FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2021-0112
v.	:	Docket No. SE 2021-0134
CRIMSON OAK GROVE RESOURCES LLC	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2021-0145
RIVER CITY STONE-DIV/MATHY CONSTRUCTION CO.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2021-0023
HOLCIM (US) INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2021-0294
GREENBRIER MINERALS, LLC	:	

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

DECISION

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

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). They come before us upon five Administrative Law Judge's certifications for interlocutory review wherein the Judge denied the Secretary's motions to settle or dismiss the proceedings. In each of these cases, the Judge denied the motions because he concluded that the Secretary had failed to provide sufficient information to support the vacating of certain citations. The Judge had requested that the Secretary either: 1) certify that the decision to vacate certain citations was not contingent upon the resolution of the remaining citations, or 2) explain how the decision to vacate is an appropriate compromise, mitigation, or settlement pursuant to section 110(k) of the Mine Act. *See* 30 U.S.C. § 820(k).

Section 110(k) provides as follows:

> No proposed penalty which has been contested before the Commission under section 105(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).

On interlocutory review, the question before the Commission is whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations.

For the reasons discussed below, we conclude that the Secretary does not possess unfettered prosecutorial discretion to vacate a citation in consideration of an operator's concessions. Rather, the Mine Act requires the Commission to review the vacating of citations when done in the context of a settlement. Therefore, we remand these cases to the Judge for proceedings consistent with this ruling.[1]

[1] Our dissenting colleague has opted to issue a consolidated dissent for both *Knight Hawk* and *Crimson Oak*, which the Commission is issuing on the same date. *Knight Hawk*, 46 FMSHRC ___, slip op. at 15-28, No. LAKE 2021-0160 (August 30, 2024). However, as we have not consolidated the instant proceedings with *Knight Hawk*, the issues raised in *Knight Hawk* exceed the scope of our interlocutory review in this matter, and we do not address them here. *See* 29 C.F.R. § 2700.76(d).

I.

Factual and Procedural Background

A. Proceedings Before the Administrative Law Judge

1. Crimson Oak – Docket No. SE 2021-0112

This case involves two section 104(a) citations and one section 104(g) order.[2] On September 27, 2021, the Secretary filed a Motion to Dismiss. The motion states that the operator decided to withdraw its contest of a citation and order and that the Secretary decided to vacate the remaining citation. The motion further states that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act. Maintaining that no issues remained for adjudication, the Secretary requested that the case be dismissed.

On October 6, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty Proceeding. The Judge noted that the Secretary had vacated the smaller penalty in this case and surmised that this could indicate that the Secretary had "acknowledged an error in the issuance of the vacated citation, and that this acknowledgement, in the context of discussions of the relative strengths and weaknesses of the matters in controversy, was sufficient inducement for the operator to acquiesce to the payment of the others." Order at 3.

However, the Judge rejected the Secretary's reliance on *RBK Construction*, 15 FMSHRC 2099 (Oct. 1993), to support her unreviewable authority to vacate a citation in the context of a settlement. According to the Judge, the Commission's succinct holding in *RBK* did not specifically address a vacated citation in the context of a quid-pro-quo settlement and relied primarily on the Supreme Court's rationale in a case involving the Occupational Safety and Health Review Committee ("OSHRC"). *See Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985). Accordingly, the Judge found that absent certification that the vacation of the citation was coincidental and not contingent upon dismissal of the remaining violations, the parties would need to explain the appropriateness of the compromise, mitigation, or settlement pursuant to section 110(k) of the Mine Act.

2. Crimson Oak – Docket No. SE 2021-0134

This case involves five section 104(a) citations. On September 28, 2021, the Secretary filed a Motion to Approve Settlement. The proposed settlement states that the "Secretary has agreed to vacate Citation No. 9493063. Additionally, as part of this settlement Respondent agrees to accept citation No. 9493062." Each of the citations had a proposed penalty of $6,858. The parties agreed to modify the negligence of the remaining three citations from "High" to

[2] A 104(a) citation is issued whenever the Secretary believes that an operator has violated the Act or any health or safety standard promulgated pursuant to the Act. 30 U.S.C. § 812(a). A 104(g) order is issued whenever the Secretary determines that a miner has not received the requisite safety training required by the Act. 30 U.S.C. § 812(g).

"Medium" with a corresponding reduction in penalty. The motion further stated that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On October 1, 2021, the Judge reached out to the parties through email to notify them that he required an explanation for the decision to vacate. He instructed the parties to "[p]lease provide a written statement or amend the settlement proposal motion to include language that the vacation is independent from, and not contingent upon, the compromise or settlement [of] the other violations in the motion." On October 5, 2021, the Secretary requested that the ALJ reduce the denial of the motion to approve settlement to a final order. On October 7, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty Proceeding utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

3. River City Stone-Div/Mathy Construction Company – Docket No. LAKE 2021-0145

This case involves two section 104(a) citations. On October 5, 2021, the Secretary filed a Motion to Dismiss. The motion stated that the operator had decided to withdraw its contest of one citation and that the Secretary had decided to vacate the other citation. The motion further stated that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act. As no issues remained for adjudication the Secretary requested that the case be dismissed.

On October 8, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty proceeding relying on the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

4. Holcim (US) Inc. – Docket No. YORK 2021-0023

This case involves thirteen section 104(a) citations. On August 3, 2021, the Secretary filed a Motion for Decision and Order Approving Settlement. In the motion, the operator agreed to withdraw contests of five citations. The Secretary agreed to vacate four citations and the parties agreed to a reduction in penalty in the remaining four citations and reduce the negligence finding in one citation. The motion further stated that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On August 26, 2021, the Judge notified the parties that, if the decision to vacate was part of an agreement with the operator to accept other citations as written, the parties would need to provide an explanation for the Judge to review pursuant to section 110(k). On August 31, 2021, the Secretary requested that the ALJ reduce the denial of the motion to approve settlement to a final order. On September 28, 2021, the Judge issued an Order Denying Motion to Approve Settlement utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

5. Greenbrier Minerals – Docket No. WEVA 2021-0294

This case involves six 104(a) citations. On August 5, 2021, the Secretary filed an Amended Motion to Approve Settlement.[3] In the motion, the operator withdrew contest of four citations. The Secretary agreed to vacate two citations. The motion further states that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On August 26, 2021, the Judge notified the parties that, if the decision to vacate was part of an agreement with the operator to accept other citations as written, the parties would need to provide an explanation for the Judge to review pursuant to section 110(k). On September 1, 2021, the Secretary requested that the Judge express the denial of the motion to approve settlement in a final order. On September 30, 2021, the Judge issued an Order Denying Motion to Approve Settlement utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

B. The Granting of Interlocutory Review

The Judge subsequently certified for review the orders denying the settlement or dismissal in each of the five cases.[4] The Commission granted review "of the Judge's orders denying the motions and the issue of whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations." Order Granting Interlocutory Review (Mar. 2, 2022).

C. The Secretary's Arguments

On review, the Secretary maintains that she possesses unreviewable prosecutorial discretion in determining whether to vacate a citation or order. She argues that the Mine Act's split-enforcement scheme grants the Secretary the sole authority to enforce the statute, thus precluding review of her decision to vacate a citation or order. The Secretary relies on the Supreme Court's holding in *Cuyahoga Valley* that the power to issue citations necessarily requires the Secretary to have the power to withdraw them. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (Nov. 1985) ("*Cuyahoga Valley*"); *RBK Construction Inc.*, 15 FMSHRC 2099 (Oct. 1993) ("*RBK Construction*" or "*RBK*"). The Secretary contends that, like OSHRC, the Commission is to serve as a neutral arbiter and is strictly limited to the confines of the role traditionally assumed by adjudicatory bodies. According to the Secretary, review of her vacatur decisions would amount to an intrusion into her enforcement authority, forcing her to pursue enforcement actions where she does not believe there is any violation.

[3] There is no other Motion to Approve Settlement in the record, so it is unclear what was being amended.

[4] Pursuant to Rule 76, the Commission, at its discretion, may grant a motion for interlocutory review upon a "determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76.

The Secretary further contends that section 110(k) of the Mine Act does not restrict her enforcement discretion in vacatur decisions. The Secretary argues that section 110(k) only applies to the settlement of penalty amounts. The Secretary asserts that in cases where she has vacated a citation, the elimination of the penalty is merely an incidental effect of the enforcement decision to vacate the underlying citation. According to the Secretary, the decision to vacate a citation has consequences for potential pattern-of-violations, history of violations and other enforcement actions. Thus, the Secretary maintains that vacatur is solely an enforcement decision, not a penalty decision.

Finally, the Secretary points out that Congress did not explicitly grant the Commission the authority to review vacatur decisions in the Mine Act. Nor does anything in the legislative history expressly mention the Commission's authority to review vacated citations. Instead, the Secretary argues, the legislative history is concerned primarily with transparency and ensuring that there is no unwarranted lowering of penalties stemming from off-the-record settlement negotiations. The Secretary maintains that, had Congress intended the Commission to review vacatur decisions, it would have provided the Commission with a meaningful standard by which to judge the validity of such enforcement actions.

II.

Disposition

For the reasons stated below, we hold that the Secretary does not have unreviewable discretion to vacate a citation or order without the Commission's approval under section 110(k) of the Act. We further hold that the parties must provide sufficient facts to support the vacatur of a citation or order in a settlement proceeding. Accordingly, we conclude that the Judge did not abuse his discretion by denying the settlement motions in these cases.

The Commission derives its authority to review the adequacy of settlements proposed by the Secretary from section 110(k) of the Act, which states that: "[n]o proposed penalty which has been contested before the Commission under section [105(a)] shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). As demonstrated below, section 110(k) of the Act authorizes the Commission to review the adequacy of all settlements proposed by the Secretary.

A. The Legislative History of Section 110(k)

In drafting the Mine Act, Congress made clear that it wanted to avoid the pitfalls of the prior regulatory regime.[5] The Senate Report states that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement

[5] Until enactment of the Federal Mine Safety and Health Act of 1977, enforcement of the 1969 Coal Act was the responsibility of the Secretary of the Interior. The Department of Interior's enforcement functions, except those assigned under section 501 of the 1969 Coal Act and those expressly transferred to the Commission, were transferred to the Secretary of Labor when the 1977 Mine Act took effect. 30 U.S.C. § 961(a) (Supp. III 1979).

tool." S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) ("*Legis. Hist.*"). The Committee explained that in investigating the penalty collection system under the Coal Act, it learned "that to a great extent the compromising of assessed penalties [did] not come under public scrutiny," and that "[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are not on the record." *Id*. It noted that even after a petition for civil penalty had been filed, "settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge." *Id*.

Accordingly, Congress drafted section 110(k) with the intent that the settlements of penalties be open to scrutiny in order to better serve the purpose of civil penalties by encouraging operators' compliance with mandatory standards. The Senate report further provided:

> 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.

Id. at 633. Thus, Congress made clear, when it enacted the 1977 Mine Act, that the terms of all settlements had to be on the record and that the Commission has the final word on the settlement of contested cases. *The American Coal Co.*, 38 FMSHRC 1972, 1975-76 (Aug. 2016) ("*AmCoal I*").

Based on the clear expression of Congressional intent and the unambiguous language in the Mine Act, the Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). To perform that function in exercise of its statutory authority, the Commission has promulgated Rule 31, which provides, inter alia, that a motion to approve a penalty settlement shall include facts in support of the penalty agreed to by the parties. *See* 29 C.F.R. § 2700.31(b)(1). Thus, "[s]ettlements are committed to the 'sound discretion' of the Commission and its judges" and they "are not bound to endorse all proposed settlements." *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (June 1995).

B. The Secretary Does Not Have Unreviewable Prosecutorial Discretion to Settle Cases by Vacating Citations

While there is a general presumption of unreviewability of decisions not to enforce, Congress may withdraw an agency's discretion over such decisions. In *Heckler v. Chaney*, the Supreme Court recognized that the presumption of unreviewability may be overcome if a statute "has indicated [Congress's] intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ." 470 U.S. 821, 834 (1985).

In the settlement context, section 110(k) provides an exception to the general rule of unreviewability. That provision expressly curtails the Secretary's authority to exercise a basic power of prosecutorial discretion: the power to settle a case. As stated in *AmCoal I*, 38 FMSHRC at 1980, "section 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability." Indeed, the Secretary "has acknowledged that the [*Heckler*] presumption is rebutted by the existence [of] section 110(k)." *Id*. at 1980 n.10, *citing AmCoal I*, Sec'y Reply Br. at 4.

The remaining issue under *Heckler* is whether the Commission would have a "meaningful standard" to apply in determining whether the Secretary has met her burden of justifying a proposed settlement. The Commission has recognized that the standards to be applied may be found in section 110(i), which sets forth the six statutory factors for assessing penalty amounts.[6] *AmCoal* I, 38 FMSHRC at 1981. In addition, the Commission has interpreted Section 110(k) to require the Judge to determine whether the proposed settlement is fair, reasonable, appropriate under the facts, and protects the public interest. *Id*. at 1976. The Commission's parameters of review are set out in section 110(i), the Act's legislative history, and the Commission's Procedural Rules. Thus, the Secretary's argument of unreviewable prosecutorial discretion is erroneous.[7]

---

[6] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[7] Our dissenting colleague *cites Twentymile Coal Co.*, for the proposition that "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." Slip op. at 21, quoting *Sec'y of Labor v. Twentymile Coal Co.* 456 F.3d 151, 157 (D.C. Cir. 2006). In that case, the Commission overturned the Secretary of Labor's decision to cite both the owner-operator of a mine, as well as its independent contractor, for the contractor's safety violations. *Twentymile*, 456 F.3d at 152. The D.C. circuit determined that because the Mine Act provided no meaningful standards against which to judge the Secretary's decision regarding which party to cite, the Commission is generally without authority to review such decisions. *Id*. That is distinguishable from the situation here. As discussed at length above, Sections 110(i) and 110(k) evince Congress' desire to limit the Secretary's discretion during settlement and provide a standard of review for the Commission to analyze the Secretary's actions.

C. The Cases Upon Which the Secretary Attempts to Rely Are Readily Distinguishable

The core of Secretary's argument that she possesses unreviewable discretion to vacate citations, regardless of the context, relies on two cases: *Cuyahoga Valley* and *RBK Construction*.

In the OSH Act case of *Cuyahoga Valley*, 474 U.S. at 4-5, the Secretary of Labor moved to vacate a penalty citation on the grounds that the Federal Railway Administration, not OSHA, had jurisdiction over the relevant safety conditions. The Supreme Court agreed that the Secretary had unreviewable discretion to withdraw a citation, finding that encroaching on the prosecutorial decisions of the Secretary would unduly hamper enforcement of the Act by discouraging settlement and commingling of roles that Congress did not intend. *Id*. at 6-7.

In *RBK Construction, Inc*., 15 FMSHRC at 2101, a case closely mirroring the facts of *Cuyahoga Valley*, the Secretary of Labor notified the Commission that it had vacated all the citations at issue because jurisdiction of the site should have been under OSHA, not MSHA. Relying on the Supreme Court's decision in *Cuyahoga Valley*, the Commission reasoned succinctly that "[w]e agree with the Secretary that he has the authority to vacate the citations in issue, and, therefore, we grant the motions to dismiss." *Id*.

These cases can be easily distinguished from the present case on three major points. First, as noted above, *Cuyahoga Valley* is an OSH Act case, and not a Mine Act case. This is important because the OSH Act does not contain any provision identical to section 110(k), i.e., a provision that authorizes the Commission to review the Secretary's proposed settlements and disapprove settlements when appropriate.

While there are similarities in the OSH Act and the Mine Act, a sponsor of the Mine Act expressly stated that the Mine Act was intended to adopt the stronger features of the OSH Act while learning from areas where prior laws fell short. *See* 123 Cong. Rec. 4387–88 (1977) (statement of Sen. Williams, the Mine Act's sponsor, upon introduction of the Act).[8] One such area of improvement was granting review of settlements to the Commission. By contrast, the OSH Act grants OSHRC no authority to review settlements, instead only requiring that such settlements be published in the Federal Register. 29 U.S.C. § 655(e). As such, application of the holding in *Cuyahoga Valley* in Commission cases is severely limited in the settlement context.

Second, *RBK* and *Cuyahoga Valley's* motions to dismiss were done in the context of a voluntary dismissal, not a settlement, and that is of significant consequence. As explained above, we have recognized that the Secretary has a general presumption of unreviewability in her

[8] The Legislative History of the Mine Act is replete with bipartisan references to the weakness of the OSH Act and its administration. *See*, *e.g.*, *Legis. Hist.* at 964-65 (Senator Schmitt noting reluctance to move mine safety regulation to the DOL because OSHA has been "strongly criticized for its handling of those health and safety programs" under their jurisdiction); *id*. at 976 (Senator Williams noting OSHA's "ineptness" in the past); *id*. at 1002 (Senator Hatch noting the "poor administration" of OSHA); *id*. at 1037 (Senator Domenici discussing why the history of OSHA has largely been one of failure).

decisions not to enforce. However, section 110(k) provides an exception to this presumption in the limited context of settlements.

Third, in both *RBK* and *Cuyahoga Valley*, the administrative agency provided the court with an explanation as to why the withdrawal or vacatur was taken. The Secretary in *Cuyahoga Valley* conceded that the relevant safety violation was under the Federal Railway Administration's jurisdiction, not OSHA's. 474 U.S. at 4. Similarly, in *RBK*, the Secretary explained that the operator was under the jurisdiction of OSHA, not MSHA, and provided evidence of policy controlling the jurisdictional dispute. 15 FMSHRC at 2099. In the present case, the crux of the matter is that the Secretary has declined to even state if the vacatur of citations was an independent decision, or whether the decision was in consideration for the operator accepting the other civil penalties at issue.[9]

D. Application of Section 110(k) in These Cases

Assuming that the Secretary had reached a deal with the operator in these cases to vacate citations in exchange for the mitigation or acceptance of the proposed penalty, section 110(k) grants the Commission the responsibility to review this arrangement.[10] In each of these cases, there are at least two civil penalties, contested pursuant to section 105(a), at issue: the one vacated by the Secretary and the one accepted by the operator. Even if there were some validity to the Secretary's argument that the penalty for the vacated citation is not relevant because the removal of the penalty is merely incidental to the vacatur of the enforcement action, the civil penalty that the operator has agreed to no longer contest is still part of the deal.

The deal that the parties have reached involving citations clearly constitutes a settlement. In order to effectuate the resolution of a contentious legal matter, the parties have mutually agreed to take actions against their own self-interest without the intervention of a court.[11]

---

[9] Our dissenting colleague states "[t]he majority does not provide any basis for veering from the express language of the Mine Act, its legislative history, the Commission's rules, or established case law to undercut the established principle of the Secretary's right to vacate a citation . . ." Slip op. at 23. However, the Dissent does not recognize or address the arguments and analysis set forth in this section of the majority opinion.

[10] Our dissenting colleague notes that the parties can only settle "if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i)." Slip op. at 19. However, that is exactly what the parties failed to do here: they failed to explain how the facts they assert comport with the penalty they agreed to assess. Specifically, the parties failed to explain why they agreed to accept one citation and vacate another. The ALJ gave the parties opportunities to provide that explanation for this compromise, but they failed to provide one.

[11] *See, e.g., "*Settle,*"* Black's Law Dictionary (10th ed. 2014) (defining "settle" as "to bring to a conclusion (what has been disputed or uncertain);" "to adjust differences; to come to a good understanding").

Moreover, the broad language of 110(k) goes beyond mere settlements of civil penalties.[12] The Mine Act also requires that the Commission review all "compromises" and "mitigations" of civil penalties as well. 30 U.S.C. § 820(k).[13] The inclusion of such language contemplates Commission review of arrangements between the Secretary and the operator that, by themselves, may not directly affect a civil penalty but are integral to the settlement package. *See The American Coal Co*., 40 FMSHRC 983, 989 (Aug. 2018) ("*AmCoal II*").

In these five cases, the Secretary has agreed to vacate citations and their corresponding penalties. In exchange, the operator appears to have agreed to forfeit its right to contest the citations by accepting the proposed penalties as written or with minor changes. The operator is also waiving its right to bring an Equal Access to Justice Act claim before the Commission.

The legislative history is clear that such arrangements are the types of arrangements that Congress intended for the Commission to review. The Senate Committee stated unambiguously that section 110(k) was intended to create transparency in the previously opaque settlement process and serve as a check on the Secretary of Labor so that settlements further the public interest and promote the remedial nature of the Mine Act. S. Rep. No. 95-181, at 44 (1977), *reprinted in Legis. Hist*. at 632-633. If the Secretary was able to exchange vacatur for concessions from the operator without Commission oversight, there would be very little opportunity for miners, Congress, and other interested parties to assess the fairness and effectiveness of MSHA. It would be easy for the Secretary to hide arbitrary enforcement actions. Similarly, without Commission review, there would be no check on the Secretary's ability to vacate legitimate citations for unsafe conditions.

One of the Secretary's errors is that she fails to treat a proposed settlement as an integral package consisting of related citations, orders, and vacaturs. She instead deals separately with each part of the settlement package and thus fails to acknowledge, for example, that a vacatur will likely have a significant impact on other elements of the package. Indeed, the Commission has recognized that during settlement review, a Judge must "accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *AmCoal II*, 40 FMSHRC at 989 (internal citations omitted).[14]

---

[12] Our dissenting colleague would read section 110(k) narrowly to only require Commission review when the parties have agreed to lower the penalty for a citation. However, such a narrow view of the law stands in stark contrast to the broad language of Congress in which all settlements, mitigations, or compromises of civil penalties be subject to Commission review. Had Congress intended to proscribe review of settlements of civil penalties involving vacated citations, it would have placed clear limits on the Commission's review.

[13] The term "compromise," has been defined as the "settlement of differences or by consent reached by mutual concessions." *Compromise*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/compromise (last visited Aug. 27, 2024). The term "mitigates" has been defined as "to cause to become less harsh" or "to make less severe or painful" (i.e., or ameliorate, lessen, or balance out something). *Mitigate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/mitigate (last visited Aug. 27, 2024).

Because civil penalties are so closely intertwined with citations, the vacatur of a citation in a proposed settlement will result in a change in penalty amounts and affect the operator's agreement to pay. Of course, the ultimate penalty change occurs when the citation in question is vacated, and the civil penalty becomes zero. Nevertheless, under the Secretary's position, the Commission and the public would have no ability or right to understand what has happened. This position is clearly inconsistent with section 110(k) of the Mine Act.

III.

Conclusion

For the reasons stated above, we hold that the Secretary does not possess unreviewable discretion to vacate a contested citation without the Commission's approval under section 110(k) of the Act. Further, we hold that the parties must provide sufficient factual support to vacatur under such circumstances. We therefore conclude that the Judge did not abuse his discretion by denying the settlement motions. Accordingly, we affirm the Judge's denial of the motions and remand the cases to the Judge.

Mary Lu Jordan, Chair

Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

[14] Our dissenting colleague characterizes the ALJ's analysis here as a "mini-hearing" on the merits of the case. Slip op. at 20. That is not an accurate characterization of what has occurred here. The Judge did not convene a hearing nor did he question witnesses or make credibility determinations. Instead, he simply read the submissions provided by the parties, noticed inconsistencies between the facts asserted and the penalty assessed, and requested clarification. The parties failed to provide sufficient clarification and the ALJ denied the settlement.

Commissioner Althen, dissenting:

This opinion addresses two cases presently being acted upon by the Commission. These cases involve a total of six settlement dockets now pending before the Commission concerning whether a Commission Administrative Law Judge ("ALJ") may interfere with the Secretary's exercise of prosecutorial discretion. In each case, I respectfully dissent.

In *Crimson Oak Grove Resources, LLC*, Docket No. SE 2021-0112 et al., the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary's discretionary decision to vacate a citation.[1] In *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160, the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary of Labor's discretionary decision to vacate a special finding of a Significant and Substantial ("S&S") violation.[2] In each case, the Commission majority seeks to wrest discretionary policy and enforcement decisions from the Secretary. The majority does so by misconstruing the wording, purpose, and limit of section 110(k) of the Mine Act, 30 U.S.C. § 820(k) and refusing to accept the Secretary's policymaking and enforcement authority.[3]

Common threads join the cases—the Secretary's exclusive executive authority to make enforcement decisions and the Commission's failure to have any policy-making authority. Rather than writing separate opinions, I consolidate my dissenting opinion into one opinion to be issued in each case, respectively.

The express terms of the Mine Act and the established enforcement authority of the Secretary undercut the ALJ's and Commission's desire to become an enforcement agency through its review of penalty settlements rather than properly tending to its adjudicative function and the review of penalties. The Commission's decisions in these cases would allow ALJs to second-guess discretionary enforcement decisions ranging from vacating citations to designations of S&S violations finding unwarrantable failures, finding flagrant violations, and beyond. Interference by ALJs with the Secretary's substantive authority is a legal error and a

[1] In *Crimson Oak* the question for review is, "whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations." Slip op. at 2.

[2] The Commission's Order for Interlocutory review in *Knight Hawk i*s *"*whether the Secretary has unreviewable discretion to remove an [S&S] designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act." 46 FMSHRC ___, slip op. at 1, No. LAKE 2021-0160 (August 30, 2024) (citation omitted). Unaccountably, the majority misstates the issues before us in both of their opinions.

[3] The other dockets included in the cases identified above are: *Greenbrier Minerals, LLC*, Docket No. WEVA 2022-0403, *Crimson Oak Grove Res., LLC,* Docket No. SE 2021-0134*, River City Stone-Div/Mathy Construction Co.*, Docket No. LAKE 2021-0145, and *Holcim (US) Inc*., Docket No. YORK 2021-0023.

very large step backward for the efficient and lawful administration of the Mine Act.[4]

I.

BACKGROUND

In 1966, Congress enacted the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976). Congress placed standard-setting and enforcement authority in the Department of the Interior. It further created a Federal Metal and Nonmetallic Mine Safety Board of Review possessing authority to review citations contested by operators. The President appointed five members to the Board with the advice and consent of the Senate.

Building upon this effort to increase mine safety for metal/nonmetal mines, Congress turned its attention to the coal industry in 1969. It enacted the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). Again, Congress granted regulatory authority to the Department of Interior. That Department created the Mining Enforcement and Safety Administration to conduct mine safety enforcement activities.

Notwithstanding improvements, a frightening number of injuries and accidents continued to occur. An incomplete summary includes the death of 91 miners from carbon monoxide asphyxiation at the Sunshine Silver Mine in 1972, the death of 125 persons due to the bursting of an impoundment at the Buffalo Creek Mine in 1972, and the 1976 Scotia disaster in which twenty-three miners and three federal inspectors died in two explosions of accumulated methane gas with some blaming MESA for the failure to detect or address ongoing inadequate ventilation deficiencies. *See* Tim Talbott, Kentucky Historical Society*, Scotia Mine Disaster,* https://explorekyhistory.ky.gov/items/show/238 (last visited Aug. 28, 2024); MSHA, *Sunshine Mine Disaster*, https://www.msha.gov/sunshine-mine-disaster (last visited Aug. 28, 2024); MSHA, *Buffalo Creek Mine Disaster 50th Anniversary*, https://www.msha.gov/buffalo-creek-mine-disaster-50th-anniversary (last visited Aug. 28, 2024).

In response to these tragedies, Congress undertook a comprehensive review of mine safety in the mid-1970s. This review led to the passage of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or the "Act").

Dissatisfied with the performance of the Department of Interior generally and especially its assessment and collection of penalties, Congress shifted the authority to regulate and inspect mines from the Department of Interior to the Department of Labor ("DOL"). DOL established

[4] MSHA data reveals that in calendar year 2022, MSHA issued 87,474 citations. MSHA, Dept. of Labor, *MSHA Enforcement Data, MSHA Violations*, https://enforcedata.dol.gov/views/data_catalogs.php (last visited Aug. 28, 2024). Internal Commission records show that challenges to citations resulted in creation of 1,751 Commission dockets. The Commission resolved 1411 of those dockets by settlement, 314 for miscellaneous reasons, and only 13 by a decision after a hearing. In sum, the Commission processed more than 100 times more settlements than decisions after hearings.

the Mine Safety and Health Administration ("MSHA"). Under its authority from the Mine Act, MSHA exercises broad regulatory powers over the mining industries including promulgating mandatory standards and regulations. Additionally, by statute, MSHA conducts frequent and comprehensive inspections of all mines. During inspections, MSHA issues citations for violations of standards and regulations. Subsequently, it proposes penalties for the cited violations. Generally, those proposals result from the application of a penalty point system at 30 C.F.R § 100.3 that accounts for all elements prescribed by Congress for penalty proposals in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Occasionally, MSHA will propose a special assessment.

The Mine Act also created a smaller but constitutionally important federal agency—the Federal Mine Safety and Health Review Commission ("FMSHRC"). Congress assigned important functions to the Commission. These are (1) due process adjudication of alleged violations of standards and regulations promulgated by MSHA and of discrimination complaints; and (2) the assessment of penalties for established violations. The Mine Act grants the Commission authority to assess all civil penalties and identifies six specific factors for the Commission to consider when setting penalties.

The Secretary and Commission perform important but distinctly different functions within their separate jurisdictions. MSHA is the sole agency authorized to set policies and regulations for the regulation and enforcement of the Mine Act. The Secretary, through MSHA, also performs frequent and thorough inspections of mines and other investigations to enforce the Act and the Secretary's regulations. Only MSHA may issue and enforce a citation. MSHA is the sole enforcement authority for the Act and exercises plenary jurisdiction in enforcement.

The Commission is an adjudicative agency and does not have any policymaking or enforcement responsibilities. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 171 (D.C. Cir. 2006) ("[T]he Commission has no 'policymaking role,'" *id.* at 154, 111 S.Ct. 1171. Instead . . .'the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.' *Id.* at 154–55, 111 S. Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion."), *citing Martin v. OSHRC*, 299 U.S. 144 (1991); *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 463 (D.C. Cir. 1994); *Sec'y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996).

In the cases under review, the majority interjects the Commission into discretionary Secretarial enforcement decisions—decisions to vacate a previously issued citation and, separately, to vacate a special finding that a violation was S&S. The majority's assertion of a right to second-guess discretionary enforcement decisions by the Secretary is contrary to the Congressionally intended split of authority between the Secretary and the Commission. The designation of a violation as S&S and many other prosecutorial enforcement functions are wholly reserved for the Secretary. The Secretary, acting through MSHA, has the discretionary and only authority to issue or vacate a citation or S&S designation.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016) ("[W]e have

previously recognized that the Secretary is the authoritative policymaking entity under the Mine Act's scheme."); *Energy West Mining Co. v. FMSHRC,* 40 F.3d at 463. The Commission does not exercise any enforcement role other than setting penalties and must remain neutral and impartial concerning enforcement. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) ("As the Supreme Court concluded for an analogous adjudicatory body, the Commission operates as a 'neutral arbiter' . . . that possesses 'nonpolicy-making adjudicatory powers.'").

To put this case in perspective, if an ALJ may use a settlement to make decisions regarding maintaining a citation or finding a special S&S violation, it would open a host of other discretionary enforcement areas to ALJ interference—flagrant violations, unwarrantable failures, etc. No one would suggest that, before or after a hearing, an ALJ could find the Secretary showed more violations than had been cited or add to the number of violations. No one would suggest that, before or after a hearing, an ALJ could add a special S&S finding even though the violation was not cited as S&S. An ALJ may not use consideration of a settlement to second-guess the Secretary's enforcement decisions.

II.

SECTION 110(K) ADDRESSES THE COMPROMISE OF PENALTIES; IT DOES NOT PERMIT COMMISSION REVIEW OF POLICY DECISIONS BY THE SECRETARY.

The majority incorrectly seeks to justify incursion into areas of prosecutorial discretion by turning to the penalty section of the Mine Act. The penalty section, its history, and its implementation by the Commission demonstrate conclusively that the Commission does not have the authority to encroach upon the Secretary's enforcement authority.

Section 110 of the Mine Act sets out a comprehensive roadmap for penalty assessments. Section 110(i) grants the Commission authority over all civil penalties by providing,

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to [her] and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i).

The section accomplishes three goals. First, it grants the Commission the authority to assess "all" civil penalties. Second, it sets forth the specific factors the Commission must consider in setting penalties. Third, consistent with the Commission's ultimate authority, the Secretary may propose a penalty for review by the Commission without making findings of fact related to its proposal of penalties.

Two other sections of the Act confirm the Commission's authority over penalties. First, Section 105 provides that if an operator does not contest a proposed assessment within 30 days, "the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a). So, even when the Commission is not directly involved in setting a penalty, the penalty is deemed an order of the Commission.

Second, and most importantly here, Congress recognized a potential hole in the Commission's authority. If the Secretary compromised a penalty proposal and the operator did not contest it, the compromised penalty would be deemed an order of the Commission under section 105 cited above. Congress closed that loophole in the Commission's penalty authority in the penalty section relevant to this case.

Section 110(k) closes the loophole thereby confirming the Commission's authority providing that "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k) (emphasis added).

This section fits neatly into the Congressional direction for penalties by assuring the Commission's ultimate authority over penalties notwithstanding an MSHA proposal to settle a penalty. It explicitly and only applies to a "proposed penalty."

Congress could have granted the Commission oversight generally of all compromises or settlements by writing "no case brought before the Commission under section 105(a) of this Act." It did not do so. It wrote, "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act." Congress could have applied the language to "citations," or "violations." It did not do so. Congress could have given the Commission broader authority in the section of the Mine Act that created the Commission and its adjudicative authority—Section 113, 30 U.S.C. § 823. It did not do so. Section 110(k) affirmed the Commission's authority over penalties.

Congress granted the Commission oversight for penalty settlements, and it did so only in the penalty section of the Act. Previously, the Commission recognized the specificity of section 110(k). In *The American Coal Company*, the Commission wrote, "[i]n exercising its discretion, the Commission evaluates whether a proposed reduction in a penalty or penalties 'is fair, reasonable, appropriate under the facts and protects the public interest.'" 40 FMSHRC 330, 332 (Mar. 2018), *citing The American Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016) ("*AmCoal I*").

Section 110 is headed "Penalties." The section only addresses penalties. In the words of a prior Commission decision, the Commission "does not review the Secretary's

decision to settle. Rather the Commission reviews the proposed reduction of civil penalties in settlements." *AmCoal I*, 38 FMSHRC at 1982 (emphasis in original).

In *American Coal*, the Commission expressly recognized that the Commission's review of penalties in settlements is limited by boundaries. "Such boundaries are provided by section 110(i) of the Mine Act, the Act's legislative history, and the Commission's Procedural Rules." *Id.* Section 110 does not provide for assessing a penalty based upon an S&S violation, unwarrantable failure, or other substantive requirements of the Mine Act.[5]

The legislative history of the Mine Act confirms this interpretation. Congress repeatedly and expressly emphasized its dissatisfaction with penalties assessed under the Coal Act. Early in the Senate Report, the Senate said:

> The assessment and collection of civil penalties under the Coal Act has also been a great disappointment to the Committee. The Committee firmly believes that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law.

S. Rep. No. 95-181, at 15 (1977), as *reprinted in* 1977 U.S.C.C.A.N. 3401, 3415.

Later in its report, the Senate focused upon its desire for public awareness of penalty compromises, writing:

> In addition to the delay in assessing and collecting penalties, another 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*. . . .
>
> . . . 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

[5] An S&S violation has occurred if (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). Although S&S violations contain a gravity element, an S&S finding is not the same as a finding on gravity, and gravity is treated as a distinct and separate element in the assessment of penalties.

> representatives, as well as the Congress and other interested parties, can fully observe the process.
>
> To remedy this situation, Section 111(1) [section 110(k) in the final Act] provides that *a penalty once proposed and contested* before the Commission may not be compromised except with the approval of the Commission.

S. Rep. No. 95-181 at 44–45 (emphasis added).

The legislative history of section 110(k) demonstrates that the reduction of penalties through settlements was the target of section 110(k). Low penalties were the motivating concern for sections 110(i) and 110(k) expressly articulated by Congress. Previously, the Department of Interior could settle a case by reducing the penalty. An operator could bargain for a reduction in penalty to avoid litigation over a citation. Thus, a deal could be reached without any consideration of the penalty factors.

MSHA and the operator may still undertake such compromises. However, they may only do so if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i). There is no evidence, hint, or insinuation in any of this to suggest the Commission may interfere in enforcement policy decisions such as whether to issue or enforce a citation, charge an S&S violation, charge a flagrant violation, charge an unwarrantable failure or any other substantive aspect of the Mine Act with exclusive expertise and authority of the Secretary.

Commission authority over the settlement of penalties does not appear in section 105 setting out the procedures for enforcement and for operators' right to challenge citations (30 U.S.C. § 815) or section 113 establishing and providing rules for the governance of the Commission (30 U.S.C.§ 823). The express words of section 110(k) and legislative history show the only concern of section 110(k) is the reduction of penalties.

The third bounding element also demonstrates the Commission's formal acceptance that its settlement authority applies to penalties. The Commission's relevant procedural rules, identified in *American Coal*, *supra*, as a third boundary upon the review of settlements, is expressly limited to penalties. The settlement rule, Procedural Rule 31, is limited to a "Penalty Settlement" and provides, *inter alia*, that "[a] motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary . . . ." 29 C.F.R. § 2700.31(b)(1) (emphasis added). Further, Rule 31(c)(1) states:

> Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

29 C.F.R. § 2700.31(c)(1).

Consequently, the factors expressly held by the Commission as boundaries of Commission authority—the express words of the statute, the legislative history, and the Commission's rules—demonstrate that an ALJ's settlement authority consists of reviewing the penalty proposed in the settlement. In doing so, the ALJ may consider the application of the six penalty factors but that does not mean the ALJ may conduct mini hearings.

In *Hopedale Mining, LLC*, the Commission properly explained that a settlement does not present an opportunity or a right for ALJs to engage in a fact-finding proceeding.

> During the review of a proposed settlement, the Judge is not expected to engage in fact finding as she would post-hearing. *See Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties. *Id*.

42 FMSRHC 589, 595 (Aug. 2020). The ALJ is not permitted to demand evidence or make findings concerning discretionary enforcement decisions by the Secretary.

As we see below, not only do the words of the Act, its legislative history, and Commission rules limit the Commission's authority to review penalties, but also strong and prevailing case law reserves discretionary enforcement authority to the Secretary at every stage of a proceeding.

III.

PROSECUTORIAL DECISIONS SUCH AS WHETHER TO VACATE A CITATION OR CHARGE A VIOLATION AS SIGNIFICANT AND SUBSTANTIAL ARE EXERCISES OF PROSECUTORIAL DISCRETION RESERVED FOR THE SECRETARY.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Mutual Mining, Inc.*, 80 F.3d at114 ("As the Supreme Court concluded with respect to an analogous adjudicatory body, the Commission operates as a 'neutral arbiter.'"); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); *Knox Creek Coal Corp.*, 811 F.3d at 159 ("[W]e have previously recognized that the Secretary is the authoritative policymaking entity under the Mine Act's scheme."); *Twentymile Coal Co.*, 456 F.3d at 158; *Energy West Mining Co.,* 40 F.3d at 463. The Commission must be neutral and does not have jurisdiction over enforcement decisions. Certainly, it does not have jurisdiction to find a violation the Secretary has not cited or to contradict a Secretarial decision to vacate a citation, special S&S finding, flagrant violation, or a host of other enforcement decisions.

The D.C. Circuit authoritatively holds only MSHA has the authority to make enforcement decisions under the Mine Act and that authority is not bounded by the Commission. In short, "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." *Twentymile Coal Co.* 456 F.3d at 157. Indeed, the Circuit Court characterized the attempt by the Commission to assert a right for the Commission to review enforcement decisions as "pernicious," writing "the most pernicious aspect of employing this purported standard as a check on charging decisions is that it invites the reviewing body to substitute its views of enforcement policy for those of the Secretary, a power that . . . the Commission does not possess." *Id*. at 158. The Commission and courts have repeatedly applied the fundamental principle of the Secretary's exclusive authority over the broad range of enforcement decisions and policies, including the right to vacate citations and S&S enforcement.

A. <u>Citations</u>

The Secretary annually conducts thousands of meticulous inspections of mines. MSHA inspectors use their training, knowledge, and experience to make judgment calls concerning compliance with the thousands of requirements governing the mining industries. As a result, MSHA issues tens of thousands of citations. Thereafter, MSHA supervisors may review, approve, revise, or overrule inspectors' decisions. If a contest is filed, trained representatives of the Secretary pore over the citations reviewing the facts and the penalty assessment. Maintenance of a citation is one of the basic, if not the most basic, exercises of the Secretary's enforcement authority.

In *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993) ("*RBK*"), the Commission held that the Supreme Court's decision in *Cuyahoga Valley*, 474 U.S. 3*,* mandated that the Secretary had the dispositive authority to vacate a citation. The Commission correctly ended its decision with a short, declarative acknowledgment of the Secretary's authority, "We agree with the Secretary that he has the authority to vacate the citations in issue." *RBK,* 15 FMSHRC at 2101. For thirty years until today, no Commission has challenged this holding.

The Commission emphasized the Secretary's authority by instructing the Secretary and operators that they "may in the future file stipulations of dismissal signed by all parties to a proceeding, in order to effect voluntary dismissal. . . . Upon the parties' filing of the appropriate stipulation, the presiding Commission Judge shall enter an order dismissing the proceeding." *Id.* at 2101 n.2.[6] Therefore, if the parties had presented the vacation decisions separately from penalty adjustment on other citations being resolved, the ALJ would simply have ordered dismissal. It would be silly and counterproductive for the Secretary to have to resort to such gamesmanship to exercise her right to settle enforcement actions. The Secretary's unreviewable right to vacate a citation is the clear and long-standing discretionary right of the Secretary.

[6] Based upon this instruction on procedure by the Commission, when the Secretary is resolving a group of contests included in one docket, the Secretary may dispose of the vacation of a citation by filing the appropriate motion and, in turn, the ALJ "shall"—that is, "must"—approve. *RBK,* 15 FMSHRC at 2101 n.2.

- In *Bixler Mining Company*, 16 FMSHRC 1427 (July 1994), the ALJ issued a default judgment against the operator for failing to comply with a prehearing order. More than 30 days later, the Secretary filed a motion to vacate the default decision, vacate the underlying citation, and dismiss the proceeding. The Commission reopened the case and vacated the citation. The Commission "concluded that the Secretary has unreviewable authority to vacate or withdraw his own enforcement actions." *Id.* at 1428.

- In *Bridger Coal Company*, 17 FMSHRC 270 (Mar. 1995), the Secretary sought to dismiss the Secretary's own previously filed PDR. Notably, the Secretary's motion stated the motion was made "in an effort to effectively utilize his resources." *Id.* at 270l. Affirming the dispositive effect of *RBK*, the Commission unanimously granted the motion. *Id*. at 271. The Secretary, not the Commission, decides upon the appropriate use of Secretarial resources.

- In *Mechanicsville Concrete, Inc. T/A Materials Delivery*, 18 FMSHRC 877 (June 1996), the principal issue was the ALJ's decision to enter an S&S finding even though the Secretary had not made a special finding of S&S. The Commission held that the Commission does not have authority to make an S&S finding not sought by the Secretary. Without a supporting finding by the Secretary, the ALJ did not possess the authority to add a new finding. *Id*. at 879-80, *citing Mettiki Coal Co*., 13 FMSHRC 760, 764-765 (May 1991). Further, the Commission reemphasized the ongoing guiding principle: "The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable." *Id*. at 879.[7]

- In *United Metro Materials*, 24 FMSHRC 140 (Feb. 2002), Chairman Verheggen and Commissioner Beatty summarily granted the Secretary's motion to dismiss a Direction for Review of citations. Then-Commissioner (now Chair) Jordan separately concurred writing, "The [Supreme] Court pointed out that allowing the Commission to overturn the Secretary's decision to withdraw a citation would amount to allowing the Commission 'to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend.'" *Id*. at 142 (citing *Cuyahoga Valley*, 474 U.S. at 7).

- Following *Cuyahoga*, 474 U.S. 3, this Commission in *RBK,* 15 FMSHRC at 2101, concluded that it lacked the authority to overturn a Secretarial decision to withdraw or vacate a citation.

- In *United Mine Workers of America on behalf of Local 1248, District 2 v. Maple Creek Mining*, *Inc*., 29 FMSHRC 583 (July 2007), the Commission reversed an ALJ's decision to permit litigation of a Withdrawal Order notwithstanding the Secretary's settlement. It did so even though, "[w]e are aware that vacating the judge's denial of the operator's motion for summary decision may have an adverse impact upon miners who might

[7] Oddly, the majority attempts to negate the clear holding of *Mechanicsville* by arguing it derived from the Commission's own prior dispositive decision in *RBK*. *Knight Hawk*, 46 FMSHRC ___, slip op. at 9-10, No. LAKE 2021-0160 (August 30, 2024).

otherwise have been eligible for up to a week's compensation for the time they were not permitted to work due to the withdrawal order. We are sympathetic to their position. However, the Secretary has broad authority to vacate orders she has issued." *Id.* at 596-7.

- In *North American Drillers, LLC*, 34 FMSHRC 352, 355-56 (Feb. 2012), the Commission wrote: "The Commission has acknowledged that it lacks authority to overturn a decision by the Secretary to withdraw or vacate a citation under the Mine Act. *RBK,* 15 FMSHRC at 2101, *citing Cuyahoga*, 474 U.S. at 7-8; *Mechanicsville Concrete, Inc.,* 18 FMSHRC 877, 879 (June 1996). The Commission and the courts have also recognized that under the Mine Act, Congress intended to delegate such enforcement authority to the Secretary, not the Commission. *Mechanicsville,* 18 FMSHRC at 879; *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008)."

The majority does not provide any basis for veering from the express language of the Mine Act, its legislative history, the Commission's rules, or established case law to undercut the established principle of the Secretary's right to vacate a citation—the most basic exercise of her exclusive enforcement authority. In summary, the basic principles of split enforcement agencies, the Secretary's exclusive right to exercise prosecutorial discretion, the plain language of section 110(k), the legislative history of section 110(k), and the Commission's rules demonstrate the Secretary's right to vacate citations at any point.[8]

B. S&S Designations

The standard for determining if an S&S violation has occurred is whether (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020).

If an S&S determination is challenged, an ALJ reviews the evidence and decides which party has made the more convincing argument. However, before and after the hearing, the Secretary has a right and duty to review the facts and decide whether to press a special S&S finding.

[8] Even if those overwhelming principles were insufficient, commonsense principles of government decision-making mandate the absence of authority for the Commission to refuse to accept a decision to vacate a citation. The Commission cannot compel the Secretary to litigate a citation. If the Secretary finds a citation should be vacated, she may simply decline to prosecute it. In the absence of the presentation of a case by the Secretary, the citation must fail. It would be an unworkable and futile policy to attempt to force the Secretary to prosecute a citation once she has decided not to do so. Moreover, the Secretary recognizes that it is grossly unfair to the private citizen for a group of lawyers on the Commission to force the knowledgeable and experienced Secretary to prosecute the citizen despite her decision not to do so.

The Commission has understood the Secretary's enforcement power and the absence of Commission authority to interfere with the Secretary's authority:

> As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," 499 U.S. at 152, 111 S.Ct. 1171 (internal quotation marks omitted), and the Commission has no "policymaking role," *id.* at 154, 111 S.Ct. 1171. Instead, "Congress intended to delegate to the Commission the type of nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency-review context." *Id.* "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Id.* at 154-55, 111 S.Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

Twentymile Coal Co., 456 F.3d at 161 (emphasis in original).[9]

In *Mechanicsville*, 18 FMSHRC 877, the Commission recognized the breadth and scope of MSHA's prosecutorial discretion. The Commission explained the distinctly different roles of MSHA and the Commission under the Mine Act, finding that the Commission must adjudicate disputes under the Mine Act; the Commission does not enforce the Mine Act itself. *Id*. at 879-80.

In *Heckler v. Chaney,* 470 U.S. 821 (1985), the Supreme Court held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under 5 U.S.C. § 701(a)(2). *Id*. at 831. An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id*. Numerous other decisions reiterate this fundamental principle. *Lincoln v. Vigil,* 508 U.S. 182, 191 (1993); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Robbins v. Reagan*, 780 F.2d 37, 44-45 (D.C. Cir. 1985).

Citing *Heckler* and *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 538 (D.C. Cir. 1986), the Commission found that MSHA, as the enforcing administrative agency, has "virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority." *Mechanicsville*, 18 FMSHRC at 879. An ALJ forcing the Secretary to continue an enforcement action that she has decided not to pursue directly contradicts this seminal principle.

[9] A host of cases affirm these basic premises. *See, e.g., Speed Mining, Inc*. v. *FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008); *RAG Cumberland Res. LP v. FMSHRC,* 272 F.3d 590, 595-96 (D.C. Cir. 2001); *Sec'y of Labor v. Excel Mining, LLC,* 334 F.3d 1, 5-6 (D.C. Cir. 2003); *Akzo Nobel Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1303 (D.C. Cir. 2000).

In *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (August 2020), the Commission held that an Administrative Law Judge may "not to engage in fact finding as he would post-hearing." *Id.* at 576.[10] The Commission recognized MSHA's right to determine whether to assert with an S&S claim stating, "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the expertise of MSHA in judging whether a violation is S&S." *Id.*

Determination of whether a violation should be designated S&S is a fact-based inquiry requiring the exercise of prosecutorial discretion. If an S&S designation is contested at a hearing, the ALJ is presented with evidence by both parties and may decide the merits of the designation. That authority, however, does not permit an ALJ to add an S&S finding to a citation that MSHA did not designate with a special S&S finding. By parity of legal reasoning, if MSHA withdraws an S&S designation before a hearing, an ALJ could not make a post-hearing decision finding an S&S violation. Similarly, it is an impermissible abuse of discretion for an Administrative Law Judge effectively to engage *sua sponte* in a fact-based inquiry and determine that the Secretary may not remove an S&S designation before settling a case.

IV.

CONCLUSION

The controlling element of these decisions is the exclusive enforcement authority of the Secretary. Granting the Commission power to review the Secretary's policy decisions to enforce the Mine Act would place numerous such decisions in the hands of an ALJ who has heard no evidence, who has no mining experience, and to whom the parties have presented agreed-upon facts. Moreover, the Commission cannot, and should not be able, to force the Secretary to undertake prosecutions she no longer supports.

[10] A searching factual inquiry by the ALJ into the Secretary's exercise of prosecutorial discretion to vacate a violation or a special S&S finding almost certainly precludes the ALJ from continuing as the Judge at a hearing. For example, in *Knight Hawk*, Docket No. LAKE 2021-0160, the ALJ wrote, "the *operator may yet establish* by evidence that there was no violation or that any violation was not S&S." Unpublished Order Denying Motion to Approve settlement, at 5 n.4 (Sept. 30, 2021) (emphasis added). Although the Judge does not formally find S&S and disclaims finality, he places the burden of proof on the operator to establish at a hearing that the violation was not S&S. Having reached that view before the presentation of any evidence, he could not possibly continue as the trial Judge.

The express words of the Mine Act, its legislative history, Commission rules, established case law, and sound policy demonstrate the right of the Secretary of Labor to issue citations, vacate citations, issue special S&S findings, vacate special S&S findings, issue flagrant violation citations, vacate flagrant violation citations, assert unwarrantable failures, withdraw the assertion of unwarrantable failures, and engage in a host of other enforcement, policy-driven, qualified expert decisions. ALJs and Commissioners must resist the siren call to self-importance; they must stay within the boundaries of the law. The Secretary has the "uncabined" right to assert or to vacate citations, special S&S findings, and other enforcement decisions.

William I. Althen, Commissioner

Distribution:

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

William Allen McGilton
Assistant Director of Safety-Assessments
American Consolidated Natural Resources, Inc.
46226 National Rd.
St. Clarisville, OH 43950
amcgilton@coalsource.com

Joshua Schultz, Esq.
Law Office of Adele L. Abrams P.C.
600 17th St. #2800 South
Denver, CO 80202
jschultz@aabramslaw.com

Lorna M. Waddell, Esq.
Dinsmore & Shohl LLP
215 Don Knotts Blvd. Suite 310
Morgantown, WV 26501
lorna.waddell@dinsmore.com

John Jerrels
Sr. Regional Health & Safety Manager
LafargeHolcim
2942 US Highway 61
Bloomsdale, MO 63627
john.jerrels@lafargeholcim.com

Brandon Witz
Regional Health & Safety Coordinator
LafargeHolcim
3500 State Highway 61
Bloomsdale, MO 63627
Brandon.witz@lafargeholcim.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

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

Alexandra J. Gilewicz, Esq.
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210
gilewicz.alexandra.j@dol.gov

Administrative Law Judge Micheal G. Young
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
MYoung@fmshrc.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV