

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / Fax 202-434-9949

January 11, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

APPALACHIAN RESOURCE WEST
VIRGINIA, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2022-0301
AC No. 46-08930-551112

Mine: Grapevine South Surface Mine

DECISION APPROVING SETTLEMENT

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement for the citations and orders involved in this matter. The parties move to modify the citations and orders, as stated below.¹ The total penalty would be reduced accordingly, from the original assessed amount of **\$29,668.00** to **\$23,365.00**. Although the overall reduction for the docket is 21%, two of the citations each received a penalty reduction of **80%**.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9563136 (Associated 104(b) Order No. 9563148)	\$626.00	\$626.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 777D Caterpillar Haulage Truck Sustained as Issued- No penalty reduction
9563137 (Associated 104 (b) Order No. 9563147)	\$453.00	\$453.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning signal and brake lights, audible warning alarm. Sustained as Issued - No penalty reduction

¹ This docket originally consisted of 33 citations/orders, until 16 of the citations/orders were reallocated into WEVA 2022-0428. Order for Docket Reallocation, June 29, 2022.

9563138 (Associated 104(b) Order No. 9563177)	\$934.00	\$934.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on D10R Caterpillar Dozer Co. No. D007. Sustained as Issued- No penalty reduction
9563139	\$407.00	\$407.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning lights on D10R Caterpillar Dozer Co. No. D007. Sustained as Issued- No penalty reduction
9563140	\$296.00	\$296.00	Violation of 30 C.F.R. § 77.1605(k), no berm provided on three sumps along elevated haulroad. Sustained as Issued-No penalty reduction
9563141 (Associated 104(b) Order No. 9563182)	\$11,149.00	\$9,918.00	Violation of 30 C.F.R. § 77.1605(d), non-functioning signal, brake, and high beam lights, non-functioning horn. Penalty Reduction of 11%
9563142 (Associated 104(b) Order No. 9563181)	\$1,393.00	\$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785D Caterpillar Haulage Truck Co. No. RT111. Sustained as Issued- No penalty reduction
9563143 (Associated 104(b) Order No. 4563178)	\$1,393.00	\$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785C Caterpillar Haulage Truck Co. No. RT269. Sustained as Issued- No penalty reduction
9563144	\$1,471.00	\$296.00	Violation of 30 C.F.R. § 77.1001, spoilbank not stripped for a safe distance from top of the pit, not sloped to the angle of repose, toe of spoilbank has been dug out, is not bermed off to prevent unauthorized access. Modify the gravity from “reasonably likely” to “unlikely” and from “S&S” to “non-S&S” with a penalty reduction in accordance with 30 C.F.R. part 100.3. Penalty reduction of 80%.

9563145	\$1,253.00	\$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 980G Caterpillar Front-End Loader Co. No. 1893. Sustained as Issued- No penalty reduction
9563146 (Associated 104(b) Order No. 9563180)	\$1,393.00	\$1,393.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785D Caterpillar Haulage Truck Co. No. RT112. Sustained as Issued- No penalty reduction
9563149	\$1,253.00	\$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 992G Caterpillar Front-End Loader Co. No. L001. Sustained as Issued- No penalty reduction
9563150	\$133.00	\$133.00	Violation of 30 C.F.R. § 77.1110, no permanent tag on portable fire extinguisher on 992G Caterpillar Front-End Loader Co. No. L001. Sustained as Issued- No penalty reduction
9563151	\$1,253.00	\$1,253.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on Mack Fuel and Oil Service Truck Co. No. GT400. Sustained as Issued- No penalty reduction
9563152	\$4,884.00	\$987.00	Violation of 30 C.F.R. § 77.1004(b), Modify the gravity from “reasonably likely” to “unlikely” and from “S&S” to “non-S&S” with a penalty reduction in accordance with 30 C.F.R. part 100.3. Penalty reduction of 80%.
9563153	\$716.00	\$716.00	Violation of 30 C.F.R. § 77.1605(d), reverse lights, horn in operator’s cab of White Dodge Blasting Truck not functioning properly. Sustained as Issued- No penalty reduction

9563154	\$661.00	\$661.00	Violation of 30 C.F.R. § 77.410(c), reverse warning alarm on 993K Caterpillar Front-End Loader Co. No. L465 not maintained in functional condition. Sustained as Issued- No penalty reduction
TOTAL	\$29,668.00	\$23,365.00	Total penalty reduction of 21%

Section 104(a) citations were issued for citation Nos. 9563136, 9563137, 9563138, 9563141, 9563142, 9563143, and 9563146. These were followed up with section 104(b) orders. As the Commission has noted:

[t]he purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. ... The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply. See 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

Hopkins County Coal, 38 FMSHRC 1317, 1335-1336 (June 2016) (emphasis added).

For reasons not discernable to the Court, it cannot find a legitimate basis to support the Secretary's decision to hide the duly issued 104(b) orders associated with seven citations in this docket, all as identified above.²

The 104(a) citations, together with the associated (b) orders, are discussed here and will be followed by a summary analysis.

Citation No. 9563136

Citation No. 9563136 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this

² Citation Nos. 9563139, 9563140, 9563144, 9563145, 9563149, 9563150, 9563151, 9563152, 9563153, and 9563154 were issued as 104(a) citations, and received a 10% penalty reduction for good faith. All citations and orders in this docket were regularly assessed.

standard specifies that “[e]quipment defects affecting safety shall be corrected before the equipment is used.” 30 C.F.R. § 77.1606(c).

The citation stated:

The following defects affecting safety existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:

1. A large knot existed on the side wall area of the left rear outside tire.
2. Oil was leaking from the right rear inside wheel area.

This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the operator, 0 to a contractor).

Pet. for a Civil Penalty at 19.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* The violation was not found to be significant and substantial. *Id.* Negligence was found to be “low.”

Section 104 (b) Order No. 9563148 was issued in association with this citation on January 13, 2022. The (b) Order was provided by the Respondent’s attorney. The Court appreciates that cooperation. The order read:

An apparent effort was not made by the operator to correct all the conditions that were cited by MSHA on the 777D Caterpillar Haulage Truck Co. No. M03-546. This truck was being operated in the Grapevine North Pit Area with oil still leaking from the right rear inside wheel area.

Standard 77.1606(c) was cited **50 times** in two years at mine 4608930 (50 to the operator, 0 to a contractor).

104(b) Order Addendum at 3 (emphasis added). The order was terminated on January 19, 2022, with the justification that

The following actions have been taken to correct the following conditions:

1. A new tire has been installed
2. Tighten up the bolts and steam cleaned.

Id. at 4.

Thus, this (b) order reflects serious non-compliance with the underlying 104(a) citation, with the truck continuing to be operated in the Grapevine North Pit Area with one of the cited defects still uncorrected. It is noteworthy that the cited standard was cited 50 times, all to the mine operator in the past two years.

Citation No. 9563137

Citation No. 9563137 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1605(d). Titled “Loading and haulage equipment,” the standard specifies that “[m]obile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required.” 30 C.F.R. § 77.1605(d).

The citation stated:

The following conditions existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:

1. Both front marker/signal lights were not functioning when tested.
2. Both rear brake lights were not functioning when tested.
3. The left rear signal light was not functioning when tested.
4. The Level 3 audi[b]le warning alarm which is located inside the operators cab was not functioning when tested.

This truck was being operated in the Grapevine North Pit Area. This truck is operated before and after daylight hours. Mobile equipment shall be provided with audible warning devices.

Lights shall be provided on both ends when required

Standard 77.1605(d) was cited 16 times in two years at mine 4608930 (16 to the operator, 0 to a contractor).

Petition at 20.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* The violation was not found to be significant and substantial. *Id.* Negligence was found to be “low.” *Id.*

Section 104(b) Order No. 9563147 was issued as a 104(b) order in connection with Citation No. 9563137 on January 13, 2022. The order read:

No apparent effort was made by the operator to correct all the conditions that were cited by MSHA on the 777D Caterpillar Haulage Truck Co. No. M03-546. This truck was being operated in the Grapevine North Pit Area with all the conditions still existing.

Standard 77.1605(d) was cited 19 times in two years at mine 4608930 (19 to the operator, 0 to a contractor).

104(b) Order Addendum at 1.

The order was terminated on January 19, 2022, with the justification that:

The following actions have been taken to correct the following conditions:

1. A new light has been installed and the wiring repaired.
2. New lights have been installed and the wiring repaired.
3. A new light has been installed and the wiring repaired.
4. The wiring has been repaired.

Id. at 2.

In the Court's estimation this continued failure to correct multiple lighting defects along with a defective non-audible warning alarm is worse than the failure discussed just above because *none* of the cited defects had been corrected at the time the (b) order was issued and the truck continued being operated in the Grapevine North Pit Area.

Citation No. 9563138

Citation No. 9563138 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the D10R Caterpillar Dozer Co. No. D007:

1. A gap existed in the top corner of the right hand door to the operators cab. With the door closed completely the outside of the cab was still visible.
2. Bolts were missing in the floor board allowing the floor board to be loose and not properly sealed.
3. Oil was leaking out the right side final drive.
4. Oil could be seen leaking on the right side out of the frame of the dozer.
5. The seat in the operators cab is bottomed out.

This dozer was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the operator, 0 to a contractor).

Petition at 21.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "permanently disabling," affecting one person. *Id.* The violation was not found to be significant and substantial. *Id.* Negligence was found to be "low." *Id.* The citation was continued on January 13, 2022, with the justification that:

Repairs are still being conducted at this time. Most of the repairs have been completed. The mine operator removed the dozer from service until the repairs could be completed, so more time has been granted.

Id. at 22.

The citation was continued again on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 23.

The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. The following repairs have been completed 1, 2, 4, and 5. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 24.

Section 104(b) Order No. 9563177 was issued on February 1, 2022, in association with Citation No. 9563138.

The citation read:

A reasonable effort was not made by the mine operator to insure all conditions were corrected on the D10R Caterpillar Dozer Co. No. D007. Oil was still leaking from the right side of the dozer. Oil could be seen coming out the right side frame of the dozer. This dozer was being operated in the Grapevine North Pit Area with this condition still existing.

Standard 77.1606(c) was cited 56 times in two years at mine 4608930 (56 to the operator, 0 to a contractor).

104(b) Order Addendum at 5.

The order was terminated on February 3, 2022, with the justification that:

The following actions have been taken to correct the following conditions:

1. New door striker and door seals have been installed.
2. All of the bolts have been installed and is now securely in place.

3. New final drive has been installed.
4. New hoses and O-rings have been installed.
5. A new seat has been installed.

Id. at 6.

Despite generous forbearance on the part of the MSHA inspector, after issuing multiple continuances allowing additional time to correct the five separate defects found on a Caterpillar dozer, the inspector was compelled to issue a 104(b) order after three weeks had passed without *all* the defects having been corrected. As with the two previous orders discussed above, the vehicle continued to be operated in the Grapevine North Pit Area. For one keeping score, that means *three* pieces of equipment with defects were all operating in the same area. The Order contradicts claims that the equipment had been taken out of service until the repairs were completed.

Citation No. 9563141

Citation No. 9563141 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1605(d), *supra*. The citation read:

The following conditions existed on the 785D Caterpillar Haulage Truck Co. No. RT111:

1. The left and right side front signal/marker lights are not functioning when tested.
2. The left side high beam light is not functioning when tested.
3. The left and right side rear signal lights are not functioning when tested.
4. The left and right side brake lights are not functioning when tested.
5. The horn was not functioning when tested.

This truck was being operated in the Mill Seat Pit Area (Alma). This truck operates before and after daylight hours. Mobile equipment shall be provided with audible warning devices,

Lights shall be provided on both ends when required. These conditions have been recorded on the Pre-Operational Examinations and reported to the mine operator.

Standard 77.1605(d) was cited 18 times in two years at mine 4608930 (18 to the operator, 0 to a contractor).

Petition at 29.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably be expected to be “fatal,” affecting one person. *Id.* The violation was not found to be significant and substantial. *Id.* Negligence was found to be “high.” *Id.* The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 30.

The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 31.

Section 104 (b) Order No. 9563182 was issued on February 1, 2022, in association with Citation No. 9563141. The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785D Caterpillar Haulage Truck Co. No. RT111. 5 of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed
Standard 77.1605(d) was cited 21 times in two years at mine 4608930 (21 to the operator, 0 to a contractor).

104(b) Order Addendum at 15. The citation was terminated on February 8, 2022, with the justification that:

The following actions have been taken to correct the conditions:

1. Repaired the wiring to the lights.
2. Repaired the wiring to the lights.
3. Repaired the wiring to the lights.
4. Repaired the wiring to the lights.
5. Installed a new steering column and hooked up horn to new column.

Id. at 16.

The Secretary moves to keep the citation as issued but reduces the penalty, offering the following in support:

Citation #9563141 will remain as issued with a reduction in penalty.

The Respondent contends that the gravity of the citation was overevaluated and should not have been issued as “fatal”. Respondent would argue at hearing that the

cited conditions would not cause fatal injuries to miners. Respondent contends that the cited truck still had numerous lights on both ends to indicate the location at low light. The few sporadic lights that were inoperative would not hinder the safe operations while in production. Secretary recognizes that the ALJ may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to reduce the penalty for Citation #9563141 from \$11,149 to \$9,918, and the Respondent has agreed to pay the reduced penalty.

Mot. to Approve Settlement at 3-4.

Citation No. 9563141, which involves an 11% (eleven percent) reduction in the penalty, is one of the internally inconsistent settlements about which the Secretary frequently partakes. Standing by the inspector's evaluation is the easy part of the arrangement because the issuing inspector found five, yes five, defects with the mine's 785D Caterpillar Haulage Truck Co. No. RT111, four of them related to inoperative lights and one for a horn that could not sound. Worse, if possible, *the defects were all recorded on the pre-op exams, but thereafter still ignored by the operator.* While one might guess that with all those defects and the operator not acting upon them, though informed of them, the Secretary would adhere to the proposed penalty, that guess would be wrong, as the Secretary agreed to knock 11% off the regularly assessed penalty. Thus, in the face of the 104(b) order the Secretary did want to be disclosed, the Secretary, by the 11% reduction, in effect monetarily awarded the 10% good faith reduction, which the initial assessment had declined.

On this record, which is all that the Court presently is permitted to have before it, there is no way that the Court could find merit, as the Secretary suggests, in the arguments presented. In fact, the Secretary finds no merit either, as it does not alter the inspector's evaluation. The inspector's (b) order related that *five* of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed. As with an earlier-discussed order, 20 days had elapsed since the citation was issued, with the result that on the 21st day, the (b) order was issued. Further, the only claim is that a fatality would not result, but support for that claim is not presented and the Respondent does not state the lesser degree of injury to be expected. No mention is made about the non-functioning horn, which itself is a significant safety defect.

Citation No. 9563142

Citation No. 9563142 was issued on January 11, 2022, for a violation of 30 C.F.R. §77.1606(c), *supra*.

The citation read:

The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT111:

1. Right front strut is leaking oil.
2. Right rear strut is leaking oil.
3. Oil is leaking from the right rear inside wheel area.
4. Oil is leaking from the right rear outside wheel area.
5. Oil is leaking from the left rear inside wheel area.
6. Excessive slack existed in the rear stabilizer bar (dogbone).
7. Excessive slack existed in the center arm pin.
8. The left front strut is leaking oil.
9. Oil is leaking from the right front brake caliper area.
10. Oil is leaking excessively from the steering oil tank onto the deck and down onto the right side of the engine compartment area.
11. Oil is leaking excessively from the area located behind the hydraulic tank.
12. Three gussets located on the right side of the truck was cracked and separated.
13. The right rear inside tire has excessive damage to the tire.

This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).

Petition at 32-33.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* at 32. The violation was not found to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.* The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 34.

The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 35.

Section 104 (b) Order No. 9563181 was issued on February 1, 2022, in association with Citation No. 9563142.

The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785D Caterpillar Haulage Truck Co. No. RT111. 4 of the conditions have not been corrected in a reasonable amount of time based on the conditions that existed
Standard 77.1606(c) was cited 60 times in two years at mine 4608930 (60 to the operator, 0 to a contractor).

104(b) Order Addendum at 13. The order was terminated on February 8, 2022, with the justification that:

The following actions have been taken to correct the conditions:

1. Installed a new strut.
2. Installed a new strut.
3. Installed new cooler seals.
4. Installed new wheel seals on axle cover.
5. Installed new cooler seals.
6. Installed new bearings.
7. Installed new bearing and pin.
8. Installed a new seal.
9. Installed new cooler seals.
10. Resealed the steering tank.
11. Resealed the back of the hydraulic tank.
12. Welded the gussets up securely.
13. Installed a new tire.

Id. at 14.

Breaking previous records for the citations in this docket, for this citation 13 (thirteen) separate defects were identified, none of which, in the Court's estimation, could be viewed as inconsequential. Part of what could only be described as a pattern for these citations, the (b) order was issued after some 20 days had elapsed with the order being issued on the 21st day. Three weeks is, undeniably, a long period of time for the repairs to have been accomplished. The inspector's order stated that a reasonable effort had not been made to correct all of the cited conditions within a reasonable amount of time. Having gained the operator's attention through the (b) order, the defects were then all corrected a week later.

Citation No. 9563143

Citation No. 9563143 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the 785C Caterpillar Haulage Truck Co. No. RT269:

1. The mud flap located underneath the operators cab is bent down, allowing mud to get on the drivers side rear view mirror and onto the window glass of the drivers side door.
2. The truck frame is cracked across the bottom and back side of the frame. The crack is located on the rear of the truck above where the stabilizer bar (dogbane) is located.
3. The right rear strut is leaking oil.
4. The right side rear wheel is leaking oil on the inside area of the wheel.
5. The left side rear wheel is leaking oil on the inside area of the wheel.
6. Oil is leaking from the steering oil tank area which is located on the top deck above the engine compartment. The oil is leaking down onto the right side of the engine compartment area.
7. Excessive slack existed in the right side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
8. Excessive slack existed in the left side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
9. The front brake canister is over stroked. There is no warning alarm or warning light on inside the operators cab.
10. The handrail located on the front bumper to the right side step is bent and missing a bolt.
11. The hood is broke near the offside door to the operators cab. This hood is also used as a walkway (deck) to access the offside door to the operators cab.
12. The fuel gauge located inside the operators cab was not functioning when tested.
13. Paper towels are wrapped around the door striker to the drivers side door to the operators cab.
14. Paper towels are installed around the top corner to the drivers side door to the operators cab.

This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment tis used.

Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).

Petition at 36-37.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably result in “lost workdays or restricted duty,” affecting one person. *Id.* at 36. The violation was found not to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.*

The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 38. The citation was continued again on January 24, 2022, with the same justification. *Id.* at 39.

Section 104 (b) Order No. 9563178 was issued on February 1, 2022, in association with Citation No. 9563143. The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT269. 6 conditions have not been corrected in a reasonable amount of time based on the conditions that existed.

Standard 77.1606(c) was cited 57 times in two years at mine 4608930 (57 to the operator, 0 to a contractor).

104(b) Order Addendum at 7. The order was terminated on February 10, 2022, with the justification that “All defects affecting safety, on the 785C Caterpillar Haulage Truck, Co. No. RT269, that is operated on the Mill Seat Pit Area (Alma), have been corrected by a qualified person.” *Id.* at 8.

The previous record for multiple defects, as just discussed, did not last long, as Citation No. 9563143 recorded 14 (fourteen) defects on yet another Caterpillar haulage truck. As with the other 104(a) citations, some three weeks passed before the inspector refused to grant additional continuations, issuing a (b) order. In a similar time frame, nine days later, the defects were finally corrected.

Citation No. 9563146

Citation No. 9563146 was issued on January 12, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT112:

1. An excessive oil leak existed on a hose located on the right front area of the truck. Oil was spraying out the hose.
2. An excessive oil leak existed in the area behind the hydraulic tank area. A steady streams of oil was coming from this area.
3. Oil was leaking from the right rear wheel. The inside area of the wheel was covered in oil and running down the sidewall of the tire.
4. The mud flap is missing from underneath the drivers side of the operators cab. The mirror and window glass of the drivers side door was covered in mud.
5. Oil was leaking from the filter area of the steering oil tank and running down onto the right side of the engine compartment.
6. Left rear brake temperature error indicator is coming on inside the operator's cab.
7. The warning light located next to the digital display is taped over.
8. The action warning light located on the dash board is staying on at all times.
9. Excessive slack existed on the right side steering jack inside ball stud. This slack was visible when the truck was steered in either direction.
10. The right side fender is damaged where the front head lights are located causing the lights to not face forwards completely.

This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.

Standard 77.1606(c) was cited 48 times in two years at mine 4608930 (48 to the operator, 0 to a contractor).

Petition at 44-45.

For gravity, likelihood of injury was found to be “unlikely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* at 44. The violation was not found to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.* The citation was continued on January 18, 2022, with the justification that:

Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 46. The citation was continued again on January 24, 2022, with the justification that:

Repairs are still being conduct at this time. Repairs to items 1, 2, 4, 6, 7, 9 and 10 have been completed. Repair work has been hampered by parts availability and

limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 47.

Section 104 (b) Order No. 9563180 was issued on February 1, 2022, in association with Citation No. 9563146.

The order read:

A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT112. 1 of the conditions has not been corrected in a reasonable amount of time based on the conditions that existed.

Standard 77.1606(c) was cited 59 times in two years at mine 4608930 (59 to the operator, 0 to a contractor).

104(b) Order Addendum at 11. The order was terminated on February 2, 2022, with the justification that:

The following actions have been taken to correct the following conditions:

1. A new metal tube and O-rings have been installed. Steamed cleaned the area.
2. Resealed the hydraulic tank, installed several hoses and O-rings. Steamed cleaned the area.
3. Resealed wheel unit and coolant brake tube. Also installed new wheel group. Steamed cleaned the area.
4. Installed a new mud flap. Cleaned the mirror and window glass.
5. Resealed the filter on the tank. Steamed cleaned the area.
6. A new brake sensor has been installed.
7. Repaired the wiring and downloaded the system. Also removed the tape.
8. Repaired the wiring and downloaded the system.
9. Installed a new ball stud.
10. Repaired the fender by bending the fender back into place.

Id. at 12.

With Citation No. 9563146, we return to multiple defects on another vehicle, this time 10 (ten) defects on Caterpillar haulage truck. Among the 10 were four instances of excessive oil leaks. Several of the other defects were significant matters such as: the left rear brake temperature error indicator is coming on inside the operator's cab; the warning light located next to the digital display was taped over; the action warning light located on the dashboard was staying on at all times; and there was excessive slack present on the right side steering jack inside ball stud. It cannot be denied that these constituted a significant number of defects. The truck was being operated in the Mill Seat Pit area at the

time of 104(a) citation's issuance. With the passage of some 18 (eighteen) days and matters still not all corrected, the inspector understandably issued a (b) order.

Further Analysis of the hidden (b) orders.

Presented with the Secretary's contention that the Commission has no business viewing section 104(b) orders where a citation is affirmed as issued and the proposed penalty is paid in full, the Court posits "Why stop there?"

There is no logical reason or distinction for the Secretary not to expand its 104(b) order ban to also prevent any and all 104(a) citations from the Commission's eyes post the filing of its civil penalty petition, blocking their review where a citation is paid in full with no changes to the inspector's evaluation. If that doesn't make sense, and the Court agrees it does not, there is similarly no rational basis to block review of (b) orders. Such orders are as much a part of the enforcement record as 104(a) citations.

One might also ask, "what's the harm?" The answer is that anyone reading the motion would be seriously misled about the enforcement history for these citations. On the face of the motion, one would not learn that the elevated enforcement step, issuance of section 104(b) orders, was required. This does a disservice to miners and the public. The Commission, in this Court's view, should not be a party to the incomplete recounting. To allow it is analogous to issuing a book with the last chapter missing, but with no alert to the reader that there was more to the story.

As discussed above, the 7 (seven) section 104(a) citations and the associated 104(b) orders each reflect important contextual information about these, now-admitted violations. In particular, the 104(b) orders each reflect that the mine operator took an undue period of time in correcting the numerous and consequential violations, so much so that the issuing inspector understandably had no reasonable option but to issue the orders. It is noteworthy that, for several of the orders, the inspector noted that the equipment continued to be operated in its defective condition. It is perplexing that the Secretary, acting through MSHA would take this recalcitrant attitude and that the mine operator, through its cooperative legal counsel, would be the source for the relevant information.

It is this Court's position that once a matter is contested, it is before the Commission. That means *all of it*, not selected portions of enforcement actions ensuing after issuance of citations. Full stop.

In its December 13, 2022, Order Certifying Case for Interlocutory Review, the Court noted the importance of (b) orders:

The structure of the Mine Act underscores the importance of 104(b) orders. As the Court noted in its June 22, 2022 Order in *Perry County Resources*, 44 FMSHRC 501 (June 2022),

The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. [The Citation in issue] is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.

A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:

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

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its

correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty.... 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and miners' representatives when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)].* The notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.').

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: “[t]he notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.*” *Id.* at 593. (emphases in original Order).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners’ representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court’s review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector’s issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis’ remark that “Sunlight is said to be the best of disinfectants.” *See, for example, Argus v. U.S. Dept Agriculture*, 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, 5 U.S.C. § 552. To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court’s determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis’ remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People’s Money* 92 (1914).

Id. at 503-506 (footnotes omitted).

Analysis for the settlement matters not involving the Secretary’s failure to supply the Section 104(b) orders

Two citations in the motion involve penalty reductions with modifications to the issuing inspector’s evaluations. They are discussed here.

Citation No. 9563144 Penalty Reduction of 80%

Citation No. 9563144 was issued as a 104(a) citation on January 11, 2022, for a violation of 30 C.F.R. § 77.1001. Titled “Stripping; loose material,” this standard specifies that “Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.” 30 C.F.R. § 77.1001.

The citation read:

The spoilbank located in the Grapevine North Pit Area (Alma) was not stripped for a safe distance from the top of the pit. The spoil bank was not sloped to the angle of repose. The toe of the spoilbank has been dug out. The spoilbank is not at the angle of repose in the pit and is 30 to 35 feet high. A coal loader was removing coal along the base of the spoilbank. The area along the toe of the spoil bank was not bermed off to prevent unauthorized access.

This condition exposes the person working underneath the spoilbank to the hazards that existed. It is reasonably likely of this condition continues to exist an accident will occur.

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection

Standard 77.1001 was cited 1 time in two years at mine 4608930 (1 to the operator, 0 to a contractor).

Petition at 40.

For gravity, likelihood of injury was found to be “reasonably likely,” and injury could reasonably be expected to result in “lost workdays or restricted duty,” affecting one person. *Id.* The violation was found to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.* The citation was terminated on January 13, 2022, with the justification that “[m]aterial has been dumped back into the pit to correct the hazardous spoilbank. The spoilbank is now at the angle of repose.” *Id.* at 41.

The Secretary moves to modify the citation, reducing likelihood to “unlikely” and removing the significant and substantial designation, offering the following in support:

Citation #9563144 will be modified to “unlikely” and “non S&S” gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as “reasonably likely” and “S&S”. Respondent would argue at hearing that the spoilbank was compacted in the cited area because of a previous haulroad overhead. Respondent further contends that the highwall did not show any indications of adverse conditions or failure at the present time and it was not currently raining.

The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563144. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from “reasonably likely” to “unlikely” and deleting the “S&S” finding, and reduce the penalty for citation #9563144 from \$1,471 to \$296, and the Respondent has agreed to pay the reduced penalty.

Motion at 4.

For Citation No. 9563144, involving a now-admitted violation of 30 C.F.R. § 77.1001 the Secretary’s Motion seeks to modify the likelihood of the injury from the inspector’s designation of ‘reasonably likely’ to ‘unlikely.’ The standard requires that loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose. Neither of these methods of compliance were present. To the contrary, and not contested, the inspector found that the spoil bank located in the Grapevine North Pit Area was not stripped for a safe distance from the top of the pit, nor was it sloped to the angle of repose. Aggravating matters, the toe of the spoil bank has been dug out and was not bermed off to prevent unauthorized access. Further, a coal loader was removing coal along the base of the spoilbank.

Addressing the basis for the unlikely designation, the Respondent contends that the spoil bank was compacted in the cited area because of a previous haul road overhead and that the highwall did not show any indications of adverse conditions or failure at the present time and it was not currently raining. None of these claimed justifications support the unlikely designation. Instead, they are of the alternative safety conditions which the federal courts of appeals have rejected when analyzing the significant and substantial designation.³ This is especially the case

³ Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

for the claim that adverse conditions or failure *at the present time* and that it *was not currently raining*. The Commission has made it clear that analysis of the likelihood is measured by continued normal mining operations.

In the face of all this, the Secretary has agreed to change the inspector’s evaluation of the gravity to unlikely, and by that change, the violation becomes redesignated as non-S&S. No word whether the Secretary sought input from the issuing inspector about the legitimacy of these changes. As for the S&S change to non-S&S, it is the Secretary’s position that it is justified simply because he can do so, with no rationale needed, as if it can be made apart from any gravity modification. The Court does not agree. In making the claim that the Secretary has independent discretion to remove the inspector’s ‘significant and substantial’ designation, the Motion asserts such discretion, citing inapplicable Commission decisions. This is incorrect, the removal of the ‘significant and substantial’ designation comes about only by virtue of the redesignation of the likelihood of occurrence, not apart from that.

To support the change that the injury is unlikely to occur, the Respondent asserts that the spoil bank was compacted in the cited area because of a previous haul road overhead and that the highwall did not show any indications of adverse conditions or failure *at the present time*. With

“[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply.”...Such a policy would make such standards “mandatory” in name only. It is therefore unsurprising that other appellate courts have concluded that ‘[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.’ *Cumberland Coal*, 717 F.3d at 1029; see also *Buck Creek*, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

interpreted the statutory text to focus on the “nature” of “the violation” rather than any surrounding circumstances. More to the point, the court held that “consideration of redundant safety measures,”—that is, “preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely”—“is inconsistent with the language of [Section] 814(d)(1).” *Id.* at 1028–1029.

Id. at 118-119.

no embarrassment, Respondent also adds that *it was not currently raining*. None of the assertions put forward by the Respondent speak to likelihood. The standard does not offer passes when no adverse conditions or failure exist *at the present time*, nor is there a ‘no *current rain*’ exception. The Secretary has overlooked that the test for evaluation is to assume ‘continued normal mining operations.’ *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

However, given the Commission’s test for a judge’s review of settlement motions and the Court’s understanding of the application of that test, this motion, as with virtually all such motions, passes muster. Therefore, the Court leaves it to the Commission if it determines that the Court misapprehends the review test in this instance.

Citation No. 9563152 Penalty Reduction of 80%

Citation No. 9563152 was issued on January 19, 2022, as a 104(a) citation, for a violation of 30 C.F.R. § 77.1004(b). Titled “Ground control; inspection and maintenance; general,” this standard specifies that “[o]verhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.” 30 C.F.R. § 77.1004(b).

The citation read:

The mine operator drilled 90 foot pre-line holes and blasted these holes in the Grapevine North Pit Area. The mine operator then stepped out away from the pre-line a considerable distance and drilled a 30 foot break down shot. *After the breakdown shot was removed this created another highwall that was in front of the pre-line that was already shot creating a false highwall. The mine operator was in the process of drilling another 30 foot breakdown next to the area that the false highwall existed.* This condition creates an unsafe ground condition. Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted. It is reasonably likely if these conditions continue to exist an accident will occur.

Petition at 69 (emphasis added).

For gravity, likelihood of injury was found to be “reasonably likely,” and injury could reasonably be expected to be “fatal,” affecting one person. *Id.* The violation was found to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.* The citation was continued on January 24, 2022, with the justification that “A shot has been put off and that material has been ramped back up towards the upper bench. Another shot is being blasted today to have more material to complete[] the ramp to be able to safely access the upper bench to start drilling. More time is needed to construct the ramp, drill the shot and blast.” *Id.* at 70. The citation was terminated on February 1, 2022, with the justification that “The highwall has been scotched by pushing material back up along the highwall. A road has also been completed to

access the upper bench. Drilling has already commenced on the upper bench to shoot back to the existing pre-lined highwall. The mine operator will not remove the material that is scotching the highwall until the upper bench has been shot back to the existing pre-lined highwall.” *Id.* at 71.

The Secretary moves to modify the citation, reducing gravity likelihood to “unlikely” and removing the significant and substantial designation, offering the following in support:

Citation #9563152 will be modified to “unlikely” and “non S&S” gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as “reasonably likely” and “S&S”. Respondent would argue at hearing that the top safety bench measured in excess of 60 feet. The highwall only measured 30 feet, so therefore it is highly unlikely that a highwall failure would occur from this ground control issue. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563152. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from “reasonably likely” to “unlikely” and deleting the “S&S” finding, and reduce the penalty for citation #9563152 from \$4,884 to \$987, and the Respondent has agreed to pay the reduced penalty.

Motion at 4-5.

Here, for this second ground control hazard, the Respondent asserts only that the top safety bench measured in excess of 60 feet while the highwall measured 30 feet. From this, the Respondent contends that it is highly unlikely that a highwall failure would occur from the admitted ground control issue. There is no explanation how those two distances correlate to support the assertion, and the Court, under current Commission decisional law, is precluded from making reasonable inquiries about this. Further, neither the Respondent nor the Secretary address the inspector’s remark that after the breakdown shot was removed that act created another highwall that was in front of the pre-line that was already shot, creating a false highwall, nor do they speak to the inspector’s uncontested statement that the mine operator was in the process of drilling another 30-foot breakdown next to the area that the false highwall existed.

Of a severity on a par with the other ground support violation just described, this time the now-admitted violation involved the requirement for overhanging highwalls and banks to be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted. None of those prophylactic steps were taken.

The Secretary does not inform whether he consulted with the issuing inspector about the operator's brief assertion to support the unlikely characterization based on the claim that there was a top safety bench in excess of 60 feet and that the highwall was only 30 feet. The inspector of course is the only person for the Secretary who had a "eyes on" to view the situation. Further, to the Court, a 30-foot high wall is not negligible. But, that is where things are – the Court is not permitted to make inquiries about these issues, and so, absent intervention by the Commission, the motion is to be approved.

These serious questions by the Court do not operate to reject the Motion as the Commission's test for approval of such motions is satisfied. However, given the Commission's test for a judge's review of settlement motions and the Court's understanding of the application of that test, this motion, as with virtually all such motions, passes muster. Therefore, the Court again leaves it to the Commission if it determines that the Court misapprehends the review test.

Reasonable Inquiry is not Permitted

Despite the Court's analyses and expressed concerns for Citation Nos. 9563144 and 9563152, it is not permitted to make reasonable inquiry about the contentions advanced in settlement motions. This is because, under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *AmCoal* and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

The Commission has stated that the administrative law judges have "**front line oversight**" of the settlement process and as such that it is an adjudicative function **that "necessarily involves wide discretion."** Despite those muscular words, the Commission has clearly set forth that the Secretary is not required to offer any comment at all as to the merits of the Respondent's arguments.

Per the Commission's decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. Meeting the first two requirements is automatic and perfunctory.

(1) The motion must state the penalty proposed by the Secretary.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

(2) The amount of the penalty agreed to in settlement.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

(3) “Facts,” as the Commission has employed that term, in support of the penalty agreed to by the parties.

In the context of settlement motions, “facts” have an atypical meaning.⁴ In discussing what constitute “facts” for settlements, the Commission stated “there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively.” *AmCoal* at 990. The only associated requirement with such “facts” is that “*there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*” *Id.* (emphasis added).

Accordingly, the Commission rejected the view that a respondent’s assertions of fact need to “present legitimate questions of fact,” and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that “[f]acts alleged in a proposed settlement need not demonstrate a ‘legitimate’ disagreement that can only be resolved by a hearing.” Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . . ” *Id.*

It should not come as a surprise that, under the Commission’s *AmCoal* test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-*AmCoal*, those decisions have met with reversals by the Commission. *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020), *American Aggregates*, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

As the motion meets the Commission’s standard for approving settlement motions and as the Court is duty-bound to faithfully apply the Commission’s present decisional holdings regarding review of settlement motions according to the way the Commission has interpreted its review responsibilities under the unique review provision set forth in section 110(k) of the Mine Act and, applying those holdings, the Court determines that this settlement, *as with all settlement motions presented to this Court post-AmCoal*, also meets the Commission’s review criteria and therefore the motion is to be approved as appropriate.

⁴ In settlements, “facts” do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/fact> (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

Typically found in the Secretary’s motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties’ settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has “considered the representations and documentation submitted, f[ound] that the assessment is reasonable and . . . conclude[d] that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act” Draft Order at 3. The Court cannot subscribe to such language.⁵ Rather, the Court’s review of settlement motions is confined to comparing the parties’ motion with the three criteria set forth by the Commission in its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

The Court has considered the motion in the context of comparing it with the Commission’s *AmCoal* decision and finds that it meets that decision’s standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **\$23,365.00** within 30 days of this decision.⁶

William B. Moran

William B. Moran
Administrative Law Judge

⁵ Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary’s motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary*. Motion at 3 (emphasis added). Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

⁶ It is preferred that penalties be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to:
U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is important to include Docket and A.C. Numbers with the payment.

Distribution:

K. Brad Oakley, Esq., Jackson Kelly PLLC, 100 W. Main Street, Suite 700
Lexington, KY 40507 kboakley@jacksonkelly.com

Emily Toler Scott, Esq., Counsel for Appellate Litigation, Office of the Solicitor
Division of Mine Safety & Health, 201 12th Street South, Suite 401, Arlington, VA 22202
scott.emily.t@dol.gov

David C. Trent, Conference & Litigation Representative, U.S. Department of Labor, MSHA
4499 Appalachian Highway, Pineville WV 24874 Trent.david@dol.gov