` FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 18, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket Nos. WEST 2022-0249 WEST 2022-0250
RULON HARPER CONSTRUCTION, INC.,	

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

DECISION

BY: THE COMMISSION

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"), involve the interlocutory review of a Commission Administrative Law Judge's ("ALJ") denial of proposed settlements between the Secretary of Labor and Rulon Harper Construction, Inc. ("Rulon"). *Rulon Harper Constr., Inc*., 44 FMSHRC 671 (Nov. 2022) (ALJ); *Rulon Harper Constr., Inc*., 44 FMSHRC 681 (Nov. 2022) (ALJ).

At issue is whether the Secretary has unreviewable discretion to remove significant and substantial ("S&S") designations[1] from contested citations without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k);[2] and whether denial of the Secretary's motions for settlement constitutes an abuse of discretion. For the reasons set forth below, we answer both questions in the negative (except in one instance, Citation No. 9727208), affirm the Judge's denial of the settlement motions, and remand the cases to the assigned Judge.[3]

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

[2] Section 110(k) of the Mine Act states that "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[3] The Administrative Law Judge originally assigned to these matters has retired. These cases have been reassigned to a new Judge.

I.

Factual and Procedural Background

The captioned dockets contain a total of 10 citations and orders. In two motions to approve settlement, the Secretary proposed modifying six citations and an order, vacating one citation, and leaving two citations unchanged. For Docket No. WEST 2022-0249, the Secretary proposed modifications to the two alleged violations at issue (including reductions in gravity, reductions in negligence and removal of an S&S designation) and a reduction in the overall penalty from $22,944 to $3,936. For Docket No. WEST 2022-0250, the Secretary proposed modifications to five of the eight alleged violations (including reductions in gravity and removal of S&S designations), vacatur of one alleged violation, and a reduction in the overall penalty from $22,134 to $7,227.

After the Commission Judge informed the Secretary of concerns regarding the lack of factual support in the original settlement motions for several violations, the Secretary filed amended motions. The amended motions provided additional language to support the specific modifications.

On November 2, 2022, the Judge denied the amended motions, citing settlement deficiencies with six of the violations and noting the seriousness of several of the violations.[4] Specifically, the Judge cited the lack of concrete facts supporting the proposed changes to negligence, gravity, and S&S and the sharp reduction in the proposed penalties. In summation, the Judge concluded that the submitted facts could not support a finding that the settlement terms were fair, reasonable, appropriate under the facts, and protective of the public interest.[5] 44 FMSHRC at 679-80; 44 FMSHRC at 690; *American Coal Co*., 38 FMSHRC 1972, 1982 (Aug. 2016) ("*AmCoal I"*).

On December 12, 2022, the Judge issued an order certifying for interlocutory review the question of whether the Judge's denial of the Secretary of Labor's motions to approve settlement constitutes an abuse of discretion. On December 15, 2022, the Commission granted the Judge's certification.

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[4] The Judge did not include discussion of the proposed modifications to Citation No. 9727212 in Docket No. WEST 2022-0250 nor does the Secretary include it in her brief on appeal. Therefore, we do not opine on the sufficiency of the settlement terms for this citation.

[5] On August 23, 2022, Rulon filed "Position Statement[s]" with the Commission in each of the named dockets providing its explanation for the circumstances surrounding each of the citations and its reasons for why the assessment amounts should be reduced. Much of the information provided in the statements was not included in the proposed motions for settlement. There is no indication that these statements reflect a mutual agreement of the parties or that the Secretary was consulted prior to filing. Therefore, we do not consider these filings as motions for settlement or stipulations of facts. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 979 (June 1982); *American Coal Co*., 40 FMSHRC 983, 991 (Aug. 2018) (*"AmCoal II"*).

II.

Disposition

A. The Secretary's Authority to Remove an S&S Designation

The Secretary filed her appeal in this case prior to issuance of the Commission's recent decisions addressing the scope of the Secretary's authority to remove an S&S designation. Specifically, the Secretary has argued, as she does here, that as an exercise of her enforcement authority, she has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k). Sec'y Br. at 17; Amend. Set. Mot. at 4; Amend. Set. Mot. at 5.

In three separate opinions, we rejected this argument, and we do so again here for the reasons cited in those decisions. Specifically, the Commission held that the Secretary does not possess unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Act. *Greenbrier Minerals, LLC*, 46 FMSHRC 933, 940 (Nov. 2024); *Knight Hawk Coal, LLC*, 46 FMSHRC 563, 566 (Aug. 2024); *Bluestone Oil Corp*., 47 FMSHRC 1, 7 (Jan. 2025).[6] We determined that sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. §§ 820(k) and 820(i), demonstrate an intent to circumscribe the Secretary's enforcement discretion, and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. *Knight Hawk*, 46 FMSHRC at 569-71.

Accordingly, the Judge did not abuse her discretion when she sought to require the Secretary to justify the proposed removal of the S&S designations associated with Citation Nos. 9479096, 9727204, 9727205, and 9727214.

B. The Judge's Denials of the Motions for Settlements

The Secretary argues that the Judge's orders are an abuse of discretion because they are "based on an improper understanding of the law." App. Br. at 17 (citing *AmCoal I*, 38 FMSHRC at 1984). Specifically, she contends that the Judge erred by refusing to accept the facts in the settlement, by assigning probative value to certain facts without a hearing, and by conducting hearing-style analyses. *Id*. at 10-12. The Secretary maintains that the Judge improperly substituted her enforcement preferences for the Secretary's enforcement decisions and failed to consider the future enforcement value of modified violations. *Id*. at 13, 16. Finally, she asserts that the Judge misunderstood Part 100 penalties and did not evaluate whether these penalties are part of a settlement that satisfies *AmCoal*. *Id*. at 14.

Commission Judges review proposed settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protect the public interest." *AmCoal I*, 38 FMSHRC at 1976. "The judges' frontline oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Knox County Stone Co*., 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission reviews the Judge's decision to approve or reject a proposed settlement under an abuse of discretion standard. *E.g.*, *AmCoal II.*, 40 FMSHRC at 987. An

[6] These cases are currently on appeal to the DC Circuit.

abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Id*. We will affirm a Judge's approval or denial of a proposed settlement that is fully supported by the record, consistent with the statutory penalty criteria, and not otherwise improper, but abuses of discretion or plain errors are subject to reversal. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012) (citation omitted).

Parties must provide Judges with sufficient information to determine whether proposed settlements are fair, reasonable, appropriate under the facts, and protective of the public interest. *AmCoal II*, 40 FMSHRC at 987-88. The Commission has consistently required its Judges to consider proffered justifications that are both substantive and relevant to proposed modifications before a motion to approve any settlement may be granted. *Greenbrier Minerals*, 46 FMSHRC at 939, *citing, Solar Sources Mining, LLC*, 41 FMSHRC 594, 601, 605, 606 (Sept. 2019) (reversing Judge's determination that the parties presented no justification to support settlement, when the parties "actually presented relevant facts," including the non-applicability of the standard); *Hopedale Mining, LLC*, 42 FMSHRC 589, 597-98 (Aug. 2020) (reversing the Judge's settlement denial because the Secretary had provided relevant justification in part to support the lowering of negligence and gravity).

By the same token, Judges are expected to evaluate the provided facts under the applicable *AmCoal* standard. Rather than engaging in fact-finding, Judges at the pre-hearing settlement stage should determine whether the agreed-upon facts provided by the parties support the proposed settlement terms. 40 FMSHRC at 990-91; *Solar Sources*, 41 FMSHRC at 601-02. In denying a proposed settlement, Judges should "articulate with some particularity" why the facts provided are insufficient to show that the settlement meets the *AmCoal* standard. *Id.* at 602-03.

Even one citation or order lacking in factual support will justify a denial of an entire settlement agreement until the defect is cured. Accordingly, we need not affirm the Judge with respect to each citation on review here to conclude that a denial is proper. In this instance, as addressed below, each docket contained multiple violations lacking the necessary support, thus preventing the Judge from finding that the settlement motions in their entirety were fair, reasonable, appropriate under the facts, or protective of the public interest. 44 FMSHRC at 672; 44 FMSHRC at 682-83.

In addition, we note that the Judge described several of the citations as "serious," the Secretary's arguments as "attempts to downplay" them, and the proposed modifications as

"major changes."[7] 44 FMSHRC at 673; 44 FMSHRC at 688. Without endorsing the Judge's specific descriptions, we emphasize that it is precisely this kind of analysis that is required in evaluating whether a settlement is fair, reasonable, appropriate under the facts, and protects the public interest. The Secretary's reasoning falls short in the proposed modifications for these citations.

Accordingly, we hold that the Judge did not abuse her discretion in denying the amended motions for settlement. We discuss each citation and order below.

1. WEST 2022-0249

a) Citation No. 9727214

Citation No. 9727214, asserting a violation of 30 C.F.R. § 56.14207, alleges that a truck was parked on a 5% grade without wheel chocks, which would prevent uncontrolled or unintended movement, that miners walked up the grade directly behind the vehicle, and that management was aware of the truck and took no action to correct or mitigate the hazard.[8] The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as high, and the violation was deemed an unwarrantable failure and issued as a section 104(d)(1) citation. Pet. for Assess. at 6.

To settle this citation, the Secretary agreed to modify the gravity to unlikely, non-S&S, the negligence to moderate, the action to a section 104(a) citation, which requires deletion of the unwarrantable failure, and reduce the penalty from $10,868 to $662. Amend. Set. Mot. at 3. As support, the parties state "[t]he cited truck was outfitted with an automatic transmission which was observed in the 'park' position, and the provided parking brake was set" and that "[a] review of information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck." *Id*.

The Judge declined to approve the removal of the S&S designation, stating that "[t]he relevant inquiry here is the magnitude of risk presented by the operator's failure to chock the

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[7] In discussing the berm citation, the Judge wrote:

> 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.

44 FMSHRC at 685.

[8] 30 C.F.R. § 56.14207 provides that "Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank."

wheels of a truck parked on a grade." 44 FMSHRC at 675. Instead of addressing this inquiry, the parties pointed to other required safety features, like the parking brake, to show that the alleged violation was not S&S. *Id*. The Judge found these safety measures redundant and that she could not consider them as part of the S&S analysis. *Id*. The Judge also found that the operator's claim that mine management was unaware of any hazards on the pickup truck raised several concerns, including the inconsistency of the information with the inspector's account, the credibility of the information, and the fact that it does not say that management was unaware of the unchocked wheels. *Id*.

Relying on *Hopedale Mining*, 42 FMSHRC at 595, the Secretary argues that the Judge erred in rejecting the removal of the S&S due to the factual support consisting of "redundant safety measures," Sec'y's Br. at 7, 11-13. She also maintains that the Judge erred in rejecting the negligence modification because she did not find the parities' contention "credible," and because the settlement differed from the conditions alleged in the citation. *Id*. at 12. The Secretary contends that Judges may not require "parties to prove a particular level of negligence in the context of settlement." *Id*. at 12, *citing Hopedale*, 42 FMSHRC at 599. We disagree with the Secretary.

First, while a Judge is constrained from engaging in post-hearing analysis of the facts when considering a motion for settlement, the facts offered in a settlement must be relevant to the hazard contributed to by the violation when seeking to remove an S&S designation. The Commission has held that if any *relevant* circumstances exist to plausibly suggest that an S&S enforcement action is unwarranted, all the Secretary needs to do is provide justification for removing the S&S designation to the Judge in her settlement motion - and her motion must be granted. *Knight Hawk Coal, LLC*, 46 FMSHRC at 573, *citing AmCoal I*, 38 FMSHRC at 1982; *Hopedale*, 42 FMSHRC at 601.

Here, the parties failed to provide the Judge with relevant circumstances that would suggest that the unchocked wheels of a truck parked on a grade *was not* S&S. The parties stated that the vehicle, on a slight grade, was parked with the parking brake set. However, these facts do not address the part of the standard the operator was alleged to have violated. *See Greenbrier Minerals, LLC*, 46 FMSHRC at 939 ("While such facts might show compliance with other safety standards, such information does not show that the hazard contributed to by the cited violation itself was decreased or eliminated"); *Sec'y of Labor v. Consolidation Coal Co*., 895 F.3d 113, 118 (D.C. Cir. 2018) (noting that "circumstances external to a violation cannot be used to reduce the likelihood that harm will ensue."). The presented facts do not demonstrate that the hazard (the unintended rolling of the vehicle down grade) contributed to by the cited violation (failure to secure a vehicle parked on grade with wheel chocks) was decreased or eliminated. The Judge properly found that the redundant safety measures were not relevant to whether the cited hazard was S&S.[9]

[9] It is well settled that redundant safety measures are irrelevant to the analysis as to whether a cited violation is S&S. That is because, as the court stated in *Buck Creek Coal, Inc*., the fact that the operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners …. the precautions are presumably in place … because of the significant dangers associated with coal mine fires." 52 F.3d 133, 136 (7th Cir. 1995).

We also do not find the Secretary's argument regarding negligence persuasive. Although Judges need not engage in fact-finding, weigh conflicting evidence, or make credibility determinations, they must still "probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Greenbrier Minerals, LLC*, 46 FMSHRC at 939, *citing Hopedale Mining*, 42 FMSHRC at 595. The Secretary seems to suggest that parties need not provide sufficient information that would support a reduction in negligence or even overcome obvious inconsistencies. However, parties are indeed required to provide sufficient and relevant information to support modifying the negligence to a reduced level. *Perry County Res., LLC*, 45 FMSHRC 573, 579 (July 2023); *Ohio Cty Coal Co*., 40 FMSHRC 1096, 1099 (Aug. 2018).

In the instant matter, the Judge recognized that the parties assert only that management was unaware of any conditions it deemed a hazard, not "that management lacked knowledge of the unchocked wheels." [10] 44 FMSHRC at 675. Assuming arguendo the parties are asserting that management lacked knowledge of the unchocked wheels, context or explanation would still be necessary to explain the glaring factual inconsistencies. *See Black Beauty*, 34 FMSHRC at 1863, n.6 (finding that the Judge did not abuse discretion by requiring additional facts where explanation in motion for a reduction in penalty was inconsistent with inspector's description of the violation and the inconsistency was not explained in the motion).

Accordingly, we conclude that the Judge did not abuse her discretion in finding that the the parties' amended settlement motion does not adequately support modification of Citation No. 9727214 to non-S&S or moderate negligence.

b) Order No. 9727216

Order No. 9727216, asserting a violation of 30 C.F.R. § 56.18002(a), alleges that the operator failed to ensure that an adequate examination of the working place was conducted prior to miners working around the crusher and wash plant.[11] The inspector found 20 violative conditions not recorded in the operator's examination record, and that some were extensive and obvious and had existed for days or weeks. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as high, and the violation deemed an unwarrantable failure and issued as a section 104(d)(1) order. Pet. for Assess. at 7.

The Secretary agreed to modify the negligence to moderate, the type of action from a section 104(d)(1) order to a section 104(a) citation, which requires deletion of the unwarrantable failure, and to reduce the penalty from $12,076 to $3,274. As support, the parties state "[a]

[10] The Secretary correctly asserts that the Judge erred in her consideration of the credibility of the operator's contention that mine management was unaware of any hazards on the pickup truck. *See Greenbrier Minerals,* 46 FMSHRC at 939. However, the error was harmless as the Judge also rejected the negligence modification on other grounds as discussed above.

[11] 30 C.F.R. § 56.18002(a) provides that: "(a) 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."

workplace examination had been conducted and documented, and there was no evidence that the examination was inadequate." Amend. Set. Mot. at 3.

The Judge found the parties' assertion failed to negate the fact of violation, the negligence finding, or the unwarrantable failure designation, and noted that the examination must be meaningful or "adequate" under Commission case law. 44 FMSHRC at 676-77. The Judge observed that none of the 20 violative conditions identified by the inspector (some of which were "extensive and obvious") had been annotated in the operator's examination record, in direct contrast to the parties' assertion that there was no evidence the examination was inadequate, and that the Secretary had failed to explain this opposing conclusion. *Id*. at 677.

We agree. The parties submitted nothing more than a conclusory statement denying the inspector's finding. The parties fail to explain how or why the 20 violative conditions relied on by the inspector are not "evidence" of an inadequate examination. *See Black Beauty*, 34 FMSHRC at 1863, n.6. As the Judge noted, failure to identify conditions that adversely affect safety and health can be evidence of an inadequate examination. *Sunbelt Rentals, Inc*., 38 FMSHRC 1619, 1627 (July 2016). Here, the Judge properly probed the inconsistent facts alleged in the settlement motion.

Accordingly, we find that the Judge did not abuse her discretion when determining that the Secretary failed to submit sufficient support for the modifications proposed for Order No. 9727216.

2. WEST 2022-0250

BERM CITATIONS

The Judge broadly determined that much of the submitted information in support of modifying the berm citations "is irrelevant, uninformative, or unconvincing." 44 FMSHRC at 686. The Secretary argues that the Judge erroneously assigned more weight to the allegations in the citations than to the facts in the settlement. Sec'y Br. at 11-12. The individual citations are addressed below.

a) Citation No. 9479096

Citation No. 9479096, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that the berms on the elevated feed ramp for the crusher were not maintained.[12] The South berm was in marginal condition while the north berm was almost entirely gone. The ramp was about 100 feet long and the north edge had about a 6-feet drop off. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 6.

[12] 30 C.F.R. § 56.9300(a) provides that: "Berms 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."

The Secretary agreed to modify the gravity to unlikely, to non-S&S, and to reduce the penalty from $3,274 to $662. As support, the parties state: "[t]he 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[.]" Amend. Set. Mot. at 3.

The Judge found the parties' assertion that "visibility was good" unpersuasive, as the S&S analysis is conducted in the course of continued normal mining operations and, visibility could worsen. The Judge also reasoned that the "partial berm," described by the inspector as "almost entirely gone," would do little to prevent accidents or satisfy the standard. 44 FMSHRC at 686. We conclude that the Judge was well within the discretion to require more factual support for this citation.

The purpose of the berm requirement of section 56.9300(a) is to minimize the severity of accidents resulting from an out-of-control vehicle traveling over the edge of a road drop-off and overturning. *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496-01 (1988). However, the facts offered by the parties presume that any traveling vehicle will be in adequate condition. In the event that a miner loses control of the vehicle and approaches the edge of a roadway, neither the linear construction of the ramp nor the good visibility will stop the over traveling or overturning of the vehicle if the berm is not provided or being maintained.[13] Additionally, the partial berm in place at the south end of the feed ramp will not prevent a vehicle from traveling over the edge where the north berm is "almost entirely gone."[14]

b) Citation No. 9727204

Citation No. 9727204, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that an elevated roadway adjacent to a 4-feet deep hole did not have a berm to prevent equipment from falling over the edge. The area is used by a skidsteer and a service truck was parked within a few feet of the edge. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 12.

The Secretary agreed to modify the gravity from reasonably likely to unlikely, from S&S to non-S&S, from fatal to lost workdays or restricted duty, and to reduce the penalty from $3,274 to $199. As support, the parties state that "[v]ehicles in the area stop at this location and do not continue to travel farther," that the skidsteer was equipped with rollover protection and a seatbelt, and the alleged drop off was only four feet. Amend. Set. Mot. at 4.

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[13] The Secretary's failure to address the relevant hazard provides sufficient grounds for the Judge's rejection of the S&S modification. Therefore, we need not reach whether it was appropriate for the Judge to analyze this in the context of "continued normal mining operations."

[14] We also reject the Secretary's implication that a miner will take the necessary precautions to avoid over traveling the edge once he or she sees a partial berm. *See, e.g., Consolidation Coal*, 895 F.3d at 118; *Newtown Energy Inc*., 38 FMSHRC 2033, 2044 (Aug. 2016); *Eagle Nest, Inc*., 14 FMSHRC 1119, 1123 (July 1992).

The Judge found the factual support inadequate, stating that the seatbelts and rollover protection on the mobile equipment are redundant safety features inappropriate to the S&S analysis. 44 FMSHRC at 686.

The parties state that "vehicles in the area stop at this location and do not continue to travel farther." However, it is unclear if the parties are asserting that vehicles stop at the threshold and do not travel over the elevated roadway or if they stop at some point on the elevated roadway, which would explain the service truck being parked near the edge. Additionally, the rollover protection and seatbelt *may* reduce the injuries sustained or prevent a fatality. However, these safety measures would do nothing to prevent the equipment from over-traveling the edge of the elevated roadway and injuring a miner. In other words, the factual support provided does not adequately speak to whether the violation is no longer of "such nature as could significantly and substantially contribute to the cause or effect of a . . . hazard." 30 U.S.C. § 814(d)(1); *Sec'y of Labor. v. JWR*, 111 F.3d 913, 917 (D.C. Cir. 1997).

c) Citation No. 9727208

Citation No. 9727208, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that an elevated roadway being used for the front-end loader ("FEL") to access a feed pile did not have a berm on the south side of the ramp. The gravity was evaluated as reasonably likely to cause a fatal injury, the violation is significant and substantial, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 16.

The Secretary agreed to modify the gravity from fatal to permanently disabling, and to reduce the penalty from $3,274 to $1,472. As support, the parties state "[t]he front-end loader was outfitted with an enclosed cab with roll over protection and seatbelt, and the highest overtravel hazard was 6 [feet] above soft earthen material, thereby lessening the likelihood of a fatality." Amend. Set. Mot. at 4.

Here, the Judge made an error in her consideration of the settlement terms which affected her analysis. The parties sought to modify the gravity of a potential injury from the cited "fatal" to "permanently disability." However, the Judge mistakenly thought the parties also sought to remove the S&S designation. She concluded that the proffered factual support was insufficient to justify the removal of the S&S designation. The Judge misinterpreted the parties' proposal. Accordingly, we conclude that the Judge abused her discretion in denying settlement of this citation.

BRAKE CITATION

d) Citation No. 9727205

Citation No. 9727205, asserting a violation of 30 C.F.R. § 56.14101(a)(2), alleges that upon testing, the park brake on the service truck failed to hold with its typical load on the

maximum grade it travels.[15] 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 and only stopped when the service brake was reapplied. This truck is used as needed around the mine site, including to haul maintenance supplies, and miners access the back of the truck as a work platform. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate, and the violation issued as a section 104(a) citation. Pet. for Assess. at 14.

The Secretary agreed to modify the gravity to unlikely, to non-S&S, and reduce the penalty from $3,274 to $662. As support, the parties state "[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." Amend. Set. Mot. at 4.

The Judge found it disingenuous to say that no grades exist at the mine, even though the road selected by the operator itself for the test was on a grade. The Judge noted that the parties do not explain or account for the discrepancy between these facts and the inspector's findings.

The Parties' "support" here is full of gaps and inconsistencies. Consequently, we, along with the Judge, are left with more questions than answers. Accordingly, the Judge did not abuse her discretion.

[15] 30 C.F.R. § 56.14101(a)(2) provides that "Minimum requirements . . . If 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."

III.

Conclusion

We hold that the Secretary does not have unreviewable discretion to remove a significant and substantial ("S&S") designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

We also conclude that the Judge did not abuse her discretion in denying the motions for settlement. These dockets are remanded to the Judge for further proceedings consistent with this decision.

Marco M. Rajkovich, Chair

Mary Lu Jordan, Commissioner

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