and fees. (Compl. at 2, 5, 6.)

barred by the statute of limitations; and (4) there is no issue of material fact and thus Respondents are entitled to summary decision as a matter of law. (Mot. Mem. at 1, 7, 17–19.)[6]

For purposes of Commission Procedural Rule 67, I must examine and address the material facts as laid out in the parties' pleadings, depositions, and documentary evidence, to rule on Respondents' motion.

C. Material Facts in the Pleadings, Depositions, and Documentary Evidence

It is undisputed that Complainant Addington was a coal miner who worked for XMV since 2012, and that he developed and suffered from a severe form of Black Lung Disease called complicated pneumoconiosis. In an affidavit dated May 20, 2015, Addington acknowledges that a doctor diagnosed him with "complicated pneumoconiosis" in early 2015 and that Addington had "sufficient residual ventilatory capacity to return to [his] last coal mine job." (Mot. Mem, Ex. C at 1.) Addington returned to work at XMV despite acknowledging "the potential for exposure to dust and a possible progression of [his] lung condition." (Mot. Mem, Ex. C at 2.)

Over two years later on October 10, 2019, a U.S. Department of Labor Administrative Law Judge ("ALJ") noted in his decision adjudicating Addington's federal Black Lung Benefits claim that XMV "stipulates that [Addington] has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis." *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 3 (Oct. 10, 2019) (ALJ).[7] The Department of Labor ALJ who determined Addington suffered from complicated pneumoconiosis wrote that Addington "had to stop [work at XMV] on October 7, 2014, due to breathing problems," which comports with Addington's journal notes. (Opp'n, Ex. 1); *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 3. The ALJ wrote that a "chest X-ray dated January 6, 2015, was read as positive for complicated pneumoconiosis," whereby the agency issued its decision awarding Addington benefits on September 29, 2016. *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 2. Indeed, the ALJ stated, "[t]he only issue [XMV] contests is whether [Addington's] benefits should be offset by his wages." *Id.* That's because Addington decided to return to work at XMV even with his complicated pneumoconiosis diagnosis, per the affidavit he signed on May 20, 2015. (Mot. Mem., Ex. C.) Despite Addington's diagnosis of complicated pneumoconiosis and Black Lung Benefits award, he did not apply for Part 90 status at that time.

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[6] Respondents also allege that Addington's complaint violated the statute of limitations because section 105(c)(2), 30 U.S.C. § 815(c)(2), requires a miner to file any complaint under this section "within 60 days after such violation occurs," and that Addington added claims after the initial filing of the MSHA forms. I find these issues inapposite given my ruling.

[7] I take judicial notice of the U.S. Department of Labor ALJ decision inasmuch as it is a public document discussing an issue at the heart of this case—the determination that Addington suffered from complicated pneumoconiosis and his employer's knowledge of it. *See, e.g.*, *Sec'y on behalf of McGary v. The Marshall Cty. Coal Co.*, 38 FMSHRC 2006 (2016) (finding Commission Judge did not abuse discretion in admitting federal court complaint because "the court complaint is a publicly-filed document regarding a dispute over the reporting of mine safety and health hazards at Respondents' mines, an issue that is at the heart of this case").

Not until receiving a notice dated June 19, 2020, whereby XMV miners could obtain a free chest X-ray to determine Part 90 eligibility did Addington contemplate applying for Part 90 status. (Mot. Mem., Ex. I); *see generally* 30 C.F.R. Part 90 (Mandatory Health Standards–Coal Miners Who Have Evidence of the Development of Pneumoconiosis). As he explains in his deposition, Addington consciously decided not to seek Part 90 status earlier:

> Q: You indicated you were getting the chest X-ray because you wanted to try to get Part 90 status. But what did you understand Part 90 status to entail?
>
> A: Again, you know, after we talked about Dale, you know, he had mentioned that — and honestly, I didn't get the Part 90 early on is because I didn't want to harm the company, because I knew that they would have to run dust — on me or I would have filed it a long time ago, but I wanted to be as fair as I could be. As long as I could continue to work and nobody really bothered my pay and my benefits, then I just wanted to leave it as is because if I got fired at XMV and I went to try to pursue another job somewhere else, then I knew the Part 90 would affect me in getting a job somewhere else because managers and people at the coal mine know what the Part 90 — the protections that have to come along with the Part 90. So I elected not to do it …"

(Mot. Mem., Ex. E at 29.)

Addington underwent a chest X-ray at a local hospital on October 30, 2020, as part of the process administered by the National Institute for Occupational Safety and Health ("NIOSH"), a component of the Department of Health and Human Services ("HHS"), for miners to be screened for Part 90 eligibility. (Mot. Mem., Ex. D at 6.) In his statement to the MSHA investigator, Addington noted a delay in the reading of his October 30, 2020, X-ray due to a nurse at the hospital making a mistake and not processing his results. (Mot. Mem., Ex. D at 6; Opp'n, Ex. 2 at 33.) Addington's chest X-ray was read by two NIOSH-approved doctors on January 11, 2021 (Mot. Mem., Ex. J), and January 18, 2021 (Mot. Mem., Ex. K), as being positive for pneumoconiosis. *See* 42 C.F.R. §§ 37.52, 37.53 (HHS regulations on radiograph classifications).

On January 20, 2021, HHS made a final determination that Addington's October 30, 2020, chest X-ray was positive for pneumoconiosis making him eligible to assert his Part 90 transfer rights. (Mot. Mem., Ex. L); *see* 42 C.F.R. § 37.102 (transfer to less dusty area). After being notified of his Part 90 eligibility Addington exercised his Part 90 rights by signing an "Exercise of Option to Transfer" form and sending it to MSHA on January 21, 2021. (Mot. Mem., Ex. M.) MSHA notified XMV that Addington exercised his rights to dust monitoring and a transfer to a low-dust area of the mine by letter dated January 29, 2021. (Mot. Mem., Ex. N.)

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

B. Protections under Section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act[8] bars discrimination against or interference with miners asserting a protected right. For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The Commission has no settled legal test for claims of interference. *See Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary's two-prong test, which asks first whether the alleged interfering actions reasonably can be viewed as "tending to interfere with the exercise of protected rights," and, second, whether the interfering person can "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *See, e.g.*,

[8] "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [this Act]." 30 U.S.C. § 815(c)(1).

Armstrong Coal Co., 39 FMSHRC 1072, 1089 (May 2017) (ALJ) (applying Secretary's proposed test for interference), *appeal dismissed per settlement stipulation*, 40 FMSHRC 973, 974 (July 2018). Some Commissioners, however, would replace the second prong of the test with a requirement that the complainant demonstrate the interfering actions were motivated by animus to the exercise of protected rights. *Monongalia Cty. Coal Co.*, 40 FMSHRC at 708–29.

C. "Part 90 Miner" Rights under 30 C.F.R. Part 90

One set of rights protected under the Mine Act are the Part 90 rights afforded to miners employed at coal mines who have evidence of pneumoconiosis. *See* 30 C.F.R. § 90.2 (definition of "Part 90 miner"). Part 90 rights include a miner's option to transfer without a loss of pay to a less dusty area of the mine that is subject to testing where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air. 30 C.F.R. §§ 90.1, 90.3; *see Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776, 1778–79 (Nov. 1985) (holding miner could maintain discrimination claim while Part 90 application was pending), *and affirming decision on remand*, 8 FMSHRC 1860, 1862–63 (Dec. 1986) (upholding ALJ decision on remand that mine operator had rebutted the miner's prima facie case of discrimination).

A multi-step interagency process exists for a miner to apply under Part 90 and exercise the option to become a "Part 90 miner." *See* 30 C.F.R. §§ 90.2, 90.3; 42 C.F.R. §§ 37.52, 37.53, 37.102. HHS/NIOSH sends miners an initial letter notifying them of the availability of getting a free chest X-ray that may indicate pneumoconiosis and make them eligible for the Part 90 program. *See* 30 C.F.R. § 90.3(a). After the chest X-ray is taken and read, the Secretary of HHS interprets the results and, if the miner has pneumoconiosis, the miner is notified in writing of his rights along with an Option to Exercise form. *Id.*; *see Rochester & Pittsburgh Coal Co.*, 12 FMSHRC 189, 190–91 (Feb. 1990). Upon signing and dating the Option to Exercise form, the miner becomes a Part 90 miner with rights to transfer to a low dust area of the mine with respirable dust sampling and no loss of pay. *Rochester & Pittsburgh Coal Co.*, 12 FMSHRC at 192–93; *Goff*, 7 FMSHRC at 1778–79.

III. DISCUSSION AND ANALYSIS

Because Addington alleges discrimination, retaliation, and interference with his Part 90 rights, I review his allegations pursuant to the Commission's case law on these issues.

As Addington points out, the Commission has jurisdiction and has opined on miners filing discrimination cases under section 105(c)(1) for violations of their protections under Part 90. (Opp'n at 6–8); *see Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776. The key holding of *Goff* is that "a miner is protected from adverse personnel actions based on his medical evaluation or potential transfer pursuant to Part 90 at least as early as the date on which he files his application for Part 90 status." *Goff*, 7 FMSHRC at 1781–82; *see also McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ) (ruling section 105(c) protections apply to Part 90 miner applicant). In *Goff*, the Commission noted that the miner "presented sufficient allegations to plead a cause of action," inasmuch as "[s]everal days prior to his discharge, he applied for classification as a Part 90 miner," and "[t]his application made him 'the

subject of medical evaluation and potential transfer' within the meaning of section 105(c)(1)." *Goff*, 7 FMSHRC at 1782. The Commission further noted in *Goff* that the miner "also appears to allege that [the coal mine operator] had knowledge of his possible pneumoconiosis and his intent to file under Part 90 prior to the mailing of his [Part 90] application." *Id.* Thus, the Commission in *Goff* interpreted the miner's pleadings and documentation to present a claim cognizable under section 105(c)(1) of the Mine Act.

Consequently, I must examine Addington's pleadings and the entire record to determine whether Addington presents a cognizable claim. Using the *Pasula-Robinette* test for section 105(c) discrimination claims, I must determine whether Addington has presented sufficient allegations to plead a cause of action under section 105(c)(1) for this case to proceed.

A. Protected Activity Under Section 105(c)

Addington makes allegations and presents facts that he engaged in protected activity when he had a chest X-ray on October 30, 2020, under the auspices of HHS/NIOSH as part of applying for Part 90 status.[9] The Mine Act protects miners from discrimination who are engaged in the process of seeking Part 90 status. 30 U.S.C. § 815(c)(1); *Goff*, 7 FMSHRC at 1782.[10] Thus, Addington's allegations would satisfy the first element under the *Pasula-Robinette* test for a discrimination or retaliation claim under section 105(c)(1). Also, this would qualify as an exercise of a protected activity under the interference tests articulated by the Commission.

[9] Addington makes general allegations about his inability to work due to his breathing condition after his hospitalization on January 18, 2021, but I cannot construe this as protected activity under a work refusal theory. *See Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463–64 (Dec. 1993) (miner has right under section 105(c) to refuse work, if miner has a good faith, reasonable belief in a hazardous condition); *see also Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (Feb. 2000) (citing *Simpson v. Fed. Mine Safety & Health Rev. Comm'n*, 842 F.2d 453, 461–63 (D.C. Cir. 1988)) (adverse action may be constructive discharge where operator has no conscious retaliatory motive but fails to reasonably remedy intolerable conditions, leading to resignation of miner who reported conditions). Indeed, the Commission flatly rejected a Commission Judge's determination that a miner's "medically substantiated inability to work underground" constituted the "functional equivalent of a work refusal" that could be deemed protected activity. *Perando v. Mettiki Coal Corp*., 10 FMSHRC 491, 494–96 (1988). Here, Addington does not allege he refused to work on or after January 18, 2021, and his general factual allegations do not constitute a work refusal under Commission case law.

[10] Addington also alleges he engaged in protected activity by complaining to management over the years about his difficulty breathing due to his pneumoconiosis. (Compl. at 4; Opp'n at 3, Ex. 2 at 23–24.) In paragraph 19 of his Complaint, Addington believes his status as a miner with pneumoconiosis provides him protections from reductions in work hours or pay, and that Respondents refused to offer Addington any reasonable accommodation or unpaid leave with benefits. (Compl. at 4.) The Commission, however, has not recognized a discrimination claim under section 105(c)(1) for a miner simply having pneumoconiosis, absent a showing that the miner also "was 'the subject of medical evaluation and potential transfer' under Part 90." *Goff*, 7 FMSHRC at 1781–82.

B. Adverse Action for Discrimination or Retaliation Claims Under Section 105(c)

Although Addington pleads facts sufficient to meet the first element under the *Pasula-Robinette* test in that he engaged in protected activity by filing a Part 90 application, Addington fails under the second element to allege any adverse action taken by Respondents during the period of his Part 90 application or after his qualification as a Part 90 miner. Examining the parties' undisputed timeline of events surrounding Addington's Part 90 application demonstrates the hole in Addington's claims as to his allegations of any adverse action by Respondents.

Addington's Part 90 application timeline is as follows: (1) the June 19, 2020, letter from HHS/NIOSH notified Addington of the availability of a free chest X-ray to apply for Part 90 status; (2) Addington had his free chest X-ray taken at a local hospital on October 30, 2020; (3) a delay in processing Addington's X-ray occurred due to an administrative error by a nurse at the hospital; (4) two NIOSH-approved doctors read Addington's chest X-ray as being positive for pneumoconiosis on January 11, 2021 (Mot. Mem., Ex. J), and January 18, 2021 (Mot. Mem., Ex. K); (5) based upon the X-ray readings HHS made a final determination on January 20, 2021, that Addington was eligible under Part 90 (Mot. Mem., Ex. L); (6) Addington received notice of his Part 90 eligibility from MSHA and exercised his Part 90 rights by signing his "Exercise of Option to Transfer" and sending it to MSHA on January 21, 2021 (Mot. Mem., Ex. M); and (7) by letter dated January 29, 2021, Respondents were notified that Addington exercised his option to transfer to a low-dust area with quarterly respirable dust testing (Mot. Mem., Ex. N).

A review of the entire record including pleadings, deposition testimony, and documentary evidence, reveals that Addington raises no issues of *material* fact or alleges that he suffered any adverse action at the hands of Respondents during the pendency of his Part 90 application. Addington's last salary cut occurred on April 26, 2020, nearly two months before Addington received the June 19, 2020, notice from HHS/NIOSH about applying for Part 90 status. (Complainant's Pre-hr'g Statement at 1; Compl. at 2; Mot. Mem., Exs. D at 4–5, G.) Addington had his free chest X-ray taken on October 30, 2020, yet his last work transfer took place over a month earlier on September 22, 2020, when he moved to the surface area of XMV's Mine 39 at his same pay rate of $105,000 per year and with the same title he had at Mine 43, which was his prior assignment also on the surface area of the mine. (Mot. Mem., Exs. B at 135, H.) He makes no allegations that this transfer was an adverse personnel action. Indeed, Addington makes no allegations of any adverse personnel action or work change up to the time he took himself to an urgent care center due to breathing problems on January 18, 2021, when he was then admitted to the hospital. (Mot. Mem., Exs. H, O.) As Addington stated to the MSHA investigator: "[O]n January 18, 2021[,] I had acute respiratory failure and that was my last day of work at [Mine] 39," whereafter "I got set up on short term disability benefits in January [2021]." (Mot. Mem., Ex. D at 6.) Absent from the record are any allegations to suggest Respondents took any adverse action against Addington after he applied for Part 90 status in the fall of 2020, or after he become a Part 90 miner on January 21, 2021.

Addington's loss of company life insurance, health insurance, and other employee benefits as noted in the letter he received from Respondents on July 12, 2021 (Opp'n, Ex. 3), arose from his own inability to return to work after being admitted to the hospital in respiratory failure on January 18, 2021. (Mot. Mem., Exs. E at 66, O.) Addington's allegation he was

somehow treated differently while unable to return to work is also inapposite, because to date he is still not cleared by his doctors to return to work. (Mot. Mem., Exs. B at 21, Q, R, T.)

C. Adverse Action Motivated in Any Part by Protected Activity

Because Addington has not alleged any adverse action by Respondents during the pendency of his Part 90 application or after, it is not possible to analyze the third prong of the *Pasula-Robinette* test for discrimination, i.e., whether the adverse action was motivated in part by the protected activity. Consequently, I determine that Addington has not presented sufficient allegations to plead a cause of action for discrimination or retaliation under section 105(c).

D. Interference Claim

Although Addington makes factual allegations that he engaged in protected activity by applying for Part 90 status, which could satisfy an element of a claim of interference under section 105(c), he must also plead allegations of interfering actions by Respondents during the pendency of his Part 90 application or after he exercised his option to become a Part 90 miner.[11]

In his complaint Addington alleges that XMV and Vaughan engaged in wrongful interference when they "improperly accessed information about" Addington's Part 90 eligibility "and then withheld that information" from Addington. (Compl. at 1.) The crux of Addington's claim is contained in paragraph 9 of his complaint filed with the Commission where he states:

> In December 2020, Josh Judd and Debra Vaugh[a]n informed Addington that the company had learned that Addington had received Part[] 90 status. They did not inform Addington of his rights to be moved to a low-dust area. They did not inform him that he had to take any additional action to assert his Part 90 right. They did not afford any protection to [] Addington.

(Compl. at 3.) These are serious allegations which require thorough analysis.

If by the above statement (i.e., "the company had learned that Addington had received Part[] 90 status") Addington means that Respondents knew he was a Part 90 miner in November or December 2020 (which they deny), then that would defy logic. The undisputed facts reveal HHS made its final determination that Addington's X-ray was positive for pneumoconiosis on January 20, 2021 (Mot. Mem., Ex. L), and Addington became a Part 90 miner on January 21, 2021, when he signed his "Exercise of Option to Transfer" form and sent it to MSHA. (Mot. Mem., Ex. M.) Thus, it is impossible for Respondents to have known in November or December 2020 about an event that took place on January 21, 2021.

Looking at the entire record including the pleadings, deposition testimony, and documents *in the light most favorable to Addington*, it is quite possible that XMV and Vaughan not only believed Addington would apply for Part 90 status because XMV agreed to pay for free

[11] I need not decide between the two interference tests because Addington fails both.

X-rays as stated in the notice dated June 19, 2020 (Mot. Mem., Ex. I), but that Addington would eventually qualify as a Part 90 miner because of his pneumoconiosis diagnosis years earlier. (Mot. Mem., Ex. C at 1.) Both Addington and XMV knew of, and accepted, Addington's complicated pneumoconiosis diagnosis several years before Addington ever applied for Part 90 status under the Mine Act during the fall of 2020. Indeed, XMV knew of Addington's complicated pneumoconiosis diagnosis at least as early as 2015, so if Addington applied for Part 90 protections it would not have taken a leap in logic to conclude he would qualify.

But Addington's allegations in his complaint hinge on a misplaced belief that Judd and Vaughan's knowledge of his pneumoconiosis and possible filing of his Part 90 application *before* HHS made a final determination that his chest X-ray was positive for pneumoconiosis and *before* MSHA had officially notified Addington of his Part 90 status, somehow qualifies as interference with his Part 90 rights. Knowledge alone does not qualify as interference, and such an allegation is legally erroneous and factually immaterial given the structure of the Part 90 program as discussed below.

XMV and Vaughan's alleged foreknowledge of Addington's pneumoconiosis and his Part 90 application is immaterial here because, even if true, an operator possesses no role in the process of a miner qualifying for, or exercising his transfer option under, Part 90. Per the Part 90 program regulations, only NIOSH-approved doctors review a miner's chest X-ray and HHS makes the final determination on whether a miner has pneumoconiosis and is eligible for Part 90 status, whereby notification is given *to the miner* about the miner's qualification and transfer rights under Part 90. *See* 30 C.F.R. §§ 90.1, 90.3; 42 C.F.R. §§ 37.52, 37.53, 37.102. And only *after* a miner exercises the transfer option does MSHA notify a coal mine operator about the miner's Part 90 status. *See* 30 C.F.R. §§ 90.2 ("Part 90 miner" definition), 90.100, 90.102(b), (c) (multiple references to operator's "notification from MSHA that a part 90 miner is employed at the mine").

Further, under the Part 90 regulations neither XMV nor Vaughan would have a duty to transfer Addington to a less dusty area of the mine or begin respirable dust sampling *prior* to being notified by MSHA that Addington had exercised such option under Part 90. *See* 30 C.F.R. § 90.3(a); §§ 90.100–90.104. Thus, even if Addington's allegations of Respondents' foreknowledge were proven true, they would have no bearing on his claim of interference, given that HHS made its final determination on January 20, 2021 (Mot. Mem., Ex. L), and Addington exercised his Part 90 rights on January 21, 2021 (Mot. Mem., Ex. M). Respondents had no legal obligation to transfer Addington to a less dusty area of the mine or to "run dust" (i.e., conduct respirable dust sampling) at Addington's workplace until MSHA notified them, which did not happen until January 29, 2021, when Respondents received a letter from MSHA that Addington was a Part 90 miner. (Mot. Mem., Ex. N.)

Given the structure of the Part 90 program discussed above, whether Judd and Vaughan allegedly knew about Addington's pneumoconiosis and Part 90 application are not by themselves *material* facts. Put another way, it makes no difference whether Respondents knew in November or December 2020 that Addington had pneumoconiosis or that he had applied for Part 90 status, because Respondents neither had a role in the Part 90 approval process or in Addington becoming a Part 90 miner, nor had they any duty to transfer Addington to a less dusty area or to conduct respirable dust sampling until notified by MSHA. Knowledge of Addington's

pneumoconiosis and Part 90 application alone—without an allegation of some interfering action by Respondents—cannot satisfy a claim of interference.

Yet, in his Opposition to the Motion for Summary Decision, Addington focuses on his belief that Judd and Vaughan notified him of his Part 90 status earlier in November or December 2020, rather than after January 21, 2021, when he exercised his transfer option to become a Part 90 miner. (Opp'n at 8–9; Compl. at 3.)[12] Addington points to his deposition testimony to buttress the veracity of his allegations that Judd and Vaughan called and advised him of his Part 90 status in late November or early December (Opp'n at 2–4, 8–9, Ex. 2 at 33–34), despite documentary evidence that no final determination on Addington's Part 90 status was made by HHS until January 20, 2021. (Mot. Mem., Ex. L.)

But as explained above, any such foreknowledge by Respondents about Addington's application and potential eligibility for Part 90 status means nothing under section 105(c) without allegations of some interfering action by XMV or Vaughan. Here, Addington comes up empty because he conflates foreknowledge with an interfering action. His bald accusation that Respondents somehow delayed his becoming a Part 90 miner holds no water, because the administrative process of becoming a Part 90 miner lies with HHS and MSHA, not Respondents. Moreover, Addington raises no genuine issue of material fact, and he makes no allegations that he suffered any actual delay or interference at the hands of Respondents during the processing of his Part 90 application in the fall of 2020 up through his exercising of the option to become a Part 90 miner on January 21, 2021, or thereafter. No genuine, triable issue of material fact exists.

Addington's interference claim must fail due to the lack of allegations regarding any interfering action by Respondents that would have delayed, hindered, or otherwise interfered with, his Part 90 application or process of becoming a Part 90 miner. Accordingly, I determine that Addington has not presented sufficient allegations to plead a cause of action for a cognizable claim of interference under section 105(c)(1).

C. Conclusion

The entire record shows that no genuine issues of material fact exist, and Addington makes no allegations of an adverse action or interfering action to satisfy a claim under section 105(c)(1) that Respondents engaged in any discrimination, retaliation, or interference during the pendency of his Part 90 application or after becoming a Part 90 miner. Addington was not terminated, forced to leave, transferred to a more dusty area, or subject to a pay cut by Respondents during the pendency of his Part 90 application. And Addington's inability to return to work is not an adverse action caused by Respondents. Rather, Addington was unable to work due to medical reasons on January 18, 2021. HHS only made a final determination that Addington's X-ray showed pneumoconiosis making him eligible under Part 90 on January 20, 2021. By the time Addington exercised his Part 90 transfer rights on January 21, 2021, he was already unable to physically return to work. Indeed, over more than a year later during his

[12] In his opposition, Addington attaches his journal notes from 2014 and 2015 (Opp'n, Ex. 1), as well as excerpts of his deposition transcript (Opp'n, Ex. 2), and the suspension of benefits letter from XMV and Vaughan dated July 12, 2021. (Opp'n, Ex. 3.)

deposition taken on June 27, 2022, Addington stated he had not yet been cleared by his doctors to return to work and had no timetable as to a possible return.[13] (Mot. Mem., Ex. B at 21.)

Even when viewed in a light most favorable to Addington, the record and inferences drawn show he fails to make a cognizable claim, as his allegations are insufficient to plead a cause of action under section 105(c)(1). Legally, Addington's claims of discrimination, retaliation and interference fail, and Respondents' motion must be granted. This ruling applies only to Addington's claims under the Mine Act and does not address any separate claims or remedies he may seek under other statutes, such as section 428 of the Black Lung Benefits Act.

Respondents prevail because of an administrative process that puts the onus on miners to apply for Part 90 status—a process that took months even when the miner and coal mine operator would agree the result should be the applicant's qualification as a Part 90 miner. Requiring a miner like Addington to go through the Part 90 application process seems to be a blind spot in the intersection of the Black Lung Benefits Act and the Mine Act. The only factor in play was time, which begs the question—why would a miner adjudicated as suffering from complicated pneumoconiosis and receiving Black Lung Benefits need to apply to receive a chest X-ray and wait for HHS to tell him he had pneumoconiosis to determine his eligibility as a Part 90 miner? Only the policymakers for the Part 90 rule know. Had Addington been able to exercise his transfer option at the time of the June 19, 2020, notice, or earlier, without going through the superfluous chest X-ray process, perhaps Addington would still be working.

Because there is no genuine issue as to any material fact and Addington has not presented any cognizable claim under section 105(c) even after viewing the entire in the light most favorable to Addington, Respondents demonstrate their entitlement to summary decision as a matter of law. Therefore, I conclude that summary decision is appropriate and that Addington's section 105(c) complaint must be dismissed.

IV. ORDER

Respondents' Motion for Summary Decision is **GRANTED**, and this proceeding is hereby **DISMISSED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

[13] In his deposition Addington states he currently receives federal Black Lung Benefits, as well as Social Security benefits. (Mot. Mem., Ex. E at 72.)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 2, 20222

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RULON HARPER CONSTRUCTION, INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0249 A.C. No. 42-02078-554812 Mine: Pit 12

ORDER DENYING SETTLEMENT

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have notified the Court that they have reached a settlement agreement in this case. Based on the proposed modifications and significant penalty reduction, I deny the settlement motion. The terms of the proposed settlement are as follows:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEST 2022-0249			
9727214	$ 10,868.00	$ 662.00	- Modify Type of Action from 104(d)(1) citation to 104(a) citation; - Modify gravity from "Reasonably Likely" to "Unlikely"; - Modify negligence from "High" to "Moderate"; and - Modify Significant and Substantial from "Yes" to "No."
9727216	$ 12,076.00	$ 3,274.00	- Modify Type of Action from 104(d)(1) order to 104(a) citation; and - Modify negligence from "High" to "Moderate."
TOTAL	**$ 22,944.00**	**$ 3,936.00**	

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). This provision of the Act was designed to shed light and scrutiny upon the dealmaking that takes place between mine operators

and government regulators, and to ensure that settlements further the public interest and the purposes of the Mine Act. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64 (Aug. 2012).

Commission judges review settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). To enable judges to make this determination, Commission rules require that a motion to approve a penalty settlement must include "facts in support of the penalty agreed to by the parties." 30 C.F.R. § 2700.31(b). A judge reviews the submitted facts, the six penalty criteria set forth in section 110(i) of the Act, and all other relevant considerations when scrutinizing a settlement. *See Am. Coal Co.*, 38 FMSHRC at 1976, 1982.

I. The Assessed Penalty, Proposed Settlement, and Amendments

The Respondent owns and operates a sand-and-gravel operation at Pit 12 near Salt Lake City, Utah. This docket includes two citations issued to the Respondent on March 29, 2022. The Respondent contested the citations, and the Secretary filed a petition proposing a penalty of $22,944.00 on July 20, 2022. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On September 23, 2022, the Secretary filed his original Motion to Approve Settlement for this docket. In that filing, the Secretary proposed a compromised penalty of $3,936.00, representing a **savings for the mine operator of $19,008.00** and a **penalty reduction of 82.8 percent**. The motion also proposed numerous substantive modifications to the text of the citations. But the facts offered in support of the proposed modifications were lacking.

Accordingly, the Court notified the parties that their settlement could not be approved as submitted and gave the parties additional time to renegotiate the settlement or provide more supporting information. The Secretary filed an Amended Motion to Approve Settlement on October 3, 2022. The amended motion contains little, if any, additional information supporting the settlement.

II. The Proposed Settlement is not Fair, Reasonable, Appropriate Under the Facts, or Protective of the Public Interest

The Court now turns to the terms of the agreement. The terms are analyzed based on the facts submitted in the settlement motion as amended by the parties. Consideration is given to the monetary and nonmonetary terms of the settlement, and to the criteria established in section 110(i) of the Mine Act, such as negligence and gravity. On balance, I find that the modified penalty proposed by the Secretary is not fair, reasonable, appropriate under the facts, or protective of the public interest. I find also that the settlement motion does not adequately address the six penalty criteria. I therefore deny the Secretary's motion.

A. The Proposed Modifications to Citation No. 9727214

Citation No. 9727214 alleges a violation of 30 C.F.R. § 56.14207 as follows:

> The Dodge Ram 1500 truck was parked on a roughly 5% grade without being provided with wheel chocks or any other required means to prevent uncontrolled,

> unintended movement. Miners walked up the grade directly behind the vehicle. Should a miner be struck by the truck, fatal blunt force trauma would be the expected result. Management engaged in conduct constituting more than ordinary negligence in that the mine operator was aware of the truck and took no action to correct or mitigate the hazard. Standard 56.14207 was cited 2 times in two years at mine 4202078 (2 to the operator, 0 to a contractor). . . . This violation is an unwarrantable failure to comply with a mandatory standard.

Pet. at 6. The cited standard requires that, "[w]hen parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207. The inspector found that the alleged violation was reasonably likely to result in an injury, and that the injury could be reasonably expected to be fatal. Pet. at 6. He marked the citation as high negligence and S&S. Pet. at 6. After determining that the violation was an unwarrantable failure to comply with a mandatory standard, the inspector issued the citation under section 104(d)(1) of the Mine Act. The Secretary assessed a penalty of $10,868.00.

Now, the Secretary seeks to radically alter this citation. First, he proposes reclassification of this action from a section 104(d)(1) citation to a 104(a) citation. That proposed change requires deletion of the unwarrantable failure designation. *See* 30 U.S.C. § 814(d)(1). Second, he seeks to change the likelihood of injury from "Reasonably Likely" to "Unlikely." Third, he proposes a reduction in the negligence finding from "High" to "Moderate." And finally, he seeks to remove the S&S designation. Altogether, these changes would reduce the penalty from $10,868.00 to $662.00.

The Secretary offers very few facts in support of these major changes. He states in his motion that the pickup truck in question was "outfitted with an automatic transmission which was observed in the 'park' position" and that the "parking brake was set." Am. Mot. to App. Settlement at 3. He also notes that his "review of the information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck."[1] Am. Mot. to App. Settlement at 3.

The violation alleged here is serious, despite the Secretary's attempts to downplay it. Just one month before the Secretary filed his original motion in this case, a miner was killed by parked mobile equipment that had not been secured against accidental movement.[2] Another miner was

[1] Any other information adduced by the Secretary regarding this citation was either redundant or mere conclusion. Often, when a motion to approve settlement is filed by an MSHA conference and litigation representative (CLR), the motion relies heavily on legal conclusions that are either improperly applied or inadequately supported. The standard boilerplate language used by every CLR contains legal information that they are not sufficiently trained to understand or qualified to use in a legal document. Moreover, the Commission requires the Secretary to provide "facts," not conclusions, in support of settlement. 30 C.F.R. § 2700.31(b).

[2] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: AUGUST 4, 2022 FATALITY, https://www.msha.gov/data-reports/fatality-reports/2022/august-4-2022-fatality/fatality-alert.

killed earlier this year when a dump truck—unsecured against accidental motion—crushed a miner attempting to troubleshoot a brake issue.[3] Last year, at least three such fatal accidents occurred. One miner was pinned by his parked truck while helping a second miner repair a truck parked immediately in front of his own.[4] Another miner died when his haul truck, parked on a grade without wheel chocks, rolled downhill and crushed him.[5] A third miner with ten years of experience died while performing a pre-operational examination on a truck with unchocked wheels.[6] MSHA's root-cause analysis found that the death was caused by the contractor's failure to ensure that all truck wheels were properly blocked when parked on a grade. In 2020, a truck ran over a miner who had attempted to adjust its brakes without blocking it against motion.[7] In 2018, a miner with eight years of experience was killed by mobile equipment that was not properly secured against movement while parked.[8] In 2017, a parked pickup truck pinned a miner against a wall and killed him, in part because the wheels were not chocked.[9]

Miners are killed year after year in these accidents—accidents that are completely avoidable if operators were to follow the regulations with diligence and care. That is why the

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[3] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: JANUARY 26, 2022 FATALITY, https://www.msha.gov/data-reports/fatality-reports/2022/january-26-2022-fatality/fatality-alert.

[4] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, DECEMBER 13, 2021 FATALITY – PRELIMINARY REPORT, https://www.msha.gov/data-reports/fatality-reports/2021/december-13-2021-fatality/preliminary-report-0.

[5] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (CONSTRUCTION SAND AND GRAVEL) FATAL POWER HAULAGE ACCIDENT – APRIL 19, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/april-19-2021-fatality/final-report.

[6] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: FACILITY (COAL) FATAL POWER HAULAGE ACCIDENT – AUGUST 11, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/august-11-2021-fatality/final-report.

[7] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE MINE (SAND) FATAL POWER HAULAGE ACCIDENT – SEPTEMBER 16, 2020, https://www.msha.gov/data-reports/fatality-reports/2020/september-16-2020-fatality/final-report.

[8] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: UNDERGROUND METAL MINE (GOLD ORE) FATAL POWER HAULAGE ACCIDENT – NOVEMBER 11, 2018, https://www.msha.gov/data-reports/fatality-reports/2018/fatality-16-november-11-2018/final-report.

[9] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (CRUSHED STONE) FATAL POWER HAULAGE ACCIDENT – MARCH 24, 2017, https://www.msha.gov/data-reports/fatality-reports/2017/fatality-3-march-24-2017/final-report.

inspector's original finding of S&S is well founded: the violation alleged here is serious, and mine operators need to take them seriously or else miners will continue to die.

The Secretary now seeks to remove the S&S designation. I cannot accept this proposed modification based on the two sentences that he offers in support of the change. The Secretary points to other required safety features, like the parking brake, to show that the alleged violation is not significant or substantial. However, I am precluded from considering redundant safety measures as part of S&S analysis. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013). The relevant inquiry here is the magnitude of risk presented by the operator's failure to chock the wheels of a truck parked on a grade. Given the number of serious accidents caused by this condition, I find that the inspector has set forth no basis for S&S and that the Secretary's facts cannot support deletion of the S&S designation. Accepting the facts, even if true, stand in opposition to the current case law regarding S&S. I cannot accept a settlement that is contrary to law.

As additional support for the S&S changes, the Secretary insists that he has "discretion to modify the significant and substantial designation" based on two Commission cases: *American Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996). Am. Mot. to App. Settlement at 4. But the Secretary's reliance on these cases is misplaced. The Commission in *Mechanicsville* held that an ALJ may not add an S&S designation on her own initiative, and the Commissioners merely reiterated this holding in *American Aggregates*. By contrast, the present case involves the Secretary's proposal to remove an S&S designation. The case citations of the CLR are irrelevant here. It appears they were drafted by an attorney and are used in every settlement agreement by a CLR who is not qualified to cite to legal authority. I find that the Secretary's claim of discretion regarding S&S is erroneous, and that his decision to remove the S&S designation wrongfully dispenses with decades of history and precedent.

I further find that the submitted facts cannot support the negligence changes. The Secretary attests that a "review of the information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck." Am. Mot. to App. Settlement at 3. This statement raises several concerns. It does not specify the basis of the "information provided by the operator" or whether it is credible. *Id*. It does not mesh with the inspector's account, which noted that management "was aware" of the violative condition. Pet. at 6. And it does not even say explicitly that management lacked knowledge of the unchocked wheels—only that management was unaware of any conditions that it deemed a "hazard." Am. Mot. to App. Settlement at 3.

Moreover, even if management lacked actual knowledge of the unchocked wheels, this fact would still not negate negligence. The Secretary defines negligence as when "[t]he operator knew *or should have known* of the violative condition." 30 C.F.R. § 100.3 (emphasis added). The Commission looks to "the operator's actual *or constructive knowledge* of the violative condition or practice" to determine its negligence. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016) (emphasis added). The record indicates that management should have known of the condition since miners routinely "walked up the grade directly behind the vehicle." Pet. at 6. The Commission also looks to the operator's "supervision, training, and disciplining of its employees

to determine if [it] has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *Knight Hawk*, 38 FMSHRC at 2369. Here, the Secretary has submitted no facts regarding the operator's supervision or training practices. Accordingly, the facts do not mitigate the operator's negligence as alleged in the petition.

Finally, and most importantly, I must deny the proposed penalty reduction associated with this citation. The threadbare information submitted cannot support such a drastically compromised penalty. For further discussion of the penalty, see *infra*, Section II.C.

B. The Proposed Modifications to Order No. 9727216

Order No. 9727216 alleges a violation of 30 C.F.R. § 56.18002(a) as follows:

> The mine operator failed to ensure that an adequate examination of working places was being conducted prior to miners working around the crusher and wash plant areas. During this inspection 20 violative conditions were noted and cited. The workplace examination record noted 0 safety concerns. Some of the conditions cited were extensive and obvious and had been in existence for days or weeks. The failure to identify and correct hazards is known to contribute to fatal accidents across the mining industry. Mine management engaged in conduct constituting more than ordinary negligence in that they did not complete the required examinations and allowed hazards to exist with no mitigation. . . . This violation is an unwarrantable failure to comply with a mandatory standard.

Pet. at 7. The inspector found that the operator's failure to conduct an adequate exam was reasonably likely to result in an injury that could reasonably be expected to be fatal. He marked the order as S&S and high negligence. After determining that the violation was an unwarrantable failure to comply with a mandatory safety standard, the inspector issued the order under section 104(d)(1) of the Mine Act. He withdrew the crusher and the wash plant from operation until the mine operator terminated the order by training a designee to conduct a thorough workplace examination.

Section 56.18002(a) requires that "a competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." 30 C.F.R. § 56.18002(a). Merely performing an examination is not enough to satisfy the standard—the operator must perform an *adequate* examination. Under Commission case law, a workplace examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016).

The first fact put forward by the Secretary—that a "workplace examination had been conducted and documented"—is therefore hollow. *See* Am. Mot. to App. Settlement at 3. This fact does not negate the fact of violation, the negligence finding, or the unwarrantable failure designation. The workplace examination has to be meaningful to satisfy the safety standard; haphazard inspections do not protect miners. For instance, in *Sunbelt Rentals*, the operator

performed and recorded a workplace examination. The exam failed to identify the loose material that would later strike a miner and knock him unconscious. 38 FMSHRC at 1627; *Sunbelt Rentals, Inc.*, 40 FMSHRC 573, 583-90 (Apr. 2018) (ALJ). The operator did not protect the miner with its inadequate examination and could not avoid liability under section 56.18002(a).

Here, the record supports a finding that the examination was inadequate. The inspector noted twenty violative conditions. Some of the violations were "extensive and obvious," and some had been in existence for "days or weeks." Pet. at 7. Meanwhile, the operator's workplace exam noted none of these issues.

The inspector's report tends to contradict the second and final fact offered by the Secretary in support of settlement: that "there was no evidence that the examination was inadequate." [10] Failure to identify and address safety violations can be evidence of an inadequate examination. *LRock Industries*, 39 FMSHRC 1429 (July 2017) (ALJ); *APAC-Kansas, Inc.*, 38 FMSHRC 2560 (Oct. 2016) (ALJ). The inspector documented the operator's failure to identify twenty violations despite the extensiveness and duration of the violative conditions. Accordingly, there *is* evidence that the examination was inadequate.

I cannot say how the Secretary has now concluded that "no evidence" exists in the face of the inspector's report. He provides no further context or explanation for his conclusion, even when asked to supplement his original filing on this precise issue. Instead, he wants me to ignore the evidence of an inadequate examination and to accept his current version of events without further facts or scrutiny. To accept the Secretary's facts uncritically would be a derogation of my statutory duty under section 110(k) of the Mine Act.

By attempting to make such a drastic change with such weak and inconsistent facts, the Secretary again conveys that he does not take this violation seriously. But this is a serious offense. Miners continue to suffer injuries, fatal and otherwise, due to inadequate workplace examinations. Just days before the Secretary filed his motion in this case, he released a fatality alert indicating that a miner died due in part to the failure to conduct an adequate workplace examination.[11] Accordingly, I take the allegations in this case seriously and would require concrete and specific facts to justify the dramatic changes proposed. The Secretary's motion is devoid of such facts. I therefore must deny the proposed changes as unreasonable and inappropriate under the facts.

C. The Proposed Penalty Reduction

The other major defect in the present motion is the penalty reduction. The Secretary proposes a drastic penalty reduction from the assessed penalty of $22,944.00 to the compromised

[10] Any other information adduced in support of the proposed modifications was nonfactual and conclusory in nature.

[11] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: SEPTEMBER 9, 2022 FATALITY https://www.msha.gov/data-reports/fatality-reports/2022/september-9-2022-fatality/fatality-alert.

value of $3,936.00. Based on the reasoning below, I find that the proposed penalty reduction is unfair and contrary to the public interest.

Before passage of the Mine Act, mine operators were governed by the Coal Act and its regulations. Operators and regulators negotiated settlements that never saw public scrutiny, and negotiations often led to large penalty reductions for operators. Senator Richard Schweiker (R-Pennsylvania) described the dysfunction:

> [Mine operators] get slapped [with] a fine of $100 or $200 or $300. They accumulate a whole lot of them and go back in court and ultimately settle them at 10 or 20 cents on the dollar… So what you actually assess them at and what they settle for are worlds apart and is part of the frustration of dealing with the act.

123 Cong. Rec. S10,277, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1072-73 (1978) ("*Legis. Hist.*"). This system failed to deter hazardous workplace conduct, and devastating mine accidents continued to occur. Members of Congress knew that paltry settlement amounts would not be sufficient incentive for mine operators to adopt safe and compliant practices. As Senator Wendell Ford (D-Kentucky) said:

> The settlement of penalty assessments in the past, often for as little as 30 cents on the dollar, has been a disgrace, as well as a serious obstacle to effective use of the civil penalty mechanism to encourage compliance.

123 Cong. Rec. S10,209, *reprinted in Legis. Hist.*, at 922. There was bipartisan consensus that compromised settlements had become an impediment to ensuring miner safety.

Congress decided to reshape the settlement regime with the Mine Act. Congress identified the compromise of assessed penalties in settlement as a problem with prior legislation, and it crafted section 110(k) of the Mine Act as a solution. By subjecting settlements to judicial review, Congress intended to avoid "the unwarranted lowering of penalties as a result of off-the-record negotiations" and to ensure that "the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.*, at 633.

It is therefore my duty to review compromised penalties. Motions proposing large penalty reductions—where the operator would pay only "10 or 20" or "30 cents on the dollar"—demand particular attention because they are the very settlements that Congress saw as an obstacle to regulatory compliance. 123 Cong. Rec. S10,277, S10,209, *reprinted in Legis. Hist.*, at 1072-73, 922. The parties must present concrete facts, review the six penalty criteria, and demonstrate how the proposed settlement will be fair and protective of the public interest.

Here, the public interest is not adequately protected. Encouraging compliance with safety regulations was a key public interest motivating Congress to pass the Mine Act, and it has been a key public interest considered by the Commission when scrutinizing settlements. *Black Beauty*, 34 FMSHRC at 1866. I fail to see how this settlement could promote compliance. Instead, by allowing the operator to pay just seventeen cents on the dollar for these two serious alleged

violations, the Secretary encourages the operator to embrace the status quo and accept the minor settlement amounts as the cost of doing business. The Secretary has not submitted any information to dissuade me of this thinking, or to show that a reduced penalty furthers the public interest. Accordingly, I find that the large penalty reduction undermines operator compliance, fails to deter dangerous behavior, and therefore contravenes the public interest.

D. Non-monetary aspects of the settlement

I have also considered the non-monetary aspects of this settlement motion. Just as in all other settlement motions, the Secretary includes the rote recitation that he "has evaluated the enforcement value of the compromise and is maximizing his prosecutorial impact in settling this case on appropriate terms." Am. Mot. to App. Settlement at 2. He says that resolution of this case through settlement is of "significant enforcement value to the Secretary" in part because the citations, as modified, are "preserved for future enforcement actions and are not subject to potential vacatur or further downward adjustment after a hearing." Am. Mot. to App. Settlement at 2-3.

I accord significant weight to the value of avoiding litigation and its attendant uncertainty. However, the Secretary's boilerplate statements do little more to help me understand how this particular settlement meets the *AmCoal* standard. Stripping citations of their S&S and unwarrantable failure designations also impacts future enforcement actions, but the Secretary provides no explanation of these specific changes and how they maximize prosecutorial impact.

Furthermore, "[t]he Commission recognized that significant non-monetary value flows from accepting the citations as written." *Solar Sources Mining*, 41 FMSHRC 594, 601 (Sept. 2019) (internal citations omitted). Here, the Secretary has elected to modify both of the citations in this docket and forfeit the non-monetary value that would flow from preserving them as written.

Altogether, although there are some non-monetary benefits to this settlement, none of the Secretary's generalized statements convince me that the particular changes proposed here are "fair, reasonable, appropriate under the facts, and protect[] the public interest." *Am. Coal Co.*, 38 FMSHRC at 1976.

III. Conclusion

This case boils down to facts. The Secretary must submit facts in support of the proposed settlement, and I must scrutinize those facts. Here, the Secretary has submitted a grand total of three relevant sentences to support the 82.8 percent penalty reduction proposed. Most of the information submitted is conclusory and redundant. Few of the facts are concrete or specific. He does nothing to explain why the submitted facts differ from the inspector's report. He fails to tailor the facts to the penalty criteria or the modified portions of the citations. He ignores the seriousness of the alleged violations. And, when asked for more information, he rebuffs the Court and merely rearranges the information already encapsulated in the original motion.

It is my statutory duty to review the sufficiency of the Secretary's facts. If I were to approve this proposed settlement based on the submitted facts, the judicial review provision in section

110(k) of the Mine Act would be rendered meaningless. I cannot close my eyes to the deficiencies of the facts submitted here, nor to the risk presented to miners by the violations alleged in this case. I must deny this motion.

WHEREFORE, the Amended Motion to Approve Settlement is hereby **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 02, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RULON HARPER CONSTRUCTION, INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0250 A.C. No. 42-02078-554812 Mine: Pit 12

ORDER DENYING SETTLEMENT

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have notified the Court that they have reached a settlement agreement in this case. Based on the proposed modifications and significant penalty reduction, I deny the settlement motion. The terms of the proposed settlement are as follows:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEST 2022-0250			
9479096	$ 3,274.00	$ 662.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
9479097	$ 3,274.00	$ 3,274.00	No change.
9479098	$ 296.00	$ 296.00	No change.
9727204	$ 3,274.00	$ 199.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9727205	$ 3,274.00	$ 662.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
9727208	$ 3,274.00	$ 1,472.00	Modify gravity from "Fatal" to "Permanently Disabling."

9727211	$ 3,274.00	$ 0.00	Vacate.
9727212	$ 2,194.00	$ 662.00	Modify gravity from "Fatal" to "Lost Workdays or Restricted Duty."
TOTAL	**$ 22,134.00**	**$ 7,227.00**	

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). This provision of the Act was designed to shed light and scrutiny upon the dealmaking that takes place between mine operators and government regulators, and to ensure that settlements further the public interest and the purposes of the Mine Act. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64 (Aug. 2012).

Commission judges review settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). To enable judges to make this determination, Commission rules require that a motion to approve a penalty settlement must include "facts in support of the penalty agreed to by the parties." 30 C.F.R. § 2700.31(b). A judge reviews the submitted facts, the six penalty criteria set forth in section 110(i) of the Act, and all other relevant considerations when scrutinizing a settlement. *See Am. Coal Co.*, 38 FMSHRC at 1976, 1982.

I. The Assessed Penalty, Proposed Settlement, and Amendments

The Respondent owns and operates a sand-and-gravel operation at Pit 12 near Salt Lake City, Utah. This docket includes eight citations issued to the Respondent on March 28, 2022. The Respondent contested the citations, and the Secretary filed a petition proposing a penalty of $22,944.00 on July 20, 2022. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On September 23, 2022, the Secretary filed his original Motion to Approve Settlement for this docket. In that filing, the Secretary proposed a compromised penalty of $7,227.00, representing a **savings of nearly $15,000.00 for the mine operator** and a **total penalty reduction of 67.3 percent**. The motion also proposed numerous substantive modifications to the text of the citations. The few facts offered in support of the proposed modifications were unconvincing, and I found that they were insufficient to sustain the changes proposed.

Accordingly, the Court notified the parties that their settlement could not be approved as submitted and gave the parties additional time to renegotiate their agreement or provide more information. The Secretary filed an Amended Motion to Approve Settlement on October 3, 2022. The amended motion contains little, if any, additional information supporting the settlement.

II. The Proposed Settlement is not Fair, Reasonable, Appropriate Under the Facts, or Protective of the Public Interest

The Court now turns to the terms of the agreement. The terms are analyzed based on the facts submitted in the settlement motion as amended by the parties. Consideration is given to the monetary and nonmonetary terms of the settlement, and to the criteria established in section 110(i)

of the Mine Act, such as negligence and gravity. On balance, I find that the modified penalty proposed by the Secretary is not fair, reasonable, appropriate under the facts, or protective of the public interest. I find also that the settlement motion does not adequately address the six penalty criteria. I therefore deny the Secretary's motion.

A. The Proposed Modifications to the Berm Citations

During his inspection on March 28, 2022, the mine inspector cited the Respondent for at least **four separate violations of section 56.9300(a)**, which requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

Citation No. 9479096 alleges a violation as follows:

> The berms on the elevated feed ramp for the crusher were not maintained. The south berm was in a marginal condition but the north berm was almost entirely gone. The ramp was about 100' long and a FEL over traveling the north edge would encounter a drop off of about 6 feet. Miners over traveling the edge would be exposed to fatal blunt force trauma.

Pet. at 6. The inspector determined that the violative condition was reasonably likely to cause an injury, and that the resultant injury could reasonably be expected to be fatal. He marked the citation as moderate negligence and as S&S. The Secretary assessed a penalty of $3,274.00.

Citation No. 9727204 alleges a violation as follows:

> The elevated roadway adjacent to the hole dug by the discharge conveyor on the wash plant was not provided with a berm to prevent equipment from over traveling the edge. The hole is about four feet deep and has a soft perimeter edge. This area is used by the skidsteer and the service truck was parked within a few feet of the edge. Should a vehicle (particularly the skidsteer) over travel this edge and overturn, fatal crushing/blunt force trauma would be the expected result.

Pet. at 12. The mine inspector found that the lack of a berm was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. He determined that the violation was S&S and resulted from moderate negligence. The penalty was assessed at $3,274.00.

Citation No. 9727208 alleges a violation as follows:

> The elevated roadway being used for the FEL to access the wash plant feed pile was not provided with berms on both sides of the ramp. The approx. 50' long by 6' high ramp had no berm whatsoever on the south side. There were vehicle tracks trailing off the side of the ramp, indicating that in addition to the FEL, this ramp was used by smaller vehicles. Should a vehicle over travel the edge, fatal blunt force trauma would be the expected injury.

Pet. at 16. The inspector found that the condition was reasonably likely to cause injury, and that the resulting injury could reasonably be expected to be fatal. He designated the citation as S&S and as moderate negligence. The Secretary assessed a penalty of $3,274.00.

Finally, Citation No. 9727211 alleges a violation as follows:

> The settling ponds were not provided with berms to protect the equipment accessing the surrounding areas from over traveling the edges and falling into the water. There was tracks crossing a material bridge across the pond and the edges of the roadway had begun to fail. Should a miner over travel the edge, fatal drowning would be the expected result.

Pet. at 18. The mine inspector determined that the lack of a berm was reasonably likely to cause an injury that could reasonably be expected to be fatal. He marked the citation as S&S and as moderate negligence. The Secretary assessed a $3,274.00 penalty for this citation.

The violations alleged here are serious. Accidents involving mobile equipment and powered haulage account for the greatest proportion of fatalities in mines.[1] Many of these accidents are caused by the lack of properly maintained berms. In 2021, at least two miners died as a result of inadequate berms. A miner with 43 years of mine experience was killed while tramming an excavator along an elevated roadway that abutted a dredge pond.[2] Because the mine operator did not provide berms or guardrails on the edge of the roadway, and the excavator rolled over into the pond and the miner sustained fatal injuries. A second miner died when his haul truck overturned at the edge of a dumpsite that featured a deficient berm of inadequate height, width, thickness, and firmness.[3] In 2019, a 22-year-old electrician was killed while working in a trench when a front-end loader toppled over the unguarded edge of the trench and crushed him.[4] In 2017,

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[1] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, CY 2021 MSHA FATALITIES, https://www.msha.gov/sites/default/files/events/2021%20MSHA%20Fatalities%206-9-21.pdf.

[2] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (SAND AND GRAVEL) FATAL MACHINERY ACCIDENT – MARCH 5, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/march-5-2021-fatality/final-report.

[3] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (CONSTRUCTION SAND AND GRAVEL) POWERED HAULAGE ACCIDENT – JANUARY 19, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/january-19-2021-fatality/final-report.

[4] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (CRUSHED LIMESTONE) FATAL POWERED HAULAGE ACCIDENT – JUNE 10, 2019, https://www.msha.gov/data-reports/fatality-reports/2019/june-10-2019-fatality/final-report.

another fatal accident occurred when a haul truck overturned at a dumpsite that lacked proper berms and barriers.[5] In 2015, a miner sustained fatal injuries when his haul truck went over the edge of a bermless road and rolled over into a slough pond.[6] In 2013, a miner with 25 years of experience fell 80 feet to his death when his truck traveled through a hole in the berm and over the edge of a highwall.[7] In 2012, an experienced miner with almost five decades in the industry drowned when the skid steer he was operating traveled over a drop-off and into a water hole.[8] Mine management in that case failed to provide berms in the work area.

Year after year, miners die because operators fail to install and maintain proper barriers. The severity of these accidents could be minimized if operators were to follow the regulations with diligence and care. But operators take their cue from the Secretary, and—time and time again—the Secretary has agreed to settle berm violations like those before me today for mere cents on the dollar.

Once again here, the Secretary sends the message that these violations are not serious. He agrees to vacate one citation, remove the S&S from two others, alter the gravity findings, and reduce the penalties for the four berm violations by 82 percent. It is clear that the MSHA conference and litigation representative (CLR) is not familiar with the current case law describing S&S and has failed to apply the proper legal analysis in this case. I cannot approve a settlement that is contrary to the law.

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[5] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NON METAL MINE (LIMESTONE) POWERED HAULAGE ACCIDENT – JUNE 8, 2017, https://www.msha.gov/data-reports/fatality-reports/2017/fatality-4-june-08-2017/final-report.

[6] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (SAND AND GRAVEL) FATAL POWERED HAULAGE ACCIDENT – MARCH 17, 2015, https://www.msha.gov/data-reports/fatality-reports/2015/fatality-5-march-17-2015/final-report.

[7] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (CRUSHED AND BROKEN LIMESTONE) FATAL POWERED HAULAGE ACCIDENT – SEPTEMBER 16, 2013, https://www.msha.gov/data-reports/fatality-reports/2013/fatality-11-september-16-2013/final-report.

[8] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (CEMENT) FATAL POWERED HAULAGE ACCIDENT – JANUARY 27, 2012, https://www.msha.gov/data-reports/fatality-reports/2012/fatality-1-january-27-2012/final-report.

The Secretary is careless in his attempt to justify the proposed changes. As support for the modifications to the four berm citations, the Secretary offers just five sentences of "facts."[9] Much of the submitted information is irrelevant, uninformative, or unconvincing. For Citation No. 9479096, he says that "feed ramp was straight, visibility was good, and a partial berm was in place" which "would have alerted the loader operator that they were close to the edge of the ramp." Am. Mot. to App. Settlement at 3. For Citation No. 9727204, he submits that the "skid-steer in the area was equipped with rollover protection and a seatbelt." He further states that "the alleged drop off was 4 [feet]" and that "[v]ehicles in the area stop at this location and do not continue to travel farther." Am. Mot. to App. Settlement at 4. For Citation No. 9727208, the Secretary justifies the proposed changes by saying that the "front-end loader was outfitted with an enclosed cab with roll over protection and a seatbelt, and the highest overtravel hazard was 6 [feet] above soft earthen material." Am. Mot. to App. Settlement at 4.

These facts cannot support the proposed S&S changes. The Secretary submits that "visibility was good," but the S&S analysis is conducted in the continued course of normal mining operations, and visibility conditions could worsen. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). He notes that "a partial berm was in place," but a so-called partial berm described by an inspector as "almost entirely gone" does little to prevent accidents; it also does little to satisfy a standard requiring not just that berms exist, but also that they be maintained. The seatbelts and rollover protection on the mobile equipment are redundant safety features that cannot be considered as part of S&S analysis. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013).

Meanwhile, the inspector set forth a strong basis for the S&S designations. For Citation No. 9479096, a 100-foot elevated ramp with a 6-foot drop-off was left with an unmaintained and almost nonexistent berm. For Citation No. 9727204, the operator failed to place a berm on an elevated roadway abutting a 4-foot-deep hole with a soft perimeter. Large mobile equipment was parked within feet of the edge. Both alleged violations would be reasonably likely to cause a hazard that could injure a miner. The 4-foot and 6-foot drop-offs suggest that an injury could be reasonably serious, given the heavy equipment that was used on these roads. In my estimation, the Secretary has not presented any concrete information that would mitigate the inspector's well-founded S&S determination.

As additional support for the S&S changes, the Secretary insists that he has "discretion to modify the significant and substantial designation" based on two Commission cases: *American Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996). Am. Mot. to App. Settlement at 5. But the Secretary's reliance on these cases is misplaced. The Commission in *Mechanicsville* held that an

[9] The Secretary has not submitted any facts in support of the vacatur of Citation No. 9727211. I accept the Secretary's decision to vacate this citation, since he is owed some discretion in his enforcement decisions. I note, however, that this discretion should not be plenary, especially when vacatur occurs as part of a larger settlement. Experience reveals that the Secretary often vacates citations as part of the *quid pro quo* of settlement, and this dealmaking should be subject to judicial review pursuant to section 110(k) of the Mine Act under an "abuse of discretion" standard.

ALJ may not add an S&S designation on her own initiative, and the Commissioners merely reiterated this holding in *American Aggregates*. By contrast, the present case involves the Secretary's proposal to remove an S&S designation.

These improper and irrelevant case citations misstate the law, and yet they are included in every settlement document filed by a CLR. A CLR is not qualified to analyze or interpret case law. By attempting to do so here, the CLR has proposed a settlement that ignores the meaning of S&S as articulated in *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016), and its progeny. The present settlement fails to set forth the correct case law and, moreover, fails to provide facts demonstrating that the parties understand the legal requirements and have met those requirements. I cannot approve such a settlement. In sum, I find that the Secretary's claim of discretion regarding S&S is erroneous, and that his decision to remove the S&S designation wrongfully dispenses with decades of history and precedent.

I further find that the penalty reductions associated with Citations Nos. 9479096, 9727204, and 9727208 are inappropriate. The proposed penalties do not reflect the seriousness of the alleged violations and do not adequately deter future violative conduct. Even if the gravity changes are proper, I do not have to accept the proposed penalties and I am not bound by the Secretary's Part 100 determinations. For further discussion of the penalty, see *infra*, Section II.C.

Accordingly, I find that the S&S modifications for Citations Nos. 9479096 and 9727204 are unreasonable and inappropriate under the facts. Similarly, I take issue with the proposed penalties for Citations Nos. 9479096, 9727204, and 9727208 on the same basis. These proposed modifications are therefore denied.

B. The Proposed Modifications to Citation No. 9727205

Citation No. 9727205 alleges a violation of 30 C.F.R. § 56.14101(a)(2) as follows:

> The park brake on the GMC Service truck failed to hold with its typical load on the maximum grade it travels. The test area was an access road to the pit and was selected by the mine. The truck rolled immediately and rapidly when the park brake was tested, it stopped rolling when the service brake was reapplied. This truck is used as needed around the mine site and with miners accessing the back of the truck as a work platform in addition to using the truck to haul maintenance supplies. There is a vice mounted on the back of the truck. Should a miner be struck by the truck due to a non-functional park brake, fatal crushing blunt force trauma would be the expected result. Standard 56.14101(a)(2) was cited 3 times in two years at mine 4202078 (3 to the operator, 0 to a contractor).

Pet. at 14. The cited standard requires that, "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). The inspector determined that the alleged violation was reasonably likely to cause an injury, and that the resulting injury could reasonably be expected to be fatal. He marked the citation as S&S and as moderate negligence. The Secretary assessed a civil penalty of $3,274.00 for this citation.

Again here, the Secretary proposes major changes. He seeks to modify the likelihood of injury from "Reasonably Likely" to "Unlikely," to delete the S&S designation, and to reduce the penalty down to $662.00. In support of these changes, the Secretary says that "[t]here is no evidence that the truck is used while on grades, and the work areas around the plant are level. The service truck is used for maintenance, travels and parks on level ground, and is not reasonably likely to cause serious injury." Am. Mot. to App. Settlement at 4.

These facts do not mitigate the original S&S finding. Despite the Secretary's claim that work areas at the mine are level, the mine access road selected by the operator itself for the test was on a grade. It is disingenuous to say that the truck was tested on a graded access road and also that no grades exist at the mine. The Secretary does not explain or account for the discrepancy between his facts and the inspector's findings, and I have trouble accepting the Secretary's facts in the absence of any explanation. This type of violation must be treated as serious. Unfortunately, braking system defects continue to result in fatal accidents in the mining industry.[10] Therefore, without a more convincing explanation, I must deny the proposed S&S changes as unreasonable and inappropriate under the facts.

C. The Proposed Penalty Reduction

The other major issue in the present motion is the penalty reduction. The Secretary proposes a drastic penalty reduction from the assessed penalty of $22,134.00 to the compromised value of $7,227.00. Based on the reasoning below, I find that the proposed penalty reduction is unfair and contrary to the public interest.

Before passage of the Mine Act, mine operators were governed by the Coal Act and its regulations. Operators and regulators negotiated settlements that never saw public scrutiny, and negotiations often led to large penalty reductions for operators. Senator Richard Schweiker (R-Pennsylvania) described the dysfunction:

> [Mine operators] get slapped [with] a fine of $100 or $200 or $300. They accumulate a whole lot of them and go back in court and ultimately settle them at 10 or 20 cents on the dollar… So what you actually assess them at and what they settle for are worlds apart and is part of the frustration of dealing with the act.

123 Cong. Rec. S10,277, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1072-73 (1978) ("*Legis. Hist.*"). This system failed to deter hazardous workplace conduct, and devastating mine accidents continued to occur. Members of Congress knew that paltry settlement amounts would not be

[10] *See. e.g.*, MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: FACILITY (COAL) FATAL POWERED HAULAGE ACCIDENT – AUGUST 11, 2021 https://www.msha.gov/data-reports/fatality-reports/2021/august-11-2021-fatality/final-report; MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: UNDERGROUND (LEAD-ZINC ORE) FATAL POWERED HAULAGE ACCIDENT – FEBRUARY 22, 2021 https://www.msha.gov/data-reports/fatality-reports/2021/february-22-2021-fatality/final-report.

sufficient incentive for mine operators to adopt safe and compliant practices. As Senator Wendell Ford (D-Kentucky) said:

> The settlement of penalty assessments in the past, often for as little as 30 cents on the dollar, has been a disgrace, as well as a serious obstacle to effective use of the civil penalty mechanism to encourage compliance.

123 Cong. Rec. S10,209, *reprinted in Legis. Hist.*, at 922. There was bipartisan consensus that compromised settlements had become an impediment to ensuring miner safety.

Congress decided to reshape the settlement regime with the Mine Act. Congress identified the compromise of assessed penalties in settlement as a problem with prior legislation, and it crafted section 110(k) of the Mine Act as a solution. By subjecting settlements to judicial review, Congress intended to avoid "the unwarranted lowering of penalties as a result of off-the-record negotiations" and to ensure that "the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.*, at 633.

It is therefore my duty to review compromised penalties. Motions proposing large penalty reductions—where the operator would pay only "10 or 20" or "30 cents on the dollar"—demand particular attention because they are the very settlements that Congress saw as an obstacle to regulatory compliance. 123 Cong. Rec. S10,277, S10,209, *reprinted in Legis. Hist.*, at 1072-73, 922. The parties must present concrete facts, review the six penalty criteria, and demonstrate how the proposed settlement will be fair and protective of the public interest.

Here, the public interest is not adequately protected. The key public interest to consider in evaluating settlements is whether the proposal encourages compliance with safety regulations. *Black Beauty*, 34 FMSHRC at 1866. I fail to see how this settlement could promote compliance. Instead, by allowing the operator to pay just thirty cents on the dollar for these serious violations, the Secretary encourages the operator to embrace the status quo and accept the minor settlement amounts as the cost of doing business. The Secretary has not submitted any information to dissuade me of this thinking, or to show that a reduced penalty furthers the public interest. Accordingly, I find that the large penalty reduction undermines operator compliance, fails to deter dangerous behavior, and therefore contravenes the public interest.

D. Non-monetary aspects of the settlement

I have also considered the non-monetary aspects of this settlement motion. Just as in all other settlement motions, the Secretary includes the rote recitation that he "has evaluated the enforcement value of the compromise and is maximizing his prosecutorial impact in settling this case on appropriate terms." Am. Mot. to App. Settlement at 3. He says that resolution of this case through settlement is of "significant enforcement value to the Secretary" in part because the citations, as modified, are "preserved for future enforcement actions and are not subject to potential vacatur or further downward adjustment after a hearing." Am. Mot. to App. Settlement at 3. This language is found in every settlement motion filed by a CLR, yet a CLR is not qualified to comment on legal standards and the law regarding settlements. It is hard to imagine that reducing penalties to such a degree has any benefit to future enforcement actions.

I accord significant weight to the value of avoiding litigation and its attendant uncertainty. However, the Secretary's boilerplate statements do little more to help me understand how this particular settlement meets the *AmCoal* standard. Stripping citations of their S&S designations also impacts future enforcement actions, but the Secretary provides no explanation of these specific changes and how they maximize prosecutorial impact.

Furthermore, "[t]he Commission recognized that significant non-monetary value flows from accepting the citations as written." *Solar Sources Mining*, 41 FMSHRC 594, 601 (Sept. 2019) (internal citations omitted). Here, the Secretary has elected to modify six of the eight citations in this docket and forfeit the non-monetary value that would flow from preserving them as written.

Altogether, although there are some non-monetary benefits to this settlement, none of the Secretary's generalized statements convince me that the particular changes proposed here are "fair, reasonable, appropriate under the facts, and protect[] the public interest." *Am. Coal Co.*, 38 FMSHRC at 1976.

III. Conclusion

The violations alleged in this docket are serious, but the Secretary appears to treat them casually. He proposes substantial modifications to the text of the citations and a penalty reduction of nearly seventy percent. To justify these changes, he submits few facts. The information that was submitted is littered with inconsistencies, irrelevancies, and leaps in logic.

While the Secretary may have taken an indifferent approach in this case, I will not. I take my statutory duty to review settlements seriously. I find that the facts submitted by the Secretary simply cannot hold up to reasonable scrutiny. For the reasons stated above, the proposed settlement is not fair, reasonable, appropriate under the facts, or protective of the public interests. It is therefore denied.

WHEREFORE, the Amended Motion to Approve Settlement is hereby **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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