

Hon. William B. Moran

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

**MOTION TO APPROVE SETTLEMENT AND DISMISS PROCEEDING**

The Secretary of Labor (hereinafter "Secretary"), by the undersigned attorney, hereby moves to dismiss this proceeding and for the Administrative Law Judge to approve the negotiated settlement between the parties pursuant to section 110(k) of the Federal Mine Safety and Health Act of 1977. As reasons for the motion, the attorney for the Secretary states:

1. On March 16, 2017, in relation to this matter, the Secretary filed a Motion to Dismiss his Petition with the Court of Appeals for the District of Columbia. On March 28, 2017, the Court of Appeals granted the Secretary's Motion to Dismiss.
2. On March 28, 2017, the Secretary filed a Motion to Lift the Stay in this case with the Federal Mine Safety and Health Commission. The Motion to Lift the Stay is currently pending before the Commission.
3. The parties are filing this motion to approve settlement and dismiss proceeding with the Court so that this Court can consider the filing as soon as the Commission lifts its stay.
4. The attorney for the Secretary and the representative for the Respondent have discussed

the alleged violations and the six statutory criteria stated in Section 110 of the Federal Mine Safety and Health Act of 1977.

2. Pursuant to those discussions an agreed settlement has been reached between the parties in the amount of \$31,063.00. The original assessment for the alleged violations was at \$44,376.00.

4. After the court's original rejection of the Secretary's proposed settlement in 2014, this case was transferred to the undersigned attorney in the Office of the Solicitor. Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute.

5. If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks— a worst-case outcome the Secretary does not believe would occur but is obligated to consider—the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not

appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose.

6. The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act.

7. Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act.

8. Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified.

9. Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged

levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

**10.** The parties have entered into the following stipulation of facts:

(a) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

(b) The American Coal Company's operations affect interstate commerce.

(c) At all times relevant to the instant proceeding, The American Coal Company owned and operated the New Era Mine.

(d) The American Coal Company extracts bituminous coal.

(e) The New Era Mine produced over 6,200,000 production tons during the annual period preceding these violations.

(f) Respondent produced over 26,000,000 tons of coal at all its mines during the annual period preceding these violations.

(g) Respondent had 1,042 violations in the 15-month period preceding these violations.

(h) The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of The American Coal Company on the date indicated therein.

(i) The payment of \$31,063.00 will not affect Respondent's ability to continue in business.

11. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding to date.

12. Payment shall be made to:

U.S. Department of Labor/MSHA  
P.O. Box 790390  
St. Louis, MO 63179-0390.

In view of the foregoing, the Secretary requests that her motion be granted and the settlement agreed to between the parties be approved.

Respectfully submitted,

**NICHOLAS GEALE**  
Acting Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor



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Attorney

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For **EDWARD C. HUGLER**, Acting  
Secretary of Labor, United States  
Department of Labor, Petitioner

**CERTIFICATE OF CONSENT**

Counsel for the Secretary has conferred with representative for Respondent, Allen McGilton, and certifies that counsel for Respondent has reviewed the motion and has authorized counsel for the Secretary to represent that Respondent consents to the granting of this motion and the proposed order approving settlement.

Respectfully submitted,

**NICHOLAS GEALE**  
Acting Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor



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For **EDWARD C. HUGLER**, Acting  
Secretary of Labor, United States  
Department of Labor, Petitioner

**CERTIFICATE OF SERVICE**

I certify that one copy of the foregoing **MOTION TO APPROVE SETTLEMENT AND DISMISS PROCEEDING** was served on Respondent this 29 day of March, 2017, by sending the aforesaid copy by e-mail and by first class mail to:

Gary Broadbent, Esq.  
Allen McGilton  
Murray Energy Corp.  
46226 National Road  
St. Clairesville, OH 43950



**SUZANNE F. DUNNE**

Attorney

U.S. Department of Labor