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April 30, 2014

VIA FIRST-CLASS U.S. MAIL

The Honorable William Moran
Administrative Law Judge
Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

Re: **Secretary of Labor v. The American Coal Company**
CIVIL PENALTY PROCEEDING
Docket No.: LAKE 2011-13
Assessment Control No.: 000232235
Mine: New Era Mine
MMS No.: 0500-13-00383

Dear Judge Moran:

Enclosed please find the original and one copy of the Secretary of Labor's **MOTION FOR RECONSIDERATION AND SUPPORTING BRIEF**, for filing in the above-referenced matter. Please have the original filed and one properly-conformed copy returned to this office in the enclosed, self-addressed envelope.

Thank you for your cooperation in this matter.

Sincerely,

CHRISTINE Z. HERI
Regional Solicitor

By: _____
SUZANNE F. DUNNE
Trial Attorney

Enclosures

cc: Gary Broadbent, Esq. (w/ attachments)

s.a.f.e.

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE AMERICAN COAL COMPANY, Respondent.	)	CIVIL PENALTY PROCEEDING Docket No.: LAKE 2011-13 Mine: New Era Mine Mine ID: 11-02752 A/C No: 1102752-000232235 Judge William B. Moran

MOTION FOR RECONSIDERATION AND SUPPORTING BRIEF

The Secretary of Labor ("Secretary") respectfully files this Motion for Reconsideration of the Court's Decision Denying Settlement Motion ("Dec."), dated February 11, 2013. The Secretary submits that the proposed settlement is appropriate and in the public interest. The Solicitor's Office has reviewed all of the citations, the inspectors' notes, and the exchange of positions between the parties during the original negotiations. The Secretary, through the undersigned, fully endorses the settlement as originally proposed by the Conference and Litigation Representative, and incorporates its terms herein for reconsideration. The Secretary also moves for the Court to reconsider its legal conclusions that Section 110(k) compels the Court to reject the proposed settlement agreement for lack of factual support, and that Section 110(k) does not permit the Secretary to negotiate settlement agreements structured as a uniform percentage reduction of civil penalties. *See* Dec. at 1-2. The Secretary submits the following brief in support of his position.

INTRODUCTION

In a number of cases decided since the Commission's decision in *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012), Commission administrative law judges have rejected settlement agreements submitted by the Secretary for approval or have requested that the Secretary supply additional facts to justify proposed settlements.[1] Under the split-enforcement scheme created by the Federal Mine Safety and Health Act of 1977, the Secretary has the exclusive authority to enforce and the primary authority to interpret the Act, subject to deferential Commission and court review. *See, e.g., Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5-6 (D.C. Cir. 2003); *Sec'y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996). The Commission is "the equivalent of a court" – it is responsible for adjudication and has no policymaking role. *See Jeroski v. Sec'y of Labor*, 697 F.3d 651, 653 (7th Cir. 2012); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006). Commission judges' denials of settlement motions raise the important question of how the Secretary and the Commission's distinct enforcement and adjudicatory roles should be performed when the parties reach a settlement and the Commission reviews the compromise under Section 110(k) of the Mine Act.

Section 110(k) of the Mine Act provides for Commission approval when the Secretary seeks to settle a proposed penalty. It states in full: "No proposed penalty which has been contested before the Commission under section 105(a) [30 U.S.C. § 815(a)] shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court." 30 U.S.C. § 820(k).

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[1] *See, e.g.*, Ex. A, February 21, 2013 Order Rejecting Amended Settlement Motion, *Dickenson-Russell Coal Company, LLC*, Docket No. VA 2012-397 (Feb. 21, 2013); Ex. B, October 17, 2012 Order Rejecting Settlement Motion and Notice of Hearing, *Dominion Coal Corp.*, Docket No. VA 2012-227 (Oct. 17, 2012).

In this case, the mine operator and the Secretary, represented by an MSHA Conference and Litigation Representative ("CLR"), reached a compromise to resolve a docket of 32 contested citations and proposed the terms of the settlement agreement in a motion to the Court. *See* Feb. 8, 2013 Mot. to Approve Settlement. Under the proposed settlement, The American Coal Company ("American Coal") agreed, for purposes of settlement, to accept the 32 citations as initially written by the MSHA inspectors. American Coal also agreed to pay 70 percent of MSHA's proposed civil penalties – in other words, $31,063 out of $44,376. *Id.* Thus, the penalty for each citation would have been reduced by a uniform 30 percent.

The Court rejected the parties' compromise as incompatible with Section 110(k) of the Mine Act, as well as with the Commission's decision in *Black Beauty*, and Commission Procedural Rule 31. Dec. at 2-3. The Court rejected the proposed settlement because of its structure as a uniform, across-the-board percentage reduction, without any accompanying changes to the underlying citations. The decision explained:

> The Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of [a] yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

Dec. at 1. In addition to rejecting the concept of uniform penalty reductions for multiple citations, the Court took issue with the fact that the penalties were reduced even though American Coal had agreed to accept the citations as written and the Secretary had not made changes to the gravity or negligence for any of the citations. Dec. at 2. The Court also faulted the motion for failing to justify the reductions in proposed penalties with adequate factual support. Dec. at 1-3. Finally, the Court declined to accept the CLR's representation in the

matter, stating that the CLR's position "demonstrate[d] a lack of understanding about the operation of the Mine Act's requirements." *Id.* at 3.

After the Court rejected the Secretary's settlement motion, the case was transferred to the undersigned attorney in the Office of the Solicitor. The attorney independently reviewed the docket at issue, including all 32 citations, the inspectors' notes, recommendations from the CLR, and American Coal's position statement. Exercising her professional judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial. The Secretary, through the undersigned counsel, represents that the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals.

In asking the Court to reconsider the proposed settlement, the Secretary is also asking for the Court to reconsider its legal conclusions that Section 110(k) compels the Court to reject the proposed settlement agreement for lack of factual support, and that Section 110(k) does not permit the Secretary to negotiate settlement agreements structured as a uniform percentage reduction of civil penalties. *See* Dec. at 1-2. Under the Administrative Procedure Act, enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. That presumption can be overcome if Congress has otherwise provided, but the presumption is not overcome here because Section 110(k) of the Mine Act does not provide any meaningful standards for judicial review. Nor does Section 110(k) either prohibit or require any particular form of settlement. Section 110(k) therefore cannot be read to prevent the Secretary from negotiating, or the Commission from approving, settlements like the one proposed here.

To the extent that Commission precedent and procedural rules compel the Court to reject the proposed settlement, those Commission pronouncements are *ultra vires*. Because the Commission has no policymaking authority to expand its reviewing role beyond the role Congress described in Section 110(k), the Commission's procedural rules and precedent cannot impose more stringent requirements than those set by Congress. Instead, Section 110(k)'s adjudicatory "approval" function should be understood as simply a procedural mechanism to ensure that the settlement agreements negotiated by the Secretary are clear, transparent to the public, and in accordance with any otherwise applicable law.

The Secretary recognizes that the Court is bound to apply, and cannot overturn, the Commission's precedent or procedural rules. *See Sec'y of Labor v. Oliver Mine Maint. Co.*, 1 FMSHRC 23 (1979) ("An administrative law judge must follow the rules and precedents of the Commission."). The Secretary nonetheless presents these arguments here to comply with the requirement that an administrative law judge be afforded the opportunity to rule on questions of law before such issues are appealed to the Commission. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."); 29 C.F.R. § 2700.70(d) (same effect). The Secretary anticipates that interlocutory appellate review will likely be necessary to fully resolve the important legal questions presented.

THE PROPOSED SETTLEMENT

As can be determined by reviewing the Secretary's Petition for Assessment of Civil Penalties, Exhibit A, the docket at issue contains 32 contested citations issued by five different MSHA inspectors between July 13, 2010, and August 12, 2010. Of the 32 citations, 31 were issued under Section 104(a) and one was issued under Section 104(g)(1). In the proposed

settlement, American Coal has agreed, for purposes of settlement, to accept the citations as issued by the MSHA inspectors, including the levels of gravity and negligence alleged. American Coal has also agreed to pay $31,063, or 70 percent, of the $44,376 originally proposed by MSHA.

QUESTIONS PRESENTED

I. Does Section 110(k) provide any meaningful standards to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions?

II. In the absence of any meaningful standard in Section 110(k), what standard of review applies when the Commission or a court of appeals reviews the Secretary's settlement agreements under Section 110(k)?

III. Does the settlement the Secretary proposes here satisfy the standard that applies?

ARGUMENT

I. Section 110(k) Provides No Meaningful Standards To Limit the Secretary's Prosecutorial Discretion to Settle Mine Act Enforcement Actions

In other statutory schemes, agencies' decisions to settle enforcement actions are not reviewable by the courts. The Administrative Procedure Act precludes judicial review of "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Moreover, the Supreme Court has held that an agency's decision not to exercise its enforcement authority, or to exercise its enforcement authority in a particular way, is committed to its absolute discretion, unless Congress has otherwise provided. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The D.C. Circuit has therefore concluded that enforcement agencies are generally presumed to have the unreviewable discretion to settle enforcement actions because settlements are, in essence, a decision not to pursue an enforcement action as originally charged. *See New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (concluding that "an agency's decision to settle or dismiss an enforcement action is nonreviewable"); *see also Ass'n*

of Irritated Residents v. EPA, 494 F.3d 1027, 1031-33 (D.C. Cir. 2007) (EPA's decision to enter into consent agreements with animal feeding operations was within agency's nonreviewable discretion); *Baltimore Gas & Elec. Co v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (FERC's decision to settle enforcement action was within agency's nonreviewable discretion).

In light of this general rule, the exclusive roles established by the Mine Act's split-enforcement scheme would – in the absence of Section 110(k) – lead to the inevitable conclusion that the Commission has no authority to review the Secretary's decisions to settle enforcement actions under the Act. *Cf. Cuyahoga Valley Railway Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (noting that the Secretary must have the unreviewable authority to withdraw citations and settle cases under the analogous Occupational Safety and Health Act to avoid a "commingling of [prosecutorial and adjudicatory] roles that Congress did not intend"); *Donovan v. OSHRC*, 713 F.2d 918, 927 (2d Cir. 1983) (holding that the Occupational Safety and Health Review Commission has no authority to review Secretary's settlement agreements except to hear employee challenges to the reasonableness of the time period to abate hazardous or unsafe working conditions). As the Second Circuit has explained, the discretion to settle an enforcement action is integral to an agency's prosecutorial discretion: "A necessary incident to the Secretary's prosecutorial powers [under the split-enforcement model] is the unfettered discretionary authority to withdraw or settle a citation issued to an employer, or to settle, mitigate, or compromise any assessed penalty." *Id.* at 927 (internal citations omitted).

Of course, the "presumption of unreviewability" of agency settlement agreements by courts or court-like adjudicatory agencies can be overcome if Congress has otherwise provided. *See Heckler v. Chaney*, 470 U.S. 821, 834 (1985); *see also Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006) (applying *Chaney* to the Mine Act). The default

presumption of unreviewability is overcome, however, only where the controlling statute both (1) "indicate[s] an intent to circumscribe agency enforcement discretion"; and (2) "provide[s] meaningful standards for defining the limits of that discretion." *Chaney*, 470 U.S. at 834.

As noted, Section 110(k) states: "No proposed penalty which has been contested before the Commission under section 105(a) [30 U.S.C. § 815(a)] shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court." 30 U.S.C. § 820(k).

Section 110(k) provides a procedural mechanism for Commission "approval" of the Secretary's settlement agreements, but the statute provides no meaningful or substantive standards that limit the Secretary's prosecutorial discretion when the Secretary negotiates settlement agreements. The Commission should therefore approach this problem as a court would and conclude that, because Congress gave it no "law to apply" when reviewing the Secretary's settlement agreements, *see* 5 U.S.C. § 701(a)(2), the scope of its reviewing function is limited to ensuring that the Secretary's settlement agreements are clear, transparent to the public, and in accordance with any otherwise applicable law (*i.e.*, applicable legal standards found outside of Section 110(k) itself).

A. Section 110(k) Provides No Meaningful Standards

Section 110(k) provides a procedural mechanism for Commission "approval" of the Secretary's settlement agreements, but it does not provide any "meaningful standards" for judicial review of the compromise the Secretary reaches with mine operators. In other words, the statute calls for Commission or Court "approval" before the Secretary settles a proposed

penalty, but it does not provide any criteria for the Commission to apply to the inquiry of whether approval is warranted.

If a statute fails to provide meaningful standards to limit agency discretion, "judicial review is impossible, and agency action is shielded from the scrutiny of the courts." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). A statute fails to provide meaningful standards where it is "utterly silent on the manner in which the [enforcement agency] is to proceed against a particular transgressor," *Baltimore Gas*, 252 F.3d at 461, or where it does nothing to "circumscribe[] the government's power to discriminate among" enforcement options, *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003). In other words, meaningful standards are lacking when the adjudicator has no "legal norms" or "law to apply." *Chaney*, 470 U.S. at 834-35; *Twentymile*, 456 F.3d at 156. Neither "boilerplate truisms" nor broadly applicable standards of review (such as the APA's "substantial evidence" standard) are sufficient to limit an enforcement agency's discretion in the absence of more meaningful guidance from Congress. *Twentymile* at 158. In contrast, when a statute provides "clearly defined factors" to guide an enforcement agency's decision, the presumption of unreviewability may be overcome. *See Chaney* at 833-35 (explaining that the LMRDA's requirement that the Secretary shall bring a civil action when she "finds probable cause to believe that a violation . . . has occurred" provides a sufficient standard for limited judicial review).

Section 110(k) provides no meaningful standards to limit the Secretary's settlement authority: it is "utterly silent" as to how the Secretary should exercise his prosecutorial discretion to settle or how the Commission should review the Secretary's settlement proposals. Section 110(k) does not establish any legal standards for evaluating the Secretary's proposed compromise or supply any criteria for either entity to apply to settlement decisions. It does not

define the term "approval" or signal when approval or rejection is appropriate. Indeed, the Commission itself has acknowledged that Section 110(k)'s statutory language "contains *no explicit restrictions* on what a Commission Judge may consider when reviewing a settlement proposal." *Black Beauty* at 9 (emphasis added).

The only clue that Section 110(k) offers is its suggestion that the Commission's role is no different from an Article III court's. Section 110(k) uses identical language to describe the Commission's role in reviewing settlement proposals before it has issued a final agency order, and the Court of Appeals' role in reviewing settlement proposals once a final agency order has been issued. The statute therefore suggests that the Commission should define its role as a generalist court would when exercising its responsibilities under the Act. *See, e.g.*, *Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972) (The canon of *in pari materia* reflects that "a legislative body generally uses a particular word with a consistent meaning in a given context."); *see also* Order Approving Settlement, *Mountain Edge Mining, Inc. v. FMSHRC*, Docket No. 11-1777 (4th Cir. 2012) (summarily granting the parties' joint motion to approve settlement); *Twentymile*, 46 F.3d at 161 ("*[L]ike a court*, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.") (emphasis added). Indeed, in similar cases the Commission has looked to the Court of Appeals' reviewing role to determine its own approach. *Cf. Stansley Mineral Resources, Inc.*, 35 FMSHRC 1177, 1180 (2013) (concluding that the Commission is required to assess statutory minimum penalties in part because the Act would require the Court of Appeals to reverse the Commission's imposition of less than the minimum).

The overall structure of the Mine Act likewise provides no meaningful standards by which either the Commission or a court can review the Secretary's settlement decisions. On the contrary, the overall structure of the Act supports the conclusion that the decision to settle would

most appropriately fall within the Secretary's prosecutorial functions under the split-enforcement model, because such decisions are grounded in discretionary policy choices and an assessment of the public interest. *See SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 164 (2d Cir. 2012) (discussing policy-based nature of settlement decisions); *see also Cuyahoga Valley*, 474 U.S. at 7 (settlement within exclusive province of the Secretary under the analogous Occupational Safety and Health Act).

B. Section 110(i) Cannot Supply the Standard that Section 110(k) Does Not Provide

Section 110(i) and Section 110(k) serve different functions: Section 110(k) governs the Commission's approval of the Secretary's settlement agreements, whereas Section 110(i) governs the Commission's assessment of civil penalties after adjudication on the merits. Section 110(i) does not apply when the Commission reviews the Secretary's proposed settlements, and therefore cannot supply the meaningful standard that Section 110(k) does not provide.

Section 110(i) establishes six statutory penalty criteria that apply whenever the Commission assesses a civil penalty after adjudication. It states: "In *assessing* civil monetary penalties, the Commission shall consider [the six statutory penalty criteria]." 30 U.S.C. § 820(i) (emphasis added). In contrast, Section 110(k) specifically governs the Commission's "*approval*" of "proposed penalties . . . *compromised, mitigated, or settled*" by the Secretary. 30 U.S.C. § 820(k) (emphasis added). Congress's use of two different verbs – "assess" in Section 110(i) and "approve" in Section 110(k) – indicates that the two functions are distinct. Moreover, that Congress used the specific phrase "compromised, mitigated, or settled" in Section 110(k), but not in Section 110(i), indicates that that former provision pertains to the Commission's review of settlement agreements, but the latter does not.

Congress's decision to establish two different review functions reflects the realty that the exercise of assessing a penalty after factfinding is fundamentally different from the exercise of reviewing a compromise that has already been reached. When the Commission adjudicates a penalty contest, it makes findings of fact under each of the civil penalty factors. 29 C.F.R. § 2700.30; *see also Cantera Green*, 22 FMSHRC 616, 620 (2000). In contrast, when the Secretary and a mine operator settle an enforcement action, the parties agree to the ultimate consequences of the Secretary's underlying allegations, but they may agree to disagree about the factual or legal disputes giving rise to the proceeding in the first place. When the Secretary then seeks Commission "approval" of such a settlement agreement, the Commission's task should not be to engage in factfinding to assess civil penalties under Section 110(i), but rather to simply approve or reject the compromise before it – a different and narrower role.

The role of an adjudicator is typically narrower when reviewing a proposed compromise because the adjudicator cannot assume from the existence of the compromise that the enforcement agency's underlying allegations are correct, or that the regulated entity did in fact fail to meet its statutory or regulatory obligations. *See Citigroup*, 673 F.3d at 163 (criticizing district court's order refusing to approve SEC's proposed settlement because the order "prejudges the fact that [the defendant] had in fact misled investors, and assumes that the [agency] would succeed at trial"); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995) ("[W]hen a consent decree is brought to a district judge, because it is a settlement, there are no *findings* that the defendant has actually engaged in illegal practices. It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial.") (emphasis in original) (internal citations omitted); *see also Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting from summary affirmance) ("The District

Court seems to have assumed first that there was an antitrust violation and second that it knew the scope and effects of the violation. But the parties have settled the case and thereby avoided the necessity for such findings.").

This logic is equally applicable in the Mine Act context. Though existing Commission precedent holds that the Secretary cannot agree to exculpatory language that prevents the Secretary from relying on a settled citation for subsequent Mine Act enforcement purposes (including history of violations under Section 110(i), pattern of violations under Section 104(e) or 108(a)(2), and unwarrantable failure chain of violations under Sections 104(d)(1) and 104(d)(2)), that same precedent recognizes that "parties are free to admit or to deny the fact of a violation in settlement agreements." *Amax Lead Co.*, 4 FMSHRC 975, 977 (1982). Indeed, in reaching this conclusion, the Commission noted that such denials are part and parcel of many settlements: "Inherent in the concept of settlement is that the parties find and agree upon a mutually acceptable position that resolves the dispute and that obviates the need for further proceedings. Whether that mutual position involves an admission or denial of a violation under the Mine Act will normally be left to the parties." *Id.* at 977-78. In this case, consistent with *Amax*, American Coal accepted the citations as written by the MSHA inspectors for purposes of settlement and subsequent Mine Act enforcement actions. But American Coal neither admitted nor denied in the settlement motion that the citations were valid or that the MSHA inspectors' allegations of gravity and negligence were proper.

Thus, a Commission administrative law judge cannot apply Section 110(i) to the contested citations to determine whether the compromise penalty is "appropriate" in light of the statutory penalty factors because the allegations underlying a proposed settlement agreement cannot be treated as if they were findings of fact and conclusions of law after trial. Without

judicial factfinding, no particular penalty is "appropriate" – unless the parties have agreed to one. And if a private litigant, particularly one with counsel, has freely consented to a settlement, there is no discernible reason why the Commission should intervene to protect that party from agency overreaching.

The Commission's discussion of deterrence in *Black Beauty* further demonstrates the inapplicability of Section 110(i) to the Secretary's settlement proposals. The Commission reasoned that "penalties should be used to deter operators" from violating health and safety laws and regulations, and that it is therefore "eminently appropriate for a Judge to acknowledge the need for deterrence in deciding whether or not to approve a settlement." *Black Beauty* at 10. The Commission's reasoning cannot be squared with its role as impartial adjudicator: to consider whether a settlement proposal will sufficiently deter violations is essentially to prejudge or assume the validity of the citation as written by the MSHA inspector. Certainly the Commission would not want to "deter" an operator's lawful conduct if it were to ultimately find that no violation occurred. *See Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (1980) ("Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred."). Likewise, a judge cannot determine whether a penalty agreed to by the parties is "appropriate" under the Section 110(i) criteria without making assumptions about the validity of the citation or the accuracy of the Secretary's factual allegations pertaining to the Section 110(i) penalty factors – all without a hearing or findings of fact.

Put another way, Section 110(i) provides a wholly different kind of standard than the one that Section 110(k) fails to provide and would have to provide to make meaningful review possible. Section 110(k) provides no standard that would allow the Commission to determine

"whether the [enforcement agency] has exercised its prosecutorial discretion [to settle] well or perhaps, as well as possible." *Maryland*, 460 U.S. at 1005 (Rehnquist, J. , dissenting from summary affirmance and quoting legislative history to the antitrust Tunney Act). Section 110(i) cannot and does not fill that gap – it serves a different purpose by providing criteria for evaluating a civil penalty in light of stipulated or adjudicated facts. Section 110(i) therefore cannot supply the meaningful standard that Section 110(k) does not provide.

C. The Legislative History Does Not Supply a Meaningful Standard for Limiting the Secretary's Prosecutorial Discretion

The Commission relied heavily on the Mine Act's legislative history to justify judges' searching review of the Secretary's settlement proposals in *Black Beauty*. *See Black Beauty* at 5-6 (quoting S. Rep. No. 95-181 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978) ("Legislative History")). That reliance is misplaced. The Mine Act's legislative history neither supplies the missing standard nor justifies a more searching review of the Secretary's settlement proposals.

First, the legislative history must be viewed in its proper context. As the Commission has properly recognized, Congress adopted Section 110(k) in response to the unsatisfactory settlement practices of the Mining Enforcement and Safety Administration ("MESA") of the Department of the Interior, the agency previously charged with regulating mine safety and health. Today, however – more than 30 years later – an assumption that MSHA is acting like MESA did when settling penalty contests would be improper. Absent contemporary evidence of bad faith, 30-year old legislative history does not justify an inquiry into the mental processes of the Secretary's representatives during settlement negotiations. *See Microsoft*, 56 F.3d at 1460 ("Even when a court is explicitly authorized to review government action . . . 'there must be a

strong showing of bad faith or improper behavior' before the court may 'inquir[e] into the mental processes of administrative decisionmakers.'") (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 20 (1971)).

Moreover, even considering the legislative history as a supplement to Section 110(k), there is still no "law" for the Commission or a court to apply to limit the Secretary's prosecutorial discretion. Instead, the legislative history stresses transparency and public scrutiny as the principal reasons for the Commission's review – purposes that can be achieved even if the Commission does not engage in judicial review to the aspects of the Secretary's settlement decisions that are committed to the Secretary's prosecutorial discretion. The Senate Report suggests that Congress wanted settlements to be "on the record" and "carried out in public." *Legislative History* at 632-33. The Report describes MESA's "off the record" negotiations as reducing the efficacy of civil penalties:

> [A]nother factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. Negotiations between operators and Conference Officers of MESA are not on the record. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge. Similarly, there is considerable opportunity for off-the-record settlement negotiations with representatives of the Department of Justice while cases are pending in the district courts.

Legislative History at 632. In describing Section 110(k)'s solution, the Report explains:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

Legislative History at 633. The purposes of transparency and public scrutiny are achieved when the Secretary submits a motion to approve settlement to a Commission administrative law judge, regardless of whether the judge rejects the proposed agreement. Even if a settlement agreement is not made public until it is approved, the mere publishing of it will alert the regulated community (industry, labor, and public interest groups) – and indeed Congress itself – to any possibility that the Secretary's settlement practices present cause for concern and warrant comment and correction by the political branches.

Finally, the legislative history's statements about the consideration of litigation and collection expenses contradict each other, and therefore do not provide any meaningful guidance about what factors the Secretary or the Commission should consider when evaluating settlements. On the one hand, the legislative history states that "the need to save litigation and collection expenses *should play no role* in determining settlement amounts." Legislative History at 632 (emphasis added). In the same sentence, however, the history states the exact opposite: "[T]he reduction of litigation and collection expenses *may be a reason* for the compromise of assessed penalties." *Id.* (emphasis added). Even assuming that legislative history can supply a missing standard, an expression of legislative intent as internally inconsistent as this one would not suffice – particularly in light of the reality that reducing litigation expenses for both parties has traditionally been recognized as a legitimate reason for parties to enter into settlement agreements and for courts to approve them. *See, e.g.*, *Citigroup*, 673 F.3d at 164 (recognizing litigation expenses as a legitimate settlement factor).

D. Insofar as the Commission's Procedural Rules and Precedent Establish an Extra-Statutory Standard, They Are *Ultra Vires*

Neither the Commission's precedent nor Procedural Rule 31 can change the statutory analysis of whether Section 110(k) provides a meaningful standard for limiting the Secretary's

prosecutorial discretion to settle. In contrast to the Secretary's broad rulemaking authority, Congress granted the Commission rulemaking authority only to establish procedural rules for adjudication. *Compare* 30 U.S.C. § 957 ("The Secretary . .. [is] authorized to issue such regulations as [he] deems appropriate to carry out any provision of this chapter.") *with* 30 U.S.C. § 823 ("The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter . . .") *and* 29 C.F.R. Part 2700 (establishing procedural rules for the Commission). The Commission is therefore not statutorily authorized to promulgate substantive rules that displace the Secretary's reasonable interpretations or that set policy – whether through rulemaking or adjudication. *See Twentymile*, 456 F.3d at 161. In other words, because the Commission is like a court and possesses no policymaking powers, a Court of Appeals would owe no more deference to the Commission's interpretation of Section 110(k) than it would to a district court's statutory interpretation. *See Donovan*, 713 F.2d at 930, n.18 ("Since the Commission is not a policy-making agency, its rule . . . requiring [OSHRC] review of proposed settlements 'is not entitled to any special deference from the courts.").

II. Section 110(k)'s Adjudicatory "Approval" Function Should Be Understood Simply as a Procedural Mechanism to Ensure that the Secretary's Settlement Agreements are Clear, Transparent, and In Accordance with Otherwise Applicable Law

The Secretary and the Commission therefore face a conundrum under the Mine Act: Congress intended to give the Commission a role in reviewing the Secretary's settlement proposals, but it did not provide any meaningful standards for limiting the Secretary's prosecutorial discretion. To resolve the contradiction, the Secretary interprets Section 110(k)'s adjudicatory "approval" function to be limited to ensuring that the settlement agreements negotiated by the Secretary are clear, transparent to the public, and in accordance with applicable law. In other words, the Secretary would submit proposed settlement agreements to the

Commission for "approval," but the Commission's role would not be to evaluate the wisdom of the compromise. The Commission's role would simply be to confirm the clarity and enforceability of the agreement as submitted.

The Secretary's proposed transparency standard for evaluating the Secretary's settlement agreements would balance Section 110(k)'s provision for judicial approval of settlement agreement terms with Congress's delegation of exclusive enforcement responsibility to the Secretary under the Mine Act's split-enforcement scheme. It would also satisfy the legislative history's suggestion that transparency and public scrutiny are Section 110(k)'s principal objectives. Finally, it is consistent with the text of Section 110(k) because it would give the Commission an "approval" function without imposing extra-statutory limits on the Secretary's prosecutorial discretion to settle enforcement actions.

III. The Proposed Settlement Should Be Approved

A. The Proposed Settlement Satisfies the Secretary's Transparency Standard

The proposed settlement agreement satisfies the Secretary's proposed transparency standard and should be approved. The Motion to Approve Settlement clearly describes the terms of the parties' compromise – there is no doubt about the penalties that American Coal has agreed to pay or the effect of the conceded violations on American Coal's history of violations. *See* Dec. at 2 ("The only thing that the motion gets right is the math; each of the 32 alleged violations was reduced by 30 percent."). By specifying the terms of the settlement agreement in a filing submitted to the administrative law judge, the Secretary has made the agreement accessible to the public. Finally, the terms of the straightforward agreement are fully consistent with all applicable law.

The Secretary's Petition for the Assessment of Civil Penalties and the Secretary's settlement motions provide all of the "facts" that the Commission needs to review and approve the settlement. Expanding the settlement motion to include a citation-by-citation recitation of the operator's contentions and the Secretary's responses would not assist the judge in applying the proposed transparency standard. Judges have required such recitations because of their interpretations of Commission Procedural Rule 31 and their mistaken understanding that the Mine Act charges them with evaluating the wisdom or sufficiency of the resolution the Secretary has negotiated. But evaluating the wisdom of the compromise is not the adjudicator's role. *See Ass'n of Irritated Residents*, 494 F.3d at 1032 ("judgments [] arising from considerations of resource allocation, agency priorities, and costs of alternatives [] are well within the *agency's* expertise and discretion") (emphasis added); *Baltimore Gas & Elec. Co.*, 252 F.3d at 459 ("When the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power that the Constitution commits to the executive branch."); *New York State Dep't of Law*, 984 F.2d at 1213 (agencies rather than courts are "best positioned to weigh the benefits of pursuing an adjudication against the costs").

In any event, the recitations that the parties often supply in other cases to justify settlement are often incomplete because they do not account for the parties' assessment of litigation risks. For example, parties typically do not acknowledge practical, legitimate, and common litigation concerns such as the availability or credibility of witnesses or the additional costs of preparing for, traveling to, and presenting evidence at a hearing. Summaries of the parties' arguments similarly do not account for the Secretary's determinations about how to best allocate limited agency enforcement resources. The parties have little incentive to present these kinds of settlement "facts" to the Commission, especially when they run the risk that the

reviewing judge, having been made aware of each parties' litigation weaknesses (and having forced each party to divulge those vulnerabilities to the other party), may deny the settlement and order the parties to proceed to trial on the merits before the same judge. Thus, even if it were appropriate for Commission judges to evaluate the wisdom of the compromise, more thought would need to be given to the question of how the Secretary could adequately justify a proposed settlement without revealing "facts" subject to various privileges and pertaining to litigation strategy.

B. Even Assuming Judicial Review Under an Abuse of Discretion Standard, Section 110(k) Permits Percentage-Reduction Settlement of Multiple Citations

Finally, even assuming that the wisdom of the Secretary's settlement decisions is judicially reviewable under an abuse of discretion standard, the Court's rejection of the proposed settlement was nonetheless erroneous because Section 110(k) neither prohibits nor requires any particular form of settlement. Section 110(k) therefore cannot present a bar to the proposed settlement, which is structured as a uniform, across-the-board percentage reduction to all of the civil penalties at issue.

In practice, the Secretary uses more than one method to settle civil penalty contests under the Mine Act. In some cases, the Secretary negotiates settlements that are closely tied to MSHA's civil penalty formula found in 30 C.F.R. Part 100. In such "penalty formula settlements," the Secretary agrees to modify the citation to reflect revised determinations with regard to negligence, gravity, or some other factor. The proposed penalty is then recalculated by applying the Part 100 penalty formula to the citation as revised. In other cases, such as this "percentage-reduction settlement," the Secretary and the operator reach a compromise where the operator agrees to accept the citation as written along with a percentage reduction in civil penalty. The resulting penalty is not directly tied to MSHA's Part 100 formula.

The decision denying settlement here concluded that percentage-reduction settlements are, in and of themselves, suspect, if not wholly incompatible with Section 110(k) of the Mine Act. *See* Dec. at 1-2. It suggested that the Secretary may *only* negotiate penalty formula settlements that include adjusted gravity and negligence levels to account for the precise penalty reduction agreed to by the parties. *See* Dec. at 2.

Section 110(k) imposes no such limitations on the Secretary's discretion to structure settlements. Section 110(k) does not indicate any Congressional intent to limit the Secretary's prosecutorial discretion to negotiate percentage-reduction settlements, let alone provide meaningful standards for defining the limits of the Secretary's discretion. Nor does Section 110(k) indicate Congress's intent to require that the Secretary provide citation-by-citation "justification" for proposed settlement agreements to the Commission. The provision simply 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). The decision here reads highly specific and substantive limitations into a provision that contains no limitations at all.

Wholesale rejection of percentage-reduction settlements is also contrary to historical Commission practice. The Commission has approved numerous percentage-reduction settlements in the past. *See, e.g.*, Ex. C, Order to Modify Decision Approving Settlement, *Genwal Resources, Inc.*, Docket No. 2008-1422-R et al. (Oct. 12, 2012); Ex. D, Decision Approving Settlement, *Pine Ridge Coal Co.*, Docket No. WEVA 2009-71 et al. (Feb. 12, 2013). Indeed, as part of the joint U.S. Department of Labor-Commission efforts to reduce the backlog of Mine Act cases, the Commission adopted a strategy of facilitating "global settlements" that "dispose of cases expeditiously" by resolving multiple citations contained in "more than one

docket." *See* Ex. E, Federal Mine Safety and Health Review Commission and U.S. Department of Labor, *Final Report on the Targeted Caseload Backlog Reduction Project* at 6-7 *available at* http://www.fmshrc.gov/ 4DOL_FMSHRC_report.pdf (reporting 17 global settlement conferences involving 99 cases and 854 citations in the fourth quarter of 2011); *see also* Ex. F, *Case Backlog Reduction Project Joint Operating Plan* at 14 (Sept. 7, 2010), *available at* http://www.fmshrc.gov/ jointoperatingplan.pdf (adopting "global settlement conferences" facilitated by Commission judges as a backlog-reduction strategy). The concept of global settlements promoted in these reports – *i.e.*, the efficient resolution of multiple dockets through settlement – is no less applicable to settlements like this one that expeditiously resolve multiple citations within the same docket.

Finally, a sweeping rule prohibiting percentage-reduction settlements would eliminate an important enforcement tool. When an operator accepts the violations as issued and all agency findings are affirmed, the operator is on notice of expected future compliance, and a history of violations is established for future enforcement actions. Percentage-reduction settlements therefore permit the efficient and effective resolution of multiple violations – at a time when the contest rate remains at about 25 percent of all citations issued[2] – while still advancing the purposes of the Mine Act's enforcement scheme.

[2] *Statistics Single Source Page – Citation/Violation Statistics*, Mine Safety and Health Administration, http://www.msha.gov/stats/statistics.htm (last visited April 28, 2014).

CONCLUSION

Based on the foregoing, the Secretary requests that the Court grant the Motion for Reconsideration and approve the proposed settlement.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to Commission Procedural Rule 10, the undersigned conferred with the operator's counsel concerning this motion. American Coal reaffirmed its agreement with the settlement terms and does not oppose the Secretary's filing of this motion.

Suzanne F. Dunne
Attorney

CERTIFICATE OF SERVICE

I certify that one (1) copy of the foregoing **MOTION FOR RECONSIDERATION and SUPPORTING BRIEF** has been served on Respondent this 30th day of April, 2014, by sending the aforesaid copy by email and regular mail to:

Gary Broadbent, Esq.
Murray Energy Corporation
46226 National Road
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Suzanne Dunne

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FEB 21 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2012-397 A.C. No. 44-06864-286093-01
v.	
DICKENSON-RUSSELL COAL COMPANY, LLC, Respondent	Mine: Cherokee Mine

ORDER REJECTING AMENDED SETTLEMENT MOTION
ORDER FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge McCarthy

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 23, 2012, the Secretary of Labor,[1] through its Solicitor's Office, filed a motion seeking approval of a proposed settlement pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. The Solicitor requested that Citation No. 8190957 be modified to delete the significant and substantial designation and to reduce the proposed penalty from $971.00 to $500.00. The settlement, however, did not proffer any factual justification for the proposed modifications.[2]

On October 9, 2012, my office requested that the parties provide an amended settlement consistent with Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), which provides, inter alia, "[t]hat a motion to approve a penalty settlement shall include . . . facts in support of the penalty

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[1] During the pendency of this proceeding, the Secretary of Labor, Hilda Solis, resigned her post as Secretary effective January 22, 2013. Pending Senate confirmation of her successor, Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[2] The one citation at issue alleges that Respondent violated Cherokee Mine's Approved Emergency Response Plan by failing to provide multi-gas detectors at the Strata Refuge Alternative located on crosscut 116 along the No. 3 belt. The citation was designated as significant and substantial and MSHA proposed a penalty of $971.00. This case was originally designated for simplified proceedings pursuant to 29 C.F.R. 2700.102(b). After review of the record and discussions with the parties, it became apparent that this case was not appropriate for simplified proceedings. On December 3, 2012, I issued an Order Discontinuing Simplified Proceedings in accordance with 29 C.F.R. § 2700.104.

Exhibit A

agreed to by the parties." The Secretary declined to do so and expressed preference that the proposed settlement be rejected.

On October 15, 2012, I issued an Order rejecting the proposed settlement, which admonished the Secretary's Arlington counsel for a repeated refusal to comply with clear instructions from the Commission and the Office of Administrative Law Judges requiring factual support for proposed settlement submissions. This case was set for hearing on November 15, 2012, under separate cover.

On October 23, 2012, the Secretary filed an Amended Motion to Approve Settlement and Motion to Cancel Hearing. In the amended motion, the Secretary provided the following factual basis for the penalty reduction:

> . . . [t]he Secretary submits the fact that the Respondent contends that its practice is for every miner or group of miners to have a multi-gas detector accessible at all times. This practice, the Respondent contends, suggests that anyone going to the shelter would have a detector or be with a group that has one. The Secretary has determined that the violation was less likely to result in a serious injury. The Secretary also acknowledges that the number of people affected may have been lower than originally determined by the inspector because at least some of the miners the inspector observed near the refuge alternative may have been carrying multi-gas detectors in accordance with the company's practice.

Despite the Secretary's determination that less that three people may have been affected, the settlement did not propose that the citation be modified to reflect the Secretary's determination.[3] Similarly, the Secretary determined that the violation was "less likely to result in a serious injury," but did not request that the citation be modified accordingly. Instead, the Secretary unilaterally withdrew the S&S designation without seeking approval from the undersigned.

On November 1, 2012, my law clerk, Jason Riley, convened a conference call with counsel for the Secretary, Scott Hecker; Associate Regional Solicitor, Douglas White; and

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[3] While the Secretary is not required to amend the citation when proposing a small reduction in the proposed penalty, doing so helps create context for the Commission to ascertain the appropriateness of a penalty settlement. Ideally, when a reduction in the proposed penalty is based on, for example, a reduction in negligence, the settlement should specify the level of negligence the parties are willing to accept as part of the settlement. To state that "the negligence is lower than the Secretary previously determined" is too vague. Without knowing where the parties agree that the negligence falls on the spectrum, the appropriateness of the proposed settlement is difficult to discern, particularly in light of the terse, factual basis often provided to justify a reduction in a proposed penalty.

Respondent's counsel, Cameron Bell. At the discretion of the Court, the transcript of the call was incorporated into the record. During the call, the Secretary was asked to expound upon the argument that the Secretary retained authority to modify citations and remove S&S designations in the context of a settlement, without leave of the Commission.

Mr. Riley: . . . . Mr. Hecker, concerning the S&S designation, in the settlement you state that the Secretary has determined to delete the S&S designation but do not request that the S&S designation be removed by the judge. I believe you assert that it was within the prosecutorial discretion of the Secretary to do so. Can you please elaborate on the Secretary's position on this matter?

Mr. Hecker: Yes. Our motion contains case law in paragraph eight addressing the unreviewable discretion of designation of S&S. *Mechanicsville* is cited there, also *RBK Construction.* We believe those cases, these Commission cases, point to the fact that it's the Secretary's discretion to designate in the first instance an S&S finding on a violation and that it's our right to do so and that the Commission's purview is over the approval of the assessment on that violation. That's the Secretary's position and I believe has been the Secretary's position. Those cases are from 1993 and 1996 so it's a consistent position for an extended period of time.

. . . .

Mr. White: It's long been our position that the judge has authority - and there's no question about this - has authority to make ultimate determinations of S&S and unwarrantable findings after a hearing, but *prior to the hearing*, it is solely within the Secretary's discretion to charge or to designate or un-designate S&S and unwarrantable findings . . . our position is that the judge's discretion is to approve penalty settlements and if for example Dickenson and Russell had filed a pre-penalty contest here and we negotiated with them and settled with them before there had ever been a penalty proposed and we'd agreed to remove the S&S, the Commission would have clearly no authority over that. It's only in the context of a penalty that the authority to review the settlement arises and it is the penalty, that our position it's the penalty that they have the authority to review, not the designation of S&S or unwarrantable.

Conference Call Tr. at 1-2 (emphasis added).

Citing the Commission's decision in *Mechanicsville*, the Secretary claims authority to change the S&S status of a contested citation at any time prior to hearing. *Id., citing Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996). Such authority, the Secretary

argues, is consistent with the enforcement role delegated in the Mine Act and is analogous to the unreviewable prosecutorial discretion afforded when determining that a citation be vacated. As such, the Secretary claims that no factual basis is necessary for modification of the S&S designation prior to hearing.

In *Mechanicsville*, MSHA issued a citation for the operator's failure to install a windshield wiper on a front-end loader, and designated the citation as non-S&S. 18 FMSHRC at 878. After hearing, however, the judge determined that the danger posed by the violative condition warranted that the citation be designated as S&S. *Id.* On appeal, the Commission found that the S&S designation was an enforcement responsibility granted exclusively to the Secretary under the Mine Act, and that the judge erred in determining, on his own initiative, that the violation was S&S. *Id.* at 789. The Commission reasoned that, while section 104(d) gives the Commission authority to affirm, modify, or vacate a citation, a judge may not make additional findings and conclusions that are absent from the original pleading. *Id.*

The Secretary's reliance on *Mechanicsville* is misplaced. The question here is not whether the Secretary has the unreviewable discretion to designate a citation as S&S – it is clear that the Secretary is granted such exclusive authority. Rather, the issue presented is whether the Secretary can modify a citation offered in consideration for Respondent's acceptance of a contested civil penalty proposal without seeking approval from the Commission.

After an MSHA inspector issues a citation, the Secretary is afforded ample time to exercise prosecutorial discretion and modify a citation to correct for error or to more accurately reflect the conditions or practices at the mine. In accordance with MSHA policy, the Secretary may choose to pursue good-faith settlement efforts prior to contest or the formal filing of a civil penalty petition. Press Release, Mine Safety & Health Admin., US Dep't of Labor, MSHA to Start Using Pre-Assessment Conferencing Procedures, 11-1703-NAT (Dec. 1, 2011), *available at* http://www.dol.gov/opa/media/press/msha/MSHA20111703.htm. The Commission lacks jurisdiction to review such pre-contest settlements.

Once the operator contests the Secretary's proposed assessment of penalty, however, Commission jurisdiction attaches. 30 U.S.C. 815(d).

> .... When a proposed penalty is contested, the Commission affords an opportunity for a hearing, "and thereafter ... issue[s] an order, based on findings of fact, affirming, *modifying*, or vacating the Secretary's citation, order, *or proposed penalty*, or directing other appropriate relief." *Id.* (Emphasis added). *See also* 30 U.S.C. § 810(i)("The Commission shall have authority to assess all civil penalties provided in this Act"). Thus, it is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a

penalty based on record information developed in the course of an adjudicative proceeding. *See* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 89, 632-635, 656-657, 666-662, 906-907, 910-911, 1107, 1316, 1328-29, 1336, 1348, 1360.

The respective governing regulations adopted by the Commission and the Secretary regarding penalty assessments clearly reflect the Act's bifurcated penalty assessment procedure. Commission Rule of Procedure 29(b) provides:

> In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary. . . .

29 C.F.R. § 2700.29(b). The Secretary's regulations in 30 C.F.R. Part 100 expressly apply only to the Secretary's proposed assessment of penalties. *See also* 47 Fed. Reg. 22287 (May 1982) ("If the proposed penalty is contested, the [Federal] Mine Safety and Health Review Commission exercises independent review and applies the six statutory criteria without consideration of these [MSHA penalty assessment] regulations.")

See Sellersberg Stone Co., 5 FMSHRC 287, 291 (Mar. 11, 1983) (emphasis in original).

Section 110(k) provides for Commission oversight of settlements where the Secretary has agreed to compromise or mitigate a proposed penalty. The Act provides for this independent review to guard against possible abuses of the Secretary in proposing settlements that are inconsistent with the public interest or the Act's objectives. *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).[4] In proposing a settlement, the Secretary historically has moved the Commission to amend the penalty and modify the citation itself. *See, e.g., Energy Fuels Coal, Inc.*, 11 FMSHRC 78 (Jan. 1989) (ALJ) (approving Secretary's request that S&S designation be removed); *Consolidation Coal Co.*, 13 FMSHRC 473 (Mar. 1991) (ALJ) (approving Secretary's request that S&S designation be removed); *Jim Walter Resources, Inc.*, 1992 WL 534707 (Aug.

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[4] After acknowledging the secretive nature of the settlements entered into by Mining Enforcement and Safety Administration (the predecessor to MSHA prior to 1978), Congress intended that any settlement of mining violations be in the public record. "The Committee recognizes that settlement of penalties often serves a valid enforcement purpose. The provisions of Section 111(1) only require that such settlements be a matter of public record and approved by the Commission or Court." S. Rep. No. 950181, 95th Cong. 1st Sess. 45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In granting the Commission review over settlements, Congress purposely curtailed the Secretary's enforcement role in favor of transparency and judicial oversight.

1992) (ALJ) (approving parties' joint motion to remove the S&S designation); *Harvey W. Buche Road Building, Inc.*, 27 FMSHRC 395 (Apr. 2005) (ALJ) (approving settlement modifying citation's negligence designation).[5] Such motions make eminent sense as the penalty and the citation allegations are inextricably linked.[6]

In assessing the appropriateness of a proposed settlement, the Commission and its judges must consider the operator's history of prior violations, the size of the operator's business, the operator's negligence, the effect of the operator's ability to continue business, the good faith of the operator to achieve rapid abatement of the violation, the penalty's deterrent effect, *and the gravity of the violation.* 30 U.S.C § 820(i)(emphasis added); *See Black Beauty Coal Co.*, 34 FMSHRC ___, slip op. at 10, Docket No. LAKE 2008-327 (Aug. 20, 2012). The S&S designation is an important indicator of gravity. While the S&S designation itself does not directly affect the proposed penalty under the Part 100.3 criteria that the Secretary uses to formulate proposed civil penalties,[7] the Commission has held that S&S determination must be premised on findings that the violation contributed to a discrete safety hazard that was reasonably likely to result in an injury of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). By agreeing to remove the S&S designation in a proposed penalty settlement, the Secretary essentially concedes, for purposes of settlement, that injury was unlikely. Such a concession has direct implications on the appropriateness of the Secretary's proposed penalty and

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[5] The Commission has created settlement templates. Although the parties are not required to use the Commission-created settlement templates, 29 C.F.R. §2700.31 requires parties to include all pertinent information, which is presumably outlined in the template. The templates instruct parties to provide changes to both the penalty and citation itself. Federal Mine Safety & Health Review Comm'n, *Settlement Order Flow Chart, Washington DC Office*, http://www.fmshrc.gov/flowchart.pdf (last visited February 21, 2013).

[6] In *Rock N Roll Coal, Inc.*, the Secretary argued that a change in penalty was justified if the Secretary simply stated that the citation was modified from a 104(d)(1) citation to a 104(a) citation and the level of negligence reduced from "high" to "moderate." 33 FMSHRC 3253 (Dec. 2011) (ALJ). The Secretary made similar assertions in the present case prior to issuance of my first Order Rejecting Settlement. *See Dickenson-Russell Coal Company, LLC*, 2012 WL 6494599 (Oct. 2012). If the Secretary can also amend the citation in a contested matter without Commission review and approval, section 110(k) would be rendered meaningless. The Secretary would be able to amend the citation without review, and then use the fact that the citation was amended to justify the change in penalty.

[7] The Commission and its judges are not required to follow Part 100.3 penalty formulation when assessing a penalty. 29 C.F.R. § 2700.30(b). As the Seventh Circuit recognized, as an independent adjudicatory agency, the Commission is not bound by rules promulgated by the Secretary. *Sellersburg Stone Co.*, 736 F.2d 1147, 1152 (7th Cir. 1984) (The Commission "is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary.")

is subject to the same judicial review afforded proposed penalty revisions.[8]

In light of the foregoing, I reject the proposed settlement agreement in which the Secretary seeks to unilaterally remove the S&S designation after the proposed assessment of penalty has been contested before the Commission. I find that such action contravenes the intent of Congress set forth in the foregoing legislative history concerning Commission oversight of the settlement approval process, as sanctioned by the language in Section 110(k) of the Mine Act, which provides that no proposed penalty which has been contested shall be settled, except with the approval of the Commission. Accordingly, I conclude under *Black Beauty, supra*, that the Secretary may not modify a contested citation, including the S&S designation, in the settlement of a civil penalty proceeding, without Commission approval. Furthermore, as I found in *Rock N Roll Coal, supra,* I find that any such modifications offered in consideration for Respondent's acceptance of a contested civil penalty proposal should be supported by adequate factual foundation, as set forth in Commission Rule 31(b).

The Secretary has shown an unwillingness to accept this case law and the rationale supporting prior settlement rejections by Commission Administrative Law Judges. *See Black Beauty Coal Co.,* 34 FMSHRC ___, slip op., Docket No. LAKE 2008-327 (Aug. 20, 2012); *Rock N Roll Coal, Inc.*, 33 FMSHRC 3253 (Dec. 2011) (ALJ); *Dominion Coal Corp.*, 34 FMSHRC ___, slip op., Docket No. VA 2012-227 (October 17, 2012) (ALJ); *Dickenson-Russell Coal Company, LLC*, 2012 WL 6494599 (Oct. 2012) (ALJ); *The American Coal Co.* 35 FMSHRC ___, slip op., Docket No. LAKE 2011-13 (February 11, 2013). Absent a ruling from the Commission on this matter, I do not expect the Secretary to abandon this position.

Commission Rule 76(a), 29 C.F.R. § 2700.76(a), provides that, upon the motion of the judge or a party, the Commission may grant interlocutory review where the judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. Although the parties have not moved that the issue presented by this case be certified for interlocutory review, the large number of settlement motions filed for approval with the Commission warrants further clarity as to the Commission's role in reviewing proposed settlements.[9] Further, the scope of the Commission's authority to review non-

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[8] Sometimes during settlement negotiations, an operator will accept an originally proposed penalty in return for removal of an S&S designation. In such cases, the appropriateness of the penalty is difficult to ascertain absent justification for removal of the S&S designation. Even if I were to adopt the Secretary's argument that section 110(k) limits the Commission's review of settlements to penalties alone, the fact remains that, in such an arrangement, the parties are still settling the underlining civil penalty and the Commission must review the parties' justifications for such settlement.

[9] While the Secretary has not moved for interlocutory review in the present case, the Secretary did so in *Black Beauty Coal, supra. See* Secretary's Unopposed Motion for Certification for Interlocutory Review and for Continuance of Hearing, *Black Beauty Coal Co.*,

pecuniary settlement provisions is obscured by a split decision in *Madison Branch Management*, 17 FMSHRC 859 (June 1995).[10]

I find that it will materially advance the final disposition of the present case (and many others like it) by certifying for interlocutory review the issue of whether the Secretary can remove the *contested* S&S designation without leave of the Commission. If the Commission were to reverse my rejection of the settlement motion, it would be unnecessary to reschedule this case for hearing. Further, there would be no need for the Secretary to seek Commission approval when proposing to modify a citation that has been contested. Under the Secretary's theory, which I reject, Commission approval would merely extend to a proposed penalty settlement. Accordingly, I conclude that review by the Commission will materially advance resolution of this proceeding and possibly hundreds of other settlements pending before Commission judges.

WHEREFORE, the Secretary's Amended Settlement Motion is **DENIED** and it is **ORDERED** that the following questions are **CERTIFIED** for review: (1) Whether the Secretary can remove the S&S designation without leave of the Commission in settlement of a proposed assessment of civil penalty that has been contested? (2) Whether the Act authorizes Commission review of non-pecuniary settlement provisions?

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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32 FMSHRC 714 (June 2010) (LAKE 2008-327, LAKE 2008-590, LAKE 2009-224) (Secretary moved to certify, inter alia, "whether, in a settlement context just as in an enforcement context, the Secretary has unreviewable prosecutorial discretion to modify: (a) a citation from 'significant and substantial' ("S&S') to non-S&S; and (b) a Section 104(d) citation/order to a Section 104(a) citation/order"). The judge, however, certified the following questions for review: (1) what requirements, if any, an administrative law judge may impose upon the Secretary to demonstrate the six penalty criteria as they relate to a modified penalty in a settlement context, and (2) whether an administrative law judge may consider the deterrent purposes that underlay the penalty scheme in reviewing a settlement proposal. Accordingly, the Commission did not have occasion to pass on the important issues presented here.

[10] In *Madison Branch*, *supra*, the judge rejected a settlement based on the inadequacy of the abatement measures and ordered the parties to provide additional information explaining why the proposed inspection program would be adequate to abate the hazard. 17 FMSHRC at 864. In a split decision, Commissioners Jordan and Marks found that section 110(k) "requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." *Id.* at 867, 868. Commissioners Doyle and Holen dissented, concluding that the plain meaning of the Act and the associated legislative history, which is limited to penalty settlements, proscribes the Commission from considering non-monetary settlement provisions. *Id.* at 870-73.

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October 17, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2012-227 A.C. No. 44-07220-000278305
v.	
DOMINION COAL CORPORATION, Respondent	Mine: Mine No. 44

ORDER REJECTING SETTLEMENT MOTION AND NOTICE OF HEARING

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement.[1] The Solicitor has requested that Citation No. 8194686 be modified to reduce the type of injury that could reasonably be expected to occur to "permanently disabling," and reduce the penalty from $1,111.00 to $777.70.

The motion submitted by the Solicitor, however, fails to predicate the modifications upon any factual support. Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), mandates that the motion to approve settlement must include "facts in support of the penalty agreed to by the parties" for each violation. The Arlington Solicitor's Office has been on notice of the Commission's clear instructions to provide a factual basis for each and every settlement. *Black Beauty Coal Company*, 34 FMSHRC ___, slip op. (LAKE 2008-327, LAKE 2008-590, & LAKE 2009-2240) (Aug. 20, 2012) (unanimously finding that Commission judges are authorized to require parties to submit factual support necessary for the proper review of proposed settlements of contested civil penalties). The Secretary may not continue to act in blatant disregard of the Mine Act, Commission Rules, and previous orders unless an appeals court overturns the well-established principles set forth in the Commission's *Black Beauty*

[1] Section 110(k) of the Mine Act states that: "no proposed penalty which has been contested before the Commission under Section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 C.F.R. § 820(k).

Exhibit B

decision.

The settlement documents were filed on October 3, 2012. Immediately thereafter, the solicitor was sent an email informing him that a revised Motion and Order were needed including a factual basis for the modifications. No revision has been received.[2] The Secretary is acting in direct contravention of my Order as well as recently issued Commission decisions and obstructing the judge's authority and responsibility to enforce the intent and purpose of the Mine Act.

Therefore, the Motion to Approve Settlement is **REJECTED** and the parties are **ORDERED** to appear for a hearing on the merits of the case on November 8, 2012.

NOTICE OF HEARING/ NOTICE OF HEARING SITE

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq., **this case is set for hearing on November 8, 2012, commencing at 8:30a.m.** The location is:

Southwest Virginia Higher Education Center
One Partnership Circle
Abingdon, VA 24210
Conference Room 228

The hearing will be conducted in accordance with the Mine Act and the Commission's Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are whether the Respondent violated the Act and the cited regulatory standards, and if so, the level of gravity and degree of negligence of those violations which are proved, as well as the appropriate civil penalty to be imposed.

The parties are reminded to comply with the terms of my Prehearing Order previously issued. It is further ordered that any party intending to offer exhibits at the hearing shall submit, five (5) days prior to the commencement of the hearing, a marked copy of all exhibits to the opposing party

[2] As set forth in Judge McCarthy's recent Order rejecting settlement, the Arlington Office has repeatedly submitted settlement documents lacking any factual information. In a recent revised Order and Motion submitted in Docket No. WEVA 2010-1585, pursuant to my Order to submit the factual basis for the proposed settlement, the Solicitor included in his Order the following: "The Secretary is voluntarily providing additional information in support of her Motion to Approve Settlement in this case at the request of the administrative law judge, but preserves her right to argue in other cases that neither the Act nor the applicable legal principles require such information to be provided." It is clear from this course of conduct that the solicitors involved in these matters have no intention of following the rulings of this Commission, the orders of its Administrative Law Judges.

and the judge. The Secretary's exhibits shall be designated "S-#" and Respondent's exhibits shall be designated "R-#." Exhibits shall be clearly marked and numbered seriatim. If opposing counsel has an objection to the admission of any exhibit, they shall state the grounds for the objection in writing and submit it to the judge and opposing counsel at least three (3) days prior to the commencement of the hearing.

A list of witnesses (including experts) and a statement as to their expected testimony (and copy of any report prepared by an expert) shall also be exchanged by the parties with a copy submitted to the judge five (5) business days prior to the commencement of the hearing.

Any stipulations agreed upon by the parties shall be submitted to the judge three (3) days prior to the commencement of the hearing.

Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. § 2706.150(a) and § 2706.160(d).

If a settlement is reached after November 5, 2012, the parties are directed to appear at the hearing. In the event of a settlement reached before this date, the Secretary is directed to contact my law clerk, Maggie Palmer, at 202-233-4015 or at mpalmer@fmshrc.gov immediately. Unless a written Order is issued upon my direction removing the matter from the docket, the parties are directed to appear at the time and place designated for hearing.

No continuances will be granted.
If you have any questions or concerns, please contact Ms. Palmer.

Priscilla M. Rae
Administrative Law Judge

Distribution:

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