

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 9, 2023

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

v.

APPALACHIAN RESOURCE WEST
VIRGINIA, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2022-0516
A.C. No. 46-08930-558400

Mine: Grapevine South Surface Mine

ORDER TO VACATE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Sullivan

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citations at issue was \$18,550.00 and the proposed settlement amount is \$11,000.00.

The proposed settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
9565168	\$ 518.00	\$ 518.00	No change.
9565170	\$ 234.00	\$ 234.00	No change.
9565171	\$ 378.00	\$ 378.00	No change.
9565172	\$ 1,285.00	\$ 800.00	Vacate 104(b) order and modify negligence from "Low" to "None"
9565173	\$ 7,473.00	\$ 4,000.00	Vacate 104(b) order
9565177	\$ 2,077.00	\$ 1,000.00	Vacate 104(b) order and modify negligence from "Low" to "None"

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
9565178	\$ 234.00	\$ 234.00	No change.
9565179	\$ 198.00	\$ 198.00	No change.
9565180	\$ 133.00	\$ 133.00	No change.
9565181	\$ 1,869.00	\$ 934.00	Modify negligence from “Low” to “None”
9565182	\$ 234.00	\$ 234.00	No change.
9565183	\$ 3,022.00	\$ 1,442.00	Modify gravity from “Reasonably Likely” to “Unlikely” and remove S&S designation
9565184	\$ 234.00	\$ 234.00	No change.
9565185	\$ 661.00	\$ 661.00	No change.
Total	\$ 18,550.00	\$ 11,000.00	

This case involves fourteen citations. Three of these citations have associated withdrawal orders issued pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). The Secretary’s motion seeks the vacatur of all three 104(b) orders. Two of these orders—Orders Nos. 9565191 and 9565192, associated with Citations Nos. 9565172 and 9565173, respectively—were included in the Secretary’s petition in this case. The third 104(b) order, which accompanies Citation No. 9565177, was missing from the penalty petition. Because I highly doubted that there is any basis upon which I could approve a settlement motion specifying vacatur of an order I had never seen, by e-mail dated January 25, 2023, my law clerk requested that the Secretary provide a copy of the third order to correct the omission in the docket.

In a February 8, 2023 filing in response, the Secretary refused to do so, perhaps motivated by pending litigation in *Perry County Resources, LLC*, Docket No. KENT 2022-0024. See ALJ Order Denying Sec’y’s Settlement Mot. and Sec’y’s Mot. to Certify for Interlocutory Review (Oct. 5, 2022); Commission Order (Dec. 6, 2022) (granting interlocutory review). The motion for settlement here, by specifically including vacatur of associated 104(b) orders, greatly distinguishes this docket from the *Perry County* case. Fortunately, the Respondent quickly stepped forward to forestall further needless delay by providing a copy of the missing Order, No. 9567104, for the record in the case.

After reviewing the motion and the relevant 104(b) orders, I find that the Secretary has set forth the justification for the proposed modifications. As required by the Mine Act, I have reviewed the motion and penalty criteria and evaluated the proposed settlement pursuant to the requirements set forth in Sections 110(i) and 110(k). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violations has been considered. The negligence and gravity of the violations are addressed in the motion, in the citation, and in the file in general.

I accept the representations and modifications of the Secretary as set forth in the motion to approve settlement. I have considered the representations and documentation submitted, find

that the modifications are reasonable, and conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, Orders Nos. 9565191, 9565192, and 9567104 are **VACATED** and the motion to approve settlement is **GRANTED**.

It is **ORDERED** that the negligence for Citations Nos. 9565172, 9565177, and 9565181 be **MODIFIED** from “Low” to “None.”

It is **ORDERED** that the gravity for Citation No. 9565183 be **MODIFIED** from “Reasonably Likely” to “Unlikely,” and that the S&S designation be removed.

It is further **ORDERED** that the Respondent pay the Secretary of Labor the sum of **\$11,000.00** within 30 days of the date of this Decision.¹



John T. Sullivan
Administrative Law Judge

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¹ Please pay penalties electronically at [Pay.Gov](https://www.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. Please include Docket and A.C. Numbers.