October 2022

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ADMINISTRATIVE LAW JUDGE ORDERS

No Review Was Granted or Denied During The Month of October 2022

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 5, 2022

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2022-0024 A.C. No. 15-19015-546383
v.	
PERRY COUNTY RESOURCES, LLC, Respondent	Mine: E4-2

ORDER DENYING THE SECRETARY'S SETTLEMENT MOTION AND SECRETARY'S MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW

Before the Court is the Secretary's Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review ("Supplemental Motion"), filed June 13, 2022. In submitting its Motion and Supplemental Motion the Secretary has refused to provide the full record regarding a citation involved in this docket, namely a Section 104(b) withdrawal order in connection with Citation No. 9282162. The Secretary's refusal amounts to hiding part of the record, a posture which is inimical to the spirit of the Mine Act. Accordingly, for the reasons which follow, the Court **DENIES** the Motion to Approve Settlement **and declines** to certify that interlocutory review will materially advance the final disposition of the proceeding.

Background

Citation No. 9282162 alleged a now-admitted violation of 30 C.F.R. §75.202(a). Titled "Protection from falls of roof, face and ribs," the standard provides that the "roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

In issuing his section 104(a) citation for this violation on October 25, 2021, the inspector stated in the "condition or practice" section that the "roof bolt plates are missing, due to rusting, on several roof bolts along the primary escapeway entry on the 1 West Mains., The missing plates extend from crosscut #5 to crosscut #22 in various location. This condition exposes miners to hazards of roof fall dangers. Draw rock has fallen into the roadway in these locations. The weekly examiner travels this area one time a week." Petition at 23.

The issuing inspector noted that the cited standard has been cited 7 times in two years at this mine, all to the operator. Evaluating the gravity of the violation, the inspector listed the injury as reasonably likely, resulting in lost workdays or restricted duty and affecting one

person. Accordingly, the inspector marked the violation as "significant and substantial" with the negligence listed as moderate.[1]

On May 31, 2022, the Court e-mailed the parties, requesting a copy of the section 104(b) order associated with **Citation No. 9282162**. The Secretary's non-attorney representative, conference and litigation representative, "CLR," Gary W. Oliver, declined, noting that the order was not in contest and the Secretary had supplied copies of the violations to which the motion to approve settlement applied. E-mail from Gary W. Oliver, CLR, MSHA (May 31, 2022). The Court repeated its request, noting it "will be unable to proceed on the motion until [the Court] receives the [section 104(b)] document[s], which [the Court] would note is a matter of public record." E-mail of the Court to the Parties (May 31, 2022).

Once again, Mr. Oliver denied the Court's request, responding:

> The (b) order requested is not related to the single violation modified in this settlement, Citation No. 9282123. The underlying violation to the (b) order, Citation No. 9282162 has been affirmed and as reflected to the Exhibit A, the good faith abatement discount was not given. Therefore there is no compromise of penalty for Citation No. 9282162 requiring the court's approval pursuant to Section 110(k). The

[1] It is noteworthy that this was not the only violation involving the primary escapeway on the 1 West Mains. Citation No. 9282163, issued on October 25, 2021, involved a now-admitted violation of 30 C.F.R. § 75.380(d)(1). That standard provides that "[e]ach escapeway shall be [ ] [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." This second violation encompassed some of the same areas of the escapeway as those identified in Citation No. 9282162. Both violations were issued the same day. The issuing inspector stated that the "primary escapeway is not being maintained in safe condition to assure safe passage including disabled persons. The escapeway has draw rock and thick mud, extending from crosscut #5 on the 1 West Mains to the 003 MMU in various locations. This condition would delay and slow evacuation in the event of an emergency. The weekly examiner is required to travel this area one time a week." Petition at 19. Under 'gravity,' the inspector marked the injury as 'reasonably likely' to occur, resulting in lost workdays or restricted duty. *Id*. Accordingly, the inspector also marked the violation as 'significant and substantial.' *Id*. The negligence was listed as moderate with one person affected. *Id*. The time needed to abate the condition was significant, as the inspector twice granted additional time to correct the hazard and the citation was not terminated until November 4, 2021. *Id*. at 22.

There was yet another violation regarding escapeway hazards, though that now-admitted violation involved the mine's secondary escapeway. Involved was a directional lifeline which was broken and pulled apart. *Id*. at 25. The largest proposed penalty among the four citations in this docket, the Secretary agreed to lop 50% off the proposed penalty for that citation, No. 9282123, to $264.00, a reduction resting upon the assertion that the negligence involved was low. Motion to Approve Settlement at 4.

> Secretary requests an order approving or denying the motion to approve settlement as filed.
>
> E-mail from Gary W. Oliver, CLR, MSHA (May 31, 2022).
>
> The Court replied that it did not see the issue the same way, informing:
>
> It is [the Court's] view that each citation/order, being part of the docket, is within [its] authority to conduct an informed review. [The Court] would add that it doesn't speak well of MSHA to hide information under cover of a settlement. As [the Court] [expressed] in an earlier email today, the order is part of the public record. It should have been in the official record, yet it is not there. If [the Secretary does] not want the order to see the light of day, [the Court thinks] that is an unwise course of action as the representative charged with protecting the safety and health of miners. As former Supreme Court Justice Louis Brandeis stated: "sunlight is said to be the best of disinfectants."[2]
>
> If you refuse to comply, [the Court expressed that it] will have no choice but to file a FOIA request and in [the Court's] ruling on the motion to approve settlement to take note of the agency's unwillingness to provide public record information for this admitted violation.
>
> E-mail of the Court to the Parties (May 31, 2022).

On June 13, 2022, Emily Toler Scott, an attorney for the Secretary, entered her appearance. Additionally, on June 13, 2022, Attorney Toler Scott filed the Secretary's Supplemental Motion.

The Court's June 22, 2022 Order to Disclose the Documents

On June 22, 2022, the Court issued an Order, which directed the Secretary to "disclose all documents pertaining to the issuance of the section 104(b) order associated with Citation No. 9282162." Order at 6. As stated in the Order, the Court believes that in carrying out its review responsibilities under 30 U.S.C. §820(k), it is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. *Id*. at 3. Citation No. 9282162 is part of the docket, but the documentary record concerning the violation is incomplete without the 104(b) order. *Id*.

[2] *See, for e.g., Buckley v. Valeo,* 424 U.S. 1, 67, 96 (1976) (quoting L. Brandeis, Other People's Money 62 (1933)).

The Secretary's Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review

The Secretary recounts in the Supplemental Motion, filed June 13, 2022, that when he filed his penalty petition in the matter KENT 2022-0024, he attached copies of the four citations along with MSHA's Form 1000-179. Supplemental Motion at 2. The MSHA form shows that a section 104(b) order was issued in connection with Citation No. 9282162; however, the Secretary did not propose a penalty for "that order" and so did not attach a copy of it to the penalty petition. *Id*.

The Secretary contends that he is only required to supply copies of citations and orders for which a penalty is sought. Citing 30 U.S.C. §815(d) and §815(b)(2), the Secretary also argues the Commission never had jurisdiction over the (b) order, as "Ramaco" did not contest or seek temporary relief from the order. *Id*. at 3-4. According to the Secretary, 30 U.S.C. 820(k) "gives the Commission the authority only to 'approve[]' any 'compromise[], mitigat[ion], or settle[ment]' of a 'proposed penalty which has been contested before the Commission . . . .' 30 U.S.C. 820(k)." *Id*. at 4. The Commission has no authority over the (b) order because the order has no proposed penalty, and therefore does not have a penalty "that could be contested or compromised, mitigated, or settled." Further, the penalty proposed for the order's associated citation is not being "compromised, mitigated, or settled." *Id*.

The Secretary additionally argues that it would be an abuse of discretion to deny the motion to approve settlement because the Secretary did not supply information, asserting that the Court did not provide a rational basis for the information. *Id*. The Secretary contends that judges may request additional facts if those facts are necessary, but may not direct the Secretary to submit specific documents. *Id*. at 4-5. The Secretary also asserts that it would be an abuse of discretion to try to obtain the document through FOIA, because decisions must be based on the facts agreed to in the motion. *Id*. at 5. The Secretary objects to the Court questioning the propriety of his decision not to provide the order. *Id*.

The Secretary argues in the alternative that if the Court does not grant the motion, it should certify for interlocutory review the question "is it an abuse of discretion for a judge to deny a settlement motion because the Secretary did not provide a copy of a section 104(b) order that the Commission never had jurisdiction over, and that is unrelated to any penalty compromise?" *Id*. at 6. This question is a controlling question of law in that it involves a matter of pure law, the scope of the Commission's authority under Section 110(k) of the Mine Act, and it is controlling in that the absence of the (b) order is the only issue delaying the settlement motion. *Id*.

Analysis

The Court does not believe that an extended analysis is required as the principle involved is elemental. When presented with a motion to approve settlement, the Secretary should provide the entire documentary record related to the citations involved with the docket. Here there is no dispute that a section 104(b) order was issued in connection with the issuance of Citation No. 9282162. It is not as if the (b) order has nothing to do with the citation. It did not

come out of the blue. It was issued because the operator failed to abate that citation and therefore it is intrinsically related to it.

Section 104(b) orders are a significant feature of the Mine Act. Congress required the issuance of such orders

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

30 U.S.C §814(b).

That happened here in connection with Citation No. 9282162. This is serious business, as the Secretary implicitly acknowledges by MSHA's decision to not give the good faith abatement discount for that citation. Email from CLR Oliver (May 31, 2022). This serves to underscore the importance of disclosure of the facts attendant to the (b) order.

Though, by analogy, there are times when something errant occurs and the enforcement authority may assert to "move along, nothing to see here." At least in the realm of mine safety, that is an inadequate response. The (b) order is part of the record, though the Secretary has decided to secrete it from view by the Commission, miners and the public.

The Commission's requirements for approval of settlement motions does not suggest that citations, nor orders which may be issued in association with such citations should be withheld from review. This is a matter of having a complete record of the enforcement orders issued in connection with citations. Congress considered (b) orders to be of great importance. Yet, upon any Congressional review of the record, that a (b) order was issued in this instance would be hidden, as it is not part of the record for this violation.

"Section 104(b) provides that, if the Secretary finds that a mine operator has not totally abated a violation within the time set in the citation, and the period of time set for abatement shall not be extended, he shall issue an order withdrawing miners from the affected area." *Thunder Basin Coal,* 19 FMSHRC 1495, 1500 (Sept. 1997). MSHA is "empowered in certain instances to issue an order of withdrawal requiring mining operations to cease until compliance is achieved, *see* 30 U.S.C. § 814(b)," *Dickenson-Russell Coal Co. v. Secretary of Labor,* 747 F.3d 251, 253 (4th Cir. 2014).

The Commission has noted, "[t]he issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine

Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose." *Hopkins County Coal*, 38 FMSHRC 1317, 1336 (June 2016). In that case, the Secretary took a broad view of the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply. *Id.*

Pointedly, the Commission has also stated such (b) orders have significance in their own right, observing that section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. "Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, [the Commission] will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders." *UMWA v. Maple Creek Mining*, 29 FMSHRC 583, 592-93 (July 2007).

Further,

> the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:
>
> If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty
>
> 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. See 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ('Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.'). Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed.
>
> The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):
>
> [T]he Secretary is to similarly notify operators and miners' representatives when he believes that an operator has failed to abate a violation within the specified abatement period. In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]. The notice of proposed penalty to operators in such cases shall state that a [104(b)] order has been issued and the penalty provided by Section [110(b)] of the Act shall also be proposed. This penalty shall be proposed

> in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.
>
> S. Rep. No. 95-181, at 34-35 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622-23 (1978)."

Id. at 593.

The Secretary has remained mum as to whether he met his obligation to notify the miners' representatives when he believed that an operator has failed to abate a violation within the specified abatement period. But the Mine Act is designed to require the Secretary to notify miners' representatives under such circumstances. One can only presume that the information in the inspector's (b) order was not a tribute to the mine operator's compliance actions. The Secretary's first duty is to the safety and health of the Nation's miners, a duty shared by the Commission. All the more so here, where there were two violations related to the same escapeway in this docket.

As the Court remarked in its June 22, 2022 decision regarding this matter, it does not "believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. Citation No. 9282162 is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation, No. 9282162. The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect." *Perry County*, 44 FMSHRC 501, 503 (June 2022).

It was for the above stated reasons that the Court ordered the Secretary to disclose the section 104(b) Order associated with Citation No. 9282162. Accordingly, it **DENIES** the Secretary's supplemental settlement motion. Further, it **DENIES** the Secretary's Motion to Certify for Interlocutory Review because the inadequacy of the record can easily be rectified and immediate review will not in the Court's opinion materially advance the final disposition of the proceeding short of the Commission acceding to the Secretary's wish to veil the contents of the section 104(b) order. The Commission on its own may grant interlocutory review, should it decide that such action is appropriate.

SO ORDERED.

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

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October 18, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GENESIS ALKALI, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0189 A.C. No. 48-00152-548001 Mine: Genesis Alkali @ Westvaco

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. The parties have notified the Court that they have reached a settlement agreement in this case. Based on the drastic penalty reduction and unjustified modifications proposed, 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 2022-0189			
9479991	$ 12,007.00	$ 729.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9655723	$ 791.00	$ 0.00	Vacate.
9655731	$ 1,006.00	$ 125.00	Modify gravity from "Reasonably Likely" to "Unlikely," modify negligence from "Moderate" to "Low," and modify Significant and Substantial from "Yes" to "No."
9655754	$ 3,917.00	$ 3,917.00	No change.
9655756	$ 3,917.00	$ 530.00	Modify gravity from "Reasonably Likely" and "Permanently Disabling" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9655867	$ 1,385.00	$ 1,385.00	No changes.

9655868	$ 4,980.00	$ 1,500.00	Modify negligence from "High" to "Moderate."
9655907	$ 4,980.00	$ 1,006.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
9655908	$ 1,500.00	$ 302.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
TOTAL	**$ 34,483.00**	**$ 9,494.00**	

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.

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 operates a large trona mine near Green River, Wyoming. This docket includes nine citations issued to the Respondent between September and November of 2021 for various alleged violations of MSHA regulations. The Respondent subsequently contested these citations. On May 17, 2022, the Secretary of Labor filed his petition proposing a penalty of $34,483.00 for the citations contained in this docket. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On September 16, 2022, the Secretary filed his original Motion to Approve Settlement for this docket. In the filing, the Secretary proposed a settlement that would reduce the penalty to $9,494.00, representing a **savings for the mine operator of nearly $25,000.00** and a **penalty reduction of 72.5 percent**. The proposal seeks to modify or vacate seven of the nine citations, and to remove S&S designations from five of the citations. The facts submitted in support of the proposed modifications were minimal.

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

September 30, 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 unfair, unreasonable, inappropriate under the facts, and unprotective 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. 9479991

Citation No. 9479991 alleges a violation of 30 C.F.R. § 57.14100(b) as follows:

> In Sesqui Pumphouse, a fan (Co.# KF-24) for ventilation in the tunnels under the pumphouse, has not been running since 10/08/2021. During the inspection of the tunnels 0.5 to 0.9 H_2S gas was detected. There are no alarms/warning lights and the miners that work in the area do not carry meters with them while in the tunnels. During a "Work Place Exam" conducted on 10/08/2021, the fan was found "Not Running" and documented and was not resolved. With this condition, exposes miners to fatal injuries if H_2S gas was to build up in the tunnels. Standard 57.14100(b) was cited 27 times in two years at mine 4800152 (25 to the operator, 2 to a contractor).

Pet. at 8. The cited standard mandates that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 57.14100(b). The inspector issued this citation on November 3, 2021, indicating that the fan had been noted as nonfunctional nearly a month before this inspection. Pet. at 8. Hydrogen sulfide (H_2S) gas was observed in the tunnels. Pet. at 8. The inspector found that the alleged failure to fix the fan was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. Pet. at 8. The inspector marked the citation as high negligence and S&S. Pet. at 8. The Secretary assessed a penalty of $12,007.00.

Now, the Secretary seeks to drastically alter this citation. He proposes the reduction of the gravity from "Fatal" to "Lost Workdays or Restricted Duty." He seeks to reduce the likelihood of injury from "Reasonably Likely" to "Unlikely." He also proposes the removal of the S&S designation. Altogether, these changes would reduce the penalty from $12,007.00 to $729.00.

While the proposed changes are major, the facts offered in support are minimal. The Secretary has only submitted two statements to justify the changes proposed for this citation. The motion states that "[t]he amount of Hydrogen Sulfide detected by MSHA did not exceed MSHA's Threshold Limit Value or the General Industry Ceiling Limit for Hydrogen Sulfide," and that

"there is no evidence that exposure to a level which could result in a fatality [sic] could result." Am. Mot. to App. Settlement at 3.

The position taken by the Secretary in this case is disconcerting. The Secretary bases the gravity reductions on the fact that hydrogen sulfide levels did not exceed the threshold limit value (TLV) at the time of inspection. But the TLV is the point above which miners are exposed to unsafe concentrations of gas. If hydrogen sulfide accumulations had exceeded the TLV, miners would have faced an active risk of major health issues and the operator would have unlawfully exposed miners to noxious gases. *See* 30 C.F.R. § 56.5001. In essence, the Secretary argues that gravity and S&S should be mitigated because conditions did not become so dangerous as to violate yet another regulation.

This rationale cannot support the proposed gravity modifications. And it is not aided by the second and final fact offered by the Secretary: that there is "no evidence" that the conditions could lead to fatal exposure. Am. Mot. to App. Settlement at 3. This statement is overbroad, conclusory, and at odds with the inspector's account. The inspector found that the ventilation fans in an underground tunnel had been defective for several weeks. He observed the presence of hydrogen sulfide gas, a substance that MSHA acknowledges as "one of the most poisonous gases known."[1] Hydrogen sulfide exposure can be deadly.[2] The inspector further determined that the extremely hazardous gas could continue to accumulate in the tunnel and present a risk of fatal injury or illness for miners. Moreover, miners may not know about the risk due to the lack of alarms, warning lights, or gas meters in the area. The inspector supplied a factual basis supporting his gravity findings. In my estimation, the Secretary has not presented any concrete fact that would mitigate the original gravity determination.

Nor do the Secretary's facts mitigate the S&S finding. Ventilation violations are serious in underground areas where toxic mine gases can accumulate. A persistent and consciously overlooked defect in a ventilation fan is reasonably likely to cause a hazard that could injure a miner. The presence of hydrogen sulfide gas indicates that an injury could be reasonably serious. This is especially true if considered in the continued course of normal mining operations, as is required by S&S case law. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) ("While it is true that methane measured in the section revealed a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made in terms of continued normal mining operations. The fact that the methane was low when the violation was cited is not fatal per se to the establishment of reasonable likelihood. If normal

[1] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, MINE RESCUE TEAM TRAINING | METAL AND NONMETAL MINES (2008) https://www.msha.gov/sites/default/files/Training_Education/MSHA3027%28Metal%20and%20Nonmetal%29.pdf

[2] One of the largest modern mass fatalities in a metal/nonmetal mine occurred when hydrogen sulfide gas was liberated at the Barnett Complex Mine, operated by the Ozark-Mahoning Company, and killed seven miners on April 12, 1971. A contributing factor to the mass fatality was the failure of an underground ventilation fan at the mine. *See* BUREAU OF MINES, U.S. DEP'T OF THE INTERIOR, REPORT ON MAJOR HYDROGEN SULFIDE DISASTER BARNETT COMPLEX MINE OZARK-MAHONING COMPANY ROSICLARE, POPE COUNTY, IL (1971).

mining operations were to continue, a rapid buildup of methane could reasonably be expected.") (internal citations and quotations omitted).

It is important to note that I am not making formal findings regarding S&S. Neither party has presented evidence at hearing, and it would be inappropriate to make such findings. Rather, I am analyzing the basis for S&S as presented in the original citation and determining whether the Secretary has submitted facts that would make the removal of the S&S designation "reasonable" or "appropriate under the facts." *Am. Coal Co.*, 38 FMSHRC at 1976; *see id*. at 1982. I find that he has not.

The Secretary further supports the S&S removal by claiming "discretion to modify the significant and substantial designation." Am. Mot. to App. Settlement at 5. He finds substantive authority for this contention in *American Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996). 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 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 are irrelevant here. The Secretary's claim of discretion regarding S&S is erroneous, and his decision to alter the S&S finding here is unsupported by fact and contradicted by decades of history and precedent.

In sum, the mine inspector presented a detailed account of the alleged violation and made his gravity and S&S findings accordingly. The Secretary now seeks to sweep these original findings under the rug based on two conclusory and irrelevant statements. When given an opportunity to submit additional information, the Secretary declined to put forward any specific or concrete facts to support the proposed changes. I know that recent Commission case law would have me accept the Secretary's changes wholesale, but the Mine Act requires me to use some experience and judgement in determining whether a settlement motion is sufficient. I simply cannot turn my back on something that is so obviously contrary to the Act and its purposes. I therefore find that the proposed changes for Citation No. 9479991 are unreasonable and inappropriate under the facts.

B. 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 $34,483.00 to the compromised value of $9,494.00. 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. The facts presented here simply cannot support such a finding. Rather, the proposed settlement would undermine compliance with the Act and its regulations, by taking a meaningful civil penalty assessment and gutting it on a threadbare factual basis.

I object, in particular, to the penalty reduction associated with Citation No. 9479991. The Secretary has lowered the original assessment of $12,007.00 to a mere $729.00. The mine

operator will therefore pay just six cents on the dollar for this alleged violation. As discussed above, the allegations are serious and the facts supporting the modification are sparse. The compromised penalty negates the deterrent effect of the original citation—a deterrent effect that

is sorely needed in this case, where the mine operator allegedly allowed the violative condition to exist for weeks despite having knowledge of the defect.

Parties are not precluded from reaching settlements with large penalty reductions. Such settlements are approved routinely by the Commission and its judges. However, large penalty reductions are more likely to undercut the deterrent purposes of the Mine Act, and parties must present a substantial factual basis showing how the settlement preserves the public interest. The parties have not done so here. Accordingly, I find that this settlement is neither fair nor in the public interest.

C. 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 designations also impacts future enforcement actions, but this is not explained at all in the Secretary's motion.

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 or vacate sixteen of the present citations and thus forfeit much of 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 1972

III. CONCLUSION

In the petition, the Secretary alleged that the mine operator knew of a defective ventilation fan in an underground portion of the mine but refused to fix the fan for at least 26 days. Hydrogen sulfide, a toxic gas, was documented in this underground area. There were no alarms, warning lights, or gas sensors in the area that could have alerted miners if the toxic gas accumulated to hazardous or deadly levels.

These facts would strike any neutral observer as serious. The original penalty for this citation also indicated the seriousness of the alleged violation. But in his amended motion, the Secretary has done an about-face. He downplays the gravity of the citation. He says there is no evidence of a fatal risk, despite the evidence summarized by his inspector in the original petition. He says the gas had not yet accumulated to dangerous levels, but fails to demonstrate why it would be unlikely to do so in the future. He dispenses with the S&S designation, and he slashes the assessed penalty by 94 percent.

I will not rubber-stamp such a drastic change. The Secretary is tasked with submitting facts to justify his proposed changes, and I am charged with the duty to weigh the sufficiency of those facts. The facts here are insufficient. Approving this settlement would force me to turn a blind eye to my statutory duty under section 110(k), to decades of case law regarding gravity and S&S, and to my own knowledge and experience. Accordingly, I must deny the Secretary's 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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October 18, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GENESIS ALKALI, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0267 A.C. No. 48-00152-550854 Docket No. WEST 2022-0268 Mine: Genesis Alkali @ Westvaco

ORDER DENYING SETTLEMENT

These cases are before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The petition originally contained 38 citations and orders, until the Commission's docket office reallocated the citations into three dockets: WEST 2022-0197[1], WEST 2022-0267, and WEST 2022-0268. The latter two dockets are currently pending before this Court. In the interest of judicial economy, these matters will be considered jointly since they both involve citations issued to the same operator during the same time frame.

The parties have settled both dockets, and the Secretary of Labor has submitted a Motion to Approve Settlement in each case. The proposed settlements include dramatic penalty reductions and must be denied for the reasons set forth below.

The terms of the proposed settlement are as follows:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEST 2022-0267			
9655800	$ 1,869.00	$ 169.00	Modify gravity from "Fatal" to "Lost Workdays or Restricted Duty" and modify negligence from "High" to "Moderate."
9655900	$ 2,790.00	$ 2,790.00	No change.

[1] A settlement for Docket No. WEST 2022-0197 was approved by this Court on August 16, 2022. The original assessment was $41,855.00, and the settlement amount was $9,338.00.

9655940	$ 183.00	$ 183.00	No change.
9655941	$ 144.00	$ 144.00	No change.
9655943	$ 183.00	$ 183.00	No change.
9655944	$ 144.00	$ 144.00	No change.
9655946	$ 4,884.00	$ 4,884.00	No change.
9656004	$ 3,022.00	$ 0.00	Vacate.
9656006	$ 2,376.00	$ 0.00	Vacate.
9656007	$ 7,890.00	$ 0.00	Vacate.
9656008	$ 10,034.00	$ 0.00	Vacate.
9656010	$ 10,034.00	$ 1,254.00	Modify Part/Section from 30 C.F.R. § 57.11001 to 57.20003(a), modify gravity from "Reasonably Likely" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate" and modify Significant and Substantial from "Yes" to "No."
9656011	$ 987.00	$ 987.00	No change.
TOTAL	**$ 44,540.00**	**$ 10,738.00**	
Docket No. WEST 2022-0268			
9656012	$ 16,213.00	$ 1,472.00	Modify gravity from "Fatal" to "Lost Workdays or Restricted Duty" and modify negligence from "High" to "Moderate."
9656013	$ 4,507.00	$ 1,358.00	Modify negligence from "High" to "Moderate."
9656014	$ 481.00	$ 145.00	Modify negligence from "High" to "Moderate."

9656015	$ 4,507.00	$ 841.00	Modify Part/Section from 30 C.F.R. § 57.11001 to 57.20003(a), modify gravity from "Permanently Disabling" to "Lost Workdays or Restricted Duty," and modify negligence from "High" to "Moderate."
9656016	$ 4,161.00	$ 0.00	Vacate.
9656017	$ 4,161.00	$ 0.00	Vacate.
9656018	$ 7,890.00	$ 145.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate," and modify Significant and Substantial from "Yes" to "No."
9656019	$ 16,213.00	$ 296.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate," and modify Significant and Substantial from "Yes" to "No."
9656020	$ 10,034.00	$ 0.00	Vacate.
9656024	$ 3,022.00	$ 0.00	Vacate.
9656025	$ 4,884.00	$ 296.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9656026	$ 296.00	$ 133.00	Modify gravity from "Unlikely" to "No Likelihood."
TOTAL	**$ 76,369.00**	**$ 4,686.00**	

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.

Commission judges review settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protect 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 operates a large trona mine near Green River, Wyoming. In January 2022, MSHA issued a number of citations and orders to the Respondent for alleged violations of mandatory safety standards. The Respondent contested 38 of those citations. Some of the contested citations form the basis of the two dockets at issue here. On May 17, 2022, the Secretary of Labor filed his petition proposing a total penalty of $120,909.00 for the 25 citations contained within these two dockets. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On August 19, 2022, the Secretary submitted proposed settlement agreements corresponding to these two dockets. In the filings, the Secretary proposed a settlement that would reduce the penalty to $15,424.00, representing **a savings for the mine operator of $105,485.00** and **a penalty reduction of 87 percent.** The proposal sought to modify or vacate sixteen citations, but the filings only provided modest factual justification for **one** proposed modification. 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 information in support.

The Secretary filed an amended settlement motion for Docket No. WEST 2022-0267 on September 13, 2022. An amended motion for Docket No. WEST 2022-0268 followed two days later. The Secretary's amended filings provide some additional context for a few of the modifications proposed. Notably, the Secretary has declined to present any facts in support of his decision to vacate citations as part of this 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 motions 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 unfair, unreasonable, inappropriate under the facts, and unprotective 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.

Although I find most of the proposed modifications unacceptable, in the interest of time and length, I only discuss a few here as examples of the Secretary's unsupported reasoning and

faulty explanation. I also note that, in these cases, some proposed modifications were made by an MSHA supervisor after the penalties were contested, and others made by an MSHA conference and litigation representative. This Court has jurisdiction to review any changes proposed by the Secretary after the Respondent contests the original penalties. *See* 30 U.S.C. § 820(k); *Black Beauty*, 34 FMSHRC at 1860-61.

A. The Proposed Vacatur of Citations Nos. 9656006, 9656007, and 9656008

Citation No. 9656006 alleges a violation of 30 C.F.R. § 57.14206(b) as follows:

> The Caterpillar retractable boom fork lift is not being maintained in a safe manner. The Caterpillar machine was left unattended and running while the operator of the equipment was conducting work activities alongside the #17 Mono conveyor belt line, overhead on the catwalk. The forks of the machine had been elevated with materials loaded on the forks and the forks protruding over top of the handrailing and not secured from motion rather vertically or forward, further into the belt line area. This condition will result in fatal crushing injuries.

Pet. at 55. The inspector determined that it was reasonably likely that the violation would result in a miner's injury, and that the 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 $2,376.00 for this citation.

Citation No. 9656007 alleges a violation of 30 C.F.R. § 57.14211(c) as follows:

> A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component. The Caterpillar retractable boom fork lift and forks are not secured from accidental motion where a miner was working in the immediate area of the machine. This condition will result in serious and fatal injuries to workers who are exposed to unsecured machine parts.

Pet. at 56. Here again, the inspector determined that injury was reasonably likely, and that the injury could reasonably be expected to be fatal. He found that the operator was highly negligent for this citation and designated it as S&S. The Secretary assessed a $7,890.00 penalty associated with this citation.

Citation No. 9656008 alleges a violation of 30 C.F.R. § 57.11001 as follows:

> The mine operator has failed to ensure and maintain the safe access alongside the Mono #17 conveyor belt. A miner was conducting work activities around an unsecured machine component while having to exit the conveyor walkway by passing the unsecured machine component. This condition will result in fatal injuries as a result of hazardous access locations. Standard 57.11001 was cited 27 times in two years at mine 4800152 (23 to the operator, 4 to a contractor).

Pet. at 58. The inspector found that it was reasonably likely that this condition would cause an injury that could reasonably be expected to be fatal. He found the mine operator highly negligent for allowing this condition to persist, and he marked the conduct as S&S. For this citation, the Secretary assessed a penalty of $10,034.00.

The Secretary now seeks to vacate all three citations. For Citations Nos. 9656007 and 9656008, the Secretary explains that each citation is being vacated because "[t]he violation was cited and corrected with Citation No. 9656006."[2] Pet. at 57. According to the Secretary, the factual basis underlying all three citations is so similar that the dangerous conditions can be addressed and corrected by a single citation: Citation No. 9656006. However, in the next breath, the Secretary vacates Citation No. 9656006 without explanation.

Consequently, these three citations—originally marked as S&S and assessed for a total of $20,300.00—would disappear under the proposed settlement agreement, resulting in a huge reduction in the overall penalty. The parties have not offered any facts to justify these changes. Presumably facts are omitted because the Secretary believes that he has unfettered discretion to vacate a citation, as discussed more fully below. While I agree that he has discretion, it is not unlimited, and may be reviewed if it appears that he has abused that discretion. The parties fail to demonstrate how it would be fair, reasonable, or appropriate to vacate three citations when the inspector witnessed a forklift left running, unattended, and unsecured with a suspended load. Moreover, the parties make no effort to show how vacatur of these citations protects the public interest. Based on the record before me, I can only conclude that this settlement offends the public interest by eviscerating the deterrent effect of the original penalties. *See Black Beauty*, 34 FMSHRC at 1866 (recognizing deterrence as an important public interest to consider when reviewing settlements).

The Secretary argues that he has prosecutorial discretion to vacate citations, citing *RBK Construction, Inc.,* 15 FMSHRC 2099 (Oct. 1993). Given that he has submitted no facts in support of the proposed vacatur, the Secretary likely believes that his discretion is plenary. He is mistaken for three reasons.

First, even if *RBK Construction* were applicable, it would not preclude review of the Secretary's proposed vacatur. In that case, the Commission held only that the Secretary "has the authority to vacate citations," not that his authority is unreviewable. *Id*. at 2101. Any passing mention in other cases to the Secretary's "unreviewable" discretion to vacate citations is mere dictum and does not bind this Court.

Second, *RBK Construction* is easily distinguishable from this case. The holding in *RBK Construction* is limited to the narrow circumstance where the Secretary vacates all of a docket's citations and moves for final dismissal of the proceedings. The Secretary in that case conceded

[2] This is the language used in association with Citation No. 9656007. The language employed in association with Citation No. 9656008 is slightly different but used to the same effect. The only other language offered in support for vacating Citation No. 9656008 is that the citation was "duplicative" of Citation No. 9656006. Am. Mot. to Approve Settlement (WEST 2022-0267) 4.

that section 110(k) allows judges to scrutinize "the settlements of penalties." *Id*. at 2101. This case involves the settlement of penalties, and the analogy to *RBK Construction* therefore falters.

Finally, there is reason to doubt the wisdom of the decision in *RBK Construction*. The decision rests upon a false equivalence drawn between the Mine Act and the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq ("OSH Act"). The Supreme Court found in *Cuyahoga Valley Railway Company v. United Transportation Union* that the Secretary of Labor has "unreviewable discretion to withdraw a citation charging an employer with violating the [OSH Act]." 474 U.S. 3, 7-8 (1985). The Commission took notice of this Supreme Court case. In *RBK Construction*, the Commission held, "[b]ased on that decision," that the Secretary should similarly have discretion to vacate citations issued under the Mine Act. 15 FMSHRC at 2101 (citing *Cuyahoga Valley*, 474 U.S. at 7-8). The Commission failed to note, however, that the Mine Act and the OSH Act differ in one key aspect. The Mine Act requires that judges review settlements and compromised penalties proposed by the Secretary. *See* 30 U.S.C. § 820(k). The OSH Act contains no such requirement. Rather, judges presiding over OSH Act cases merely sign off on settlements without questioning their contents. The Commission's decision in *RBK Construction* fails to account for this nuanced yet crucial difference between the two laws that would make it reasonable to review vacaturs as part of settlement under the Mine Act when it is not reasonable to do so under the OSH Act.

My statutory duty to review settlement terms cannot be neglected. The Commission has never suggested that a judge's duty to scrutinize a settlement is diminished if the settlement happens to include vacated citations. On the contrary: the Commission has affirmed that the Secretary must submit facts to support any proposed settlement. *Black Beauty*, 34 FMSHRC at 1863 n.5; *Am. Coal Co.*, 38 FMSHRC at 1984-85. This requirement persists even if the settlement involves vacated citations. *Greenbrier Minerals, LLC*, 43 FMSHRC 509 (Nov. 2021) (ALJ).

Certainly, the Secretary should be afforded some latitude in enforcement decisions. He has access to more information about the underlying facts in this case, and he has unique expertise that helps him set agency priorities and predict the likelihood of success at trial. Agency resources are scarce, and the Secretary deserves deference in determining how to allocate those resources.

To whatever extent the Secretary has discretion in such matters, he has abused it here. He premised the vacatur of two citations on the existence of a third, and then he vacated the third citation without explanation. This procedure is arbitrary, self-contradictory, and contrary to law. Even when specifically asked to provide more information justifying the vacatur, the Secretary refused to submit *any* facts that support the proposed modifications. This Court is charged with the "duty to consider the sufficiency of facts submitted in support of a settlement," and the complete lack of factual basis for these proposed modifications cannot be ignored. *Solar Sources Mining*, 41 FMSHRC 594, 601 (Sept. 2019).

A settlement agreement cannot be appropriate under the facts if no facts are put forth. A modification cannot be found reasonable if the parties offer no reason for the change. And the Secretary's effort to avoid scrutiny is a breach of the public policy underlying section 110(k) of

the Mine Act: to shine light upon settlements formerly shrouded in darkness. I therefore cannot approve of these proposed changes.

B. The Proposed Modifications to Citation No. 9656018

Citation No. 9656018 alleges a violation of 30 C.F.R. § 57.9300(b) as follows:

> The mine operator has failed to provide berms or guardrails where roll over hazardous conditions exist. The ground area between R5 and the Bi-Carb building shows evidence of vehicular and equipment travel with an area that is not protected and provides a roll over hazardous condition. This condition will expose miners to serious injuries resulting in fatalities. Standard 57.9300(b) was cited 2 times in two years at mine 4800152 (1 to the operator, 1 to a contractor).

Pet. at 83. The regulation requires the creation and maintenance of roadway berms of "at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 57.9300(b). The inspector found that the alleged failure to install berms was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. He marked the citation as high negligence and as S&S, and the Secretary assessed a penalty of $7,890.00.

The Secretary now moves to whittle this citation down to nearly nothing. He seeks to modify the likelihood of injury from "Reasonably Likely" to "Unlikely," to reduce the gravity from "Fatal" to "Lost Workdays or Restricted Duty," and to cut the negligence from "High" to "Moderate." The Secretary also proposes the removal of the S&S designation. Altogether, the proposed changes would reduce the assessed penalty from $7,890.00 to $145.00.

The Secretary offers four statements in support of the proposed changes. The Secretary notes that "most of the vehicle travel is in pick-ups or light duty vehicles."[3] Pet. at 85. He adds that a "vehicle traveling off the road in this area would most likely cause a vehicle to become stuck in the mud" rather than roll over. Pet. at 85. Further, the Secretary asserts that the "operator requires the use of seat belts in all vehicles." Pet. at 85. Finally, the Secretary avers that the missing berm "was not an obvious condition" and that "workplace examinations should have caught this." Pet. at 85.

The proposed modifications are deficient for three reasons. First, the Secretary submits no facts that support reducing the negligence level. A berm is required on this road by law, and the absence of a berm is a clear indication of noncompliance for the operator. The inspector indicates that there is travel on the road, and therefore a missing berm would be obvious to anyone at the mine. It seems, based on the facts in the record, that the operator should have known about the violative condition. The inspector found that the operator was highly negligent for this reason. The Secretary has not presented any reason to reduce that negligence finding. His assertion that the lack of a berm "was not an obvious condition" is a legal conclusion unsupported by facts in

[3] In his motion, the Secretary frames it slightly differently: "Traffic in the affected area was limited to light duty vehicles." Am. Mot. to Approve Settlement (WEST 2022-0268) at 5.

the record, and his claim that "workplace examinations should have caught this" does nothing to mitigate the negligence finding. If anything, it supports the inspector's view of negligence because the person responsible to conduct workplace examination was either not doing his job or simply decided not to mention the issue. There is not a single, concrete fact in the record that would support a reduction in negligence. The proposed modification is therefore not reasonable or appropriate under the facts.

Second, the penalty reduction is drastic and unwarranted. The alleged violation—as described in the citation and the facts submitted in support of settlement—is serious, and a serious violation cannot be deterred by a trivial penalty of $145.00. Even if the negligence and S&S modifications were proper, the penalty reduction would not be. This Court is not bound by the Secretary's Part 100 regulations for penalty determination, and the Part 100 penalty does not address the seriousness of this violation. Accordingly, it cannot be approved. For further discussion of the penalty, see *infra*, Section II.D.

Third, the Secretary proposes the removal of the S&S designation. However, the violation alleged here is serious. The failure to install berms can lead to potentially fatal vehicle rollover. Unfortunately, miners continue to die in such fatal accidents year after year.[4] Nevertheless, the Secretary elects to strip this citation of its S&S status. This is not an isolated event: there has been an alarming uptick in the number of settlement proposals seeking removal of S&S designations from serious violations. This troubling trend chips away at the meaningful standards that protect miner safety, contravening the cornerstone public interest embedded in the Mine Act. *See* 30 U.S.C. § 801(a). In proposal after proposal, the Secretary completely ignores the meaning of S&S as set forth in *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016), as well as its forebears and its progeny. Instead, the Secretary misstates the law and therefore attempts to settle a citation in violation of the binding precedent.

Here, the facts offered in support of the S&S removal are unconvincing. Even if taken as true, the facts submitted little to mitigate the severity of harm. The road still lacks a berm, and miners traveling down the road in trucks face the risk of driving off the edge and causing a rollover. Although the negligence and penalty reductions alone would form sufficient basis for denial of this proposed modification, I also find that removal of the S&S designation is improper.

C. The Proposed Modifications to Citation No. 9656019

Citation No. 9656019 alleges a violation of 30 C.F.R. § 57.20003(a) as follows:

> The passageway leading from the top stairwell landing at the north side of the Sesqui cooling tower is not being kept in a clean and orderly fashion. The top

[4] *See, e.g.*, 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; MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (CRUSHED AND BROKEN LIMESTONE) FATAL POWERED HAULAGE ACCIDENT – SEPT. 16, 2013, https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Metal/2013/ftl13m11.pdf.

> landing has various materials piled up behind the opening direction of the door, restricting travel leading up and down into a steep stairwell location. This condition will expose miners to slips, trips, and falls resulting in fatal occurrences from elevated heights. Standard 57.20003(a) was cited 72 times in two years at mine 4800152 (68 to the operator, 4 to a contractor).

Pet. at 86. The cited housekeeping regulation requires passageways to be kept clean and orderly. 30 C.F.R. § 57.20003(a). The inspector found that the alleged violation was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. He marked the citation as high negligence and as S&S, and the Secretary assessed a penalty of $16,213.00.

Here too, the Secretary proposes major changes. He seeks to reduce the likelihood of injury from "Reasonably Likely" to "Unlikely," to cut the gravity from "Fatal" to "Lost Workdays or Restricted Duty," and to modify the negligence from "High" to "Moderate." Finally, he seeks to remove the S&S designation. The proposed changes would reduce the penalty assessed from $16,213.00 to $245.00. In other words, the operator would pay **one cent on the dollar** for this citation after settlement.

The Secretary has submitted some information in order to justify this change. He submits that the "materials that were a housekeeping issue were not in the direct route of travel" so that "[t]ripping and falling down the stairway would be unlikely." Pet. at 88. He adds that "if a fall were to happen, the stairway was provided with hand rails to prevent serious injury." Pet. at 88. Finally, the Secretary avers that "the materials addressed in the housekeeping were placed to the side, [but] a workplace examination should have addressed this condition. The mine operator should be on notice, the standard has been cited 70+ times at this mining operation." Pet. at 88.

I am aware that some current case law from the Commission would like Judges to accept, wholesale, everything the Secretary states in a settlement motion. However, Congress has required Judges to use some experience and judgement in determining if a settlement motion is sufficient. I simply cannot turn my back on something that is obviously contrary to the Act and its purpose.

Based on my judgment and experience, I take issue with three modifications proposed in the settlement motion: the negligence, the penalty, and the S&S designation. First, the Secretary fails to present facts justifying a reduction in the negligence finding. In truth, the submitted facts may even aggravate the negligence finding, since the Secretary agrees that the mine operator should be on notice after more than **seventy** citations for similar housekeeping issues in the previous two years alone. The fact that "workplace examination should have addressed this condition" does little, if anything, to mitigate the negligence since the operator is also responsible for training its miners to conduct proper workplace examinations—and that clearly has not happened given the frequency of citations related to fall hazards at this mine.

Second, the penalty reduction is dramatic and unsupported by facts. Allowing the operator to pay one cent on the dollar for this violation undermines the important public interest of encouraging operator compliance with mine safety regulations. That is especially true here, where

the operator has a history of noncompliance with this regulation. For further discussion of the penalty, see *infra*, Section II.D.

Third, the Secretary again removes the S&S designation with only limited factual basis. The submitted facts do little to negate the notion that permitting "various materials" to be "piled up behind the opening direction of the door, restricting travel leading up and down into a steep stairwell location" would be S&S. Pet. at 86. Importantly, one of the key facts presented by the Secretary is that the stairs had handrails that could prevent falls, but the S&S analysis precludes consideration of redundant safety measures. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013). The sole relevant fact remaining—that the material was not in the direct route of travel—does not address the fact that material was piled up behind the door in the opening direction. There is therefore very little information indicating why the alleged violation would not be S&S.

As 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 Approve Settlement (WEST 2022-0268) at 6. 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 are irrelevant here.

The Secretary's claim of discretion regarding S&S is erroneous, and his decision to remove the S&S designation here ignores decades of history and precedent. While I would deny the proposal based on negligence and penalty alone, I also note the deficiency of the proposed S&S changes.

D. The Proposed Penalty Reduction

The parties propose a dramatic penalty reduction. If the settlement were approved, the total penalty for the two dockets would be slashed from $120,909.00 to just $15,424.00. 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. The facts presented here simply cannot support such a finding. Rather, the proposed settlement would undermine compliance with the Act and its regulations, by taking a meaningful civil penalty assessment and gutting it on a threadbare factual basis.

The Commission and its judges "assess all civil penalties provided in [the Mine] Act." 30 U.S.C. § 820(i). It is therefore *my* duty, not the Secretary's, to assess the penalty in this case. Even if there are some legitimate facts in the motion, that does not automatically suggest that I must reduce the penalty amount to the degree suggested by the Secretary. While Part 100 is useful in assessing penalties and sometimes is useful in reducing penalties in settlement, that is not always the case. Even with modifications, violations may be serious and may require a higher penalty to deter the mine operator from further violations, and to protect the interest of the public—not to mention the miners who constantly risk their health and safety only to see the agency protecting them sending a message that safety is not important. Instead of relying on the Secretary's part 100 regulations, I look closely at the six penalty criteria.

Parties are not precluded from reaching settlements with large penalty reductions. Such settlements are approved routinely by the Commission and its judges. However, large penalty reductions are more likely to undercut the deterrent purposes of the Mine Act, and parties must present a substantial factual basis showing how the settlement preserves the public interest. The parties have not done so here. *See supra*, sections II.A-C. Accordingly, I find that this settlement is neither fair nor in the public interest.

E. 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 (WEST 2022-0267) 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 (WEST 2022-0267) at 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 is fair, reasonable, appropriate under the facts, or protective of the public interest. Many of the present citations are vacated and therefore are not preserved for future enforcement actions. Many others have been stripped of their S&S designations, which would also affect future enforcement. The Secretary offers no explanation of how these changes would provide non-monetary benefits for him or for the public.

Furthermore, "[t]he Commission recognized that significant non-monetary value flows from accepting the citations as written." *Solar Sources*, 41 FMSHRC at 601 (internal citations omitted). Here, the Secretary has elected to modify or vacate sixteen of the present citations and thus forfeit much of the non-monetary value that would flow from preserving them as written.

In sum, there are some non-monetary benefits to this settlement, but the Secretary's generalized statements do not convince me that the particular changes proposed here meet the *AmCoal* standard.

III. CONCLUSION

These citations allege serious safety issues: raised loads left unsecured and unattended, roads unprotected by berms, and passageways with significant obstacles. Many of these citations are repeat violations, and the mine operator has been cited dozens of times for similar issues in the past. And yet the Secretary proposes a settlement that would allow the operator to pay a compromised penalty of just thirteen cents on the dollar, would reduce the negligence findings, and would scrub away the S&S designations from many of the citations. The support offered for the proposed modifications is paltry and often has nothing to do with the relevant penalty criteria.

The Secretary's proposal would transform the civil penalty into a trivial fee accepted by the operator at the cost of doing business. This contradicts the purpose behind the Mine Act—to meaningfully deter dangerous conduct. The proposed settlement will not keep miners safe and, if the words in section 110(k) of the Mine Act are to bear any meaning at all, it must be denied.

WHEREFORE, the Amended Motions to Approve Settlement are 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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October 19, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of GEORGE RICE, Complainant v. NALLY & HAMILTON ENTERPRISES, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 2022-0118 MSHA Case No. BARB-CD-2022-03 Mine: Meadow Branch Mine Mine ID: 15-19890

ORDER GRANTING MOTION TO DISSOLVE ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge McCarthy

This matter is before the undersigned on the Secretary of Labor's Application for Temporary Reinstatement filed on behalf of miner George Rice pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended ("Act"), and 29 C.F.R. § 2700.45.

On September 26, 2022, the undersigned issued an Amended Order Granting Temporary Reinstatement of Rice. On September 27, 2022, the parties submitted a Joint Motion to Approve Temporary Economic Reinstatement Agreement ("Agreement"). The parties agreed that, "[i]f the Secretary notifies Rice that he has decided not to prosecute Rice's case on the merits, Nally & Hamilton will file a motion with the presiding ALJ to dissolve this Agreement, and Rice will not oppose said motion." Agreement, 2. On September 28, 2022, the undersigned accepted the Agreement and issued an Order modifying the September 26, 2022 Order.

On October 14, 2022, the Secretary filed a Notice pursuant to 29 C.F.R. § 2700.45(g) that he was not going to file a Discrimination Complaint on Rice's behalf. On October 18, 2022, the Respondent filed a Motion to Dissolve the Order Granting Temporary Economic Reinstatement.

Federal circuit courts of appeals and Commission judges have ruled that, for 105(c) claims such as this one, any "temporary reinstatement provision ends when the Secretary's involvement ends" and that "the termination of [a temporary reinstatement] should rest on the Secretary's determination" to not file a Discrimination Complaint. *Vulcan Const. v. FMSHRC*, 700 F.3d 297, 310, 311 (7th Cir. 2012); *see also N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012); *Panther Creek Mining, LLC*, 39 FMSHRC 2001, 2002 (Oct. 2017) (ALJ); *Black River Coal, LLC*, 38 FMSHRC 2869, 2870 (Nov. 2016) (ALJ); *Teck Alaska, Inc.*, 35 FMSHRC 2891, 2893 (Aug. 2013) (ALJ).

After finding insufficient evidence to pursue a Discrimination Complaint, the Secretary's involvement ended. Pursuant to precedent and the Agreement, the September 26, 2022 Amended Order Granting Temporary Reinstatement, as modified by the September 28, 2022 Order, is dissolved.

For the foregoing reasons, the September 26, 2022 Order, as modified by the September 28, 2022 Order, is **DISSOLVED** and the terms of the September 27, 2022 Temporary Economic Reinstatement Agreement are **TERMINATED**. Mr. Rice may elect to file a Discrimination Complaint on his own behalf with the Commission within 30 days' notice of the Secretary's determination. 30 U.S.C. 815(c)(3).

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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