

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2025

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2022-0189
ADMINISTRATION (MSHA)	:	WEST 2022-0267
	:	WEST 2022-0268
v.	:	
	:	
GENESIS ALKALI, LLC	:	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act” or “Act”). It comes before us on interlocutory review of a Commission Administrative Law Judge’s order denying two proposed settlements between the Secretary of Labor and Genesis Alkali, LLC.

The captioned dockets contain a total of 34 citations. The Secretary initially proposed settlements for the three dockets in which a total of sixteen citations would be modified, nine would be vacated, and nine would remain unchanged. The Judge denied these settlements on October 18, 2022. Unpublished Orders (Oct. 18, 2022) (“Oct. Order A,” “Oct. Order B”).¹ On November 29, 2022, the Secretary filed an amended proposed settlement for Docket No. WEST 2022-0189, and the parties filed joint “Stipulations of Dismissal” for Docket Nos. WEST 2022-0267 and WEST 2022-0268. Under the new filings, six citations would be modified, nineteen would be vacated, and nine would remain unchanged.

On December 7, 2022, the Judge interpreted the joint filing as a settlement motion, denied both motions, and certified her denials for interlocutory review. Unpublished Order (Dec. 7, 2022) (“Dec. Order”). In denying the motion for Docket No. WEST 2022-0189, the Judge particularly found insufficient justification for the proposed modifications to Citation No. 9479991. In denying the motion for Docket Nos. WEST 2022-0267 and WEST 2022-0268, she

¹ For purposes of this decision: “Oct. Order A” refers to the Judge’s October 18, 2022, Denial Order in Docket No. WEST 2022-0189; “Oct. Order B” refers to the Judge’s October 18, 2022, Denial Order in Docket Nos. WEST 2022-0267 and WEST 2022-0268; and “Dec. Order” refers to the Judge’s combined December 7, 2022, Order in all three dockets.

particularly noted the lack of any justification for the vacatur and found that the Secretary had abused her discretion to vacate citations.²

The question before us on interlocutory review is whether the Judge abused her discretion in denying the November 29, 2022, motions. For the reasons below, we conclude that the Judge did not abuse her discretion in denying the proposed settlements.

I.

Factual and Procedural Background

This proceeding has a complex procedural history, summarized below. The Commission has accepted interlocutory review of the Judge's *December 7, 2022*, order denying the parties' motions filed on *November 29, 2022*. However, that denial order incorporates by reference her earlier October 18, 2022, orders denying motions filed by the Secretary in September of 2022.

September Motions: In September 2022, the Secretary filed a settlement motion in each captioned docket.³ In each motion, the Secretary provided some justification for proposed modifications to citations, but none for proposed vacatur of citations.

WEST 2022-0189: On September 30, 2022, the Secretary filed a proposed settlement for the nine citations at issue. According to the proposed terms, one citation would be vacated, six would be modified, and two would be unchanged, with a corresponding total penalty reduction from \$34,483 to \$9,494.

WEST 2022-0267: On September 13, 2022, the Secretary filed a proposed settlement for the thirteen citations at issue. According to the proposed terms, four citations would be vacated, two would be modified, and seven would be unchanged, with a corresponding total penalty reduction from \$44,540 to \$10,738.

WEST 2022-0268: On September 15, 2022, the Secretary filed a proposed settlement for the twelve citations at issue. According to the proposed terms, four citations would be vacated and eight would be modified, with a corresponding total penalty reduction from \$76,369 to \$4,686.

² The consolidated dockets have since been reassigned to another Administrative Law Judge. Unpublished Order dated Jan. 11, 2023.

³ The Secretary had filed earlier settlement motions in each of these dockets, which were informally denied. The Secretary then filed amended motions with additional justification but the same substantive terms. These amended motions (the "September Motions") were the first settlement motions to be formally denied (October 18, 2022).

October Denials: On October 18, 2022, the Judge issued two orders denying the September motions (consolidating Docket Nos. WEST 2022-0267 and 0268).⁴ She found both proposed settlements to be unfair, unreasonable, inappropriate under the facts, and unprotective of the public interest, and particularly found the overall penalty reductions to be contrary to the public interest. Oct. Order A at 3, 5-7; Oct. Order B at 4, 11-13.

WEST 2022-0189: The Judge particularly found that the explanations provided by the Secretary were insufficient to justify the proposed modifications to Citation No. 9479991 (Oct. Order A at 3-5).

WEST 2022-0267 & 0268: The Judge particularly found that the Secretary abused his discretion by vacating three citations without explanation (Oct. Order B at 6-7) and that the Secretary's explanations were insufficient to justify the proposed modifications for two citations (*id.* at 8-11).

November Motions: On November 29, 2022, the parties submitted two new motions.

WEST 2022-0189: The Secretary filed an amended settlement motion providing additional justifications for the proposed modifications to Citation No. 9479991. The overall terms of the proposed settlement remained unchanged.

WEST 2022-0267 & 0268: The parties jointly filed a document titled "Stipulations of Dismissal" for the combined dockets. The Respondent stated that it was withdrawing its contest of seven citations, and the Secretary stated that she was vacating the remaining citations pursuant to her prosecutorial discretion.

December Denial and Certification: On December 7, 2022, the Judge issued a single combined order denying the November motions and certifying the matter for interlocutory review.

WEST 2022-0189: The Judge incorporated by reference all rationales for denial outlined in her October order. She acknowledged that the amended motion offered additional support for the proposed modifications to Citation No. 9479991. However, she found the additional justifications unconvincing, contradictory, and insufficient to establish that the changes were fair, reasonable, appropriate or in the public interest. Dec. Order at 3.

WEST 2022-0267 & 0268: The Judge interpreted the "Stipulations of Dismissal" as an amended settlement motion. *Id.* at 2. She found that the parties had attempted to evade review of settlements, in contravention of the Mine Act. *Id.* at 2-3. The Judge again incorporated by reference her rationales for denial outlined in her October order and reiterated that the Secretary had abused her discretion to vacate citations. *Id.* at 3.

⁴ The Judge certified both denial orders for interlocutory review on November 17, 2022. The Commission ultimately found those certifications moot, in light of the subsequent settlement motions. 44 FMSHRC 713, 714 (Dec. 2022).

Commission acceptance of review: On December 12, 2022, the Commission granted interlocutory review on the issue of whether the Judge abused her discretion in denying the November 29, 2022, motions to approve settlement. 44 FMSHRC 713, 714 (Dec. 2022).

Secretary's Arguments on review:⁵ The Secretary requests that the Commission vacate the Judge's Order of December 7, 2022, approve the proposed settlement in Docket No. WEST 2022-0189, and enter an order dismissing Docket Nos. WEST 2022-0267 and WEST 2022-0268 consistent with the parties' stipulations. Br. at 27.

WEST 2022-0189: The Secretary claims that the parties' justifications regarding Citation No. 9479991 satisfy the Commission's standard for approving settlements, and that the Judge erred by not accepting the facts as presented in the motion. Br. at 24-26.

WEST 2022-0267-0268: The Secretary claims that she has unreviewable authority to vacate citations, consistent with the Mine Act's split-enforcement scheme which gives the Secretary authority over enforcement decisions. Br. at 12-24. This argument is detailed more fully in Section III.B, below.

III.

Disposition

Section 110(k) of the Mine Act states that “[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k). Consistent with this Congressional mandate, Commission Judges review proposed settlements to determine whether they are “fair, reasonable, appropriate under the facts, and protect[] the public interest.” *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) (“*AmCoal I*”). If the support presented in the settlement is not sufficient to permit the Judge to make that determination, the Judge may request further support from the parties. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1863-64 (Aug. 2012). The Commission then reviews the Judge's determination under an abuse of discretion standard. *E.g.*, *American Coal Co.*, 40 FMSHRC 983, 987 (Aug. 2018) (“*AmCoal II*”). We will affirm a Judge's approval or denial of a proposed settlement that is fully supported by the record, consistent with the statutory penalty criteria, and not otherwise improper, but abuses of discretion or plain errors are subject to reversal. *Black Beauty*, 34 FMSHRC at 1863-64.

We find that the Judge did not abuse her discretion in denying the November 29, 2022, motion filed in Docket No. WEST 2022-0189, or in denying the motion of the same date filed in Docket Nos. WEST 2022-0267 and WEST 2022-0268.

A. Docket No. WEST 2022-0189

The Secretary has filed multiple amended settlements in this docket. Each motion proposed the same terms but provided additional support for the proposed modifications to

⁵ Genesis Alkali has not filed any briefs in this matter.

Citation No. 9479991. The Judge denied each motion, primarily due to insufficient support for the proposed modifications to Citation No. 9479991.⁶ The Judge’s denial of the Secretary’s November 29, 2022, amended motion is currently before us on review. We find that the Judge did not abuse her discretion in finding that the proposed modifications were not fair, reasonable, appropriate under the facts, or protective of the public interest.

Citation No. 9479991 alleges a violation of 30 C.F.R. § 57.14100(b), which requires that any equipment defects affecting safety be “corrected in a timely manner to prevent the creation of a hazard to persons.” The citation alleges that a ventilation fan in the tunnels under the pumphouse had not been running for 26 days, which would expose miners to fatal injuries if hydrogen sulfide gas was to build up in the tunnels. The citation notes that hydrogen sulfide gas was detected at levels of 0.5-0.9 ppm, there were no alarms or warning lights, and miners were not carrying meters. The issuing inspector marked the citation as significant and substantial (“S&S”), the result of high negligence, and reasonably likely to cause fatal injury.⁷ Oct. Order A at 3.

The Secretary proposes modifying the citation to non-S&S, reducing the gravity from “Fatal” to “Lost Workdays,” and reducing the penalty from \$12,007 to \$729.

In her September motion, the Secretary provided two statements in support of the proposed modifications: (1) the amount of hydrogen sulfide gas detected did not exceed the Mine Safety and Health Administration’s Threshold Limit Value (“TLV”) or the General Industry Ceiling limit; and (2) there was no evidence that the condition could result in lethal levels of exposure. The Judge found these insufficient to justify the proposed changes. She noted that gas levels in excess of the TLV pose major health risks, and found it illogical to mitigate the level of gravity to “Lost Workdays” and remove the S&S designation simply because the level of contamination was not extreme enough to exceed the TLV and/or cause a fatality. She also found the Secretary’s assertion regarding non-lethal levels of exposure to be overbroad, conclusory, and at odds with the citation’s assertions that gas could further accumulate, the fan had been defective for some time, and miners may not have been aware of the dangerous conditions. Oct. Order A at 4-5, 8.

In her November motion, the Secretary added two additional assertions. First, the motion states that gas concentrations could not have increased to fatal levels because the material being pumped through the tunnels did not contain anything that would cause concentrations to approach the TLV. Second, the motion states that the pumphouse operator wore a gas meter any time the employee entered the tunnels until the fan was repaired, and no gas was detected during

⁶ The Judge also found the total penalty reduction to be a “major defect” in the proposed settlement. Oct. Order A at 5. However, even on that point, she “object[ed], in particular, to the penalty reduction associated with Citation No. 9479991.” *Id.* at 6.

⁷ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety and health hazard.”

that time. Incorporating her October Denial by reference, the Judge again denied the proposed settlement. She acknowledged that the Secretary’s amended motion offered “slightly more information in support of Citation No. 9479991,” but found that the additional facts did not resolve the insufficiency. Dec. Order at 3. She concluded that “even in the face of the newly offered facts” the proposed settlement failed to account for the seriousness of the violation alleged, and that the amended motion “does not show how the major changes proposed are fair, reasonable, appropriate, or in the public interest.”⁸ *Id.*

The citation alleges that miners were working in contaminated air without a functional ventilation fan for nearly a month, constituting a significant and substantial violation. As the Judge noted, the hazards associated with inadequate ventilation are “among the most serious in mining.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (internal citations omitted) (cited in Oct. Order A at 4). A persistent and overlooked defect in a ventilation fan can allow the accumulation of potentially hazardous gases, i.e., can significantly and substantially contribute to a hazard. See *Oak Grove Res., LLC v. Sec’y of Labor*, 520 F.App’x. 1, 2013 WL 1729514 (D.C. Cir. 2013) (unpublished) (upholding Judge’s determination that a failure to conduct a weekly examination was S&S where the record indicated that a compromised ventilation fan, if undetected by inspection, might allow methane and other potentially lethal gases to build up in the mine).

The Secretary seeks to reduce the level of gravity to “Lost Workdays” and remove the S&S designation, primarily on the basis that hydrogen sulfide accumulations could not reach fatal levels. However, a likelihood of fatality is not required for a violation to be S&S. Long-term exposure to non-fatal levels of gas may still cause serious injury. Additionally, poor ventilation carries other risks in addition to hydrogen sulfide accumulations.

The Secretary also represents for settlement purposes that the pumphouse operator’s gas detector did not detect any gas when he entered the tunnels. However, gas was apparently detected when the citation was issued. Furthermore, as the Judge noted, S&S evaluations should be made in terms of continued mining operations. The fact that gas was not detected at a certain time does not preclude a buildup of gas if normal mining operations were to continue. Oct. Order A at 4, *citing U.S. Steel*, 7 FMSHRC at 1130.

⁸ The Judge did not explicitly analyze each additional justification proposed by the Secretary in the November motion. We note that, in denying a proposed settlement, Judges are generally required to “articulate [any deficiencies] with some particularity.” *Solar Sources Mining*, 41 FMSHRC 594, 602 (Sept. 2019). A fully articulated decision allows the Commission to effectively perform our review function. *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). In this instance, however, any error in this regard is harmless. As explained further below, the new proposed justifications in the Secretary’s November Motion do not address the underlying insufficiencies noted in the Judge’s October Order and incorporated by reference into her December Order. The Judge’s second denial of the proposed settlement is supported by the record. *E.g., Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012).

The Judge found in her October Order that the Secretary's initial representations did not sufficiently justify the proposed modifications of reducing the gravity for Citation No. 9479991 to "Lost Workdays" and removing the S&S designation. The Judge then found in her December Order that the Secretary's additional representations were still insufficient to justify the proposed modifications, in light of the seriousness (i.e., gravity) of the violation. In other words, the Judge found that it would not be fair, reasonable, appropriate under the facts, or protective of the public interest to reduce the citation's gravity to "Lost Workdays" and remove the S&S designation simply because miners would not have been exposed to *fatal* levels of hydrogen sulfide. The Judge did not abuse her discretion in denying the proposed settlement.

B. Docket Nos. WEST 2022-0267 & WEST 2022-0268

In the docket discussed above, the terms of the successive settlement motions remained constant. Conversely, in the dockets discussed below, the parties' November 29, 2022, filing differed radically from earlier motions. The Secretary initially proposed vacating eight citations, modifying ten citations, and keeping seven unchanged. When the proposed settlement motion was denied, rather than amending the motion to provide additional support, the parties jointly filed "Stipulations of Dismissal" in which the Respondent stated that it was withdrawing its contest of seven citations, and the Secretary stated that she was vacating eighteen citations pursuant to her prosecutorial discretion, without case-specific justification. For the reasons below, consistent with our recent holding in *Crimson Oak Grove Res.*, 46 FMSHRC 593 (Aug. 2024) ("*Crimson Oak*"), we find that the Judge did not abuse her discretion in denying the parties' November 29, 2022, filing.

The Commission's decision in *Crimson Oak*, issued after the captioned matter was certified for interlocutory review, is highly relevant to this proceeding. As here, the parties filed "Motions to Dismiss" in which the operator stated that it would withdraw its contest of certain citations and the Secretary stated that she would dismiss the remaining citations, without providing support for the proffered terms. *Id.* at 595-97. As here, the Secretary claimed unreviewable prosecutorial discretion in determining whether to vacate a citation. *Compare id.* at 597-98 with *Br.* at 12-24. As here, the Judge rejected the Secretary's claim and denied the motions. As in *Crimson Oak*, we affirm the Judge's denial.

As a preliminary matter, the Judge did not err in interpreting the parties' "Stipulations of Dismissal" as a settlement motion. Where an operator has agreed to forfeit its right to contest certain citations and the Secretary has agreed to vacate the remaining citations to effectuate the resolution of a legal matter, "[t]he deal that the parties have reached . . . clearly constitutes a settlement." *Crimson Oak*, 46 FMSHRC at 602. As the Judge notes, the parties here have "settled the case and now present new terms." *Dec. Order* at 2, n.1. The Secretary concedes that Genesis Alkali was initially "willing to accept modified versions of ten violations" across the two dockets, however "the ALJ's refusal to recognize the eight vacatures that occurred during settlement compelled the Secretary to vacate" those ten citations that would otherwise have been modified. *Br.* at 22. In other words, the parties' lack of success in having the original settlement terms approved "compelled" the Secretary to change the terms. The Secretary's decision to vacate the citations was made within the context of settlement.

Parties who submit settlement motions must provide supporting justifications, so that the Judge may determine whether the proposed terms are fair, reasonable, appropriate under the facts, and protective of the public interest. *AmCoal I*, 38 FMSHRC at 1981. This basic premise holds true for vacatur in the settlement context. *Crimson Oak*, 46 FMSHRC at 598 (vacatur in the settlement context are subject to Commission review and “parties must provide sufficient facts to support the vacatur of the citation or order in a settlement proceeding”).

In *Crimson Oak* and the captioned matter, the Secretary has asserted that the Mine Act’s split-enforcement scheme grants the Secretary the sole authority to enforce the statute, thus precluding Commission review of her decision to vacate a citation. She has contended that section 110(k) of the Act does not restrict the Secretary’s discretion, because it only authorizes the Commission to review settlement of penalty amounts and does not provide any meaningful standard by which to review the Secretary’s vacatur decision. The Secretary has relied in part 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*”). Compare Br. at 12-20 with *Crimson Oak*, 46 FMSHRC at 597-98.

Section 110(k) of the Act states that “[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k). As we explained in *Crimson Oak*, this explicit Congressional mandate clearly and unambiguously “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.”⁹ *Crimson Oak*, 46 FMSHRC at 599. Additionally, we held that section 110(i), which sets forth the six statutory factors for assessing penalty amounts, provides a meaningful standard of review to apply in determining whether the Secretary has met her burden of justifying a proposed settlement. *Id.* at 600; 30 U.S.C. § 820(i).

Although sections 110(k) and 110(i) refer to penalties, we emphasized in *Crimson Oak* that settlements are a holistic package of interacting monetary and nonmonetary aspects which the Judge must consider in its entirety. 46 FMSHRC at 603-04, citing *AmCoal II*, 40 FMSHRC at 989. We noted that penalties and citations are closely intertwined, but under the Secretary’s

⁹ During the June 20, 1977, Senate Floor Debate regarding the Federal Mine Safety and Health Amendments Act of 1977, Senator Wendell H. Ford noted:

[T]his bill limits the opportunities for compromising penalties. The settlement of penalty assessments in the past, often for as little as 30 cents on the dollar, has been a disgrace, as well as a serious obstacle to effective use of the civil penalty mechanism to encourage compliance.

123 Cong. Rec. 9931 (1977) (statement of Sen. Ford), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 922 (1978).

position “the Commission and the public would have no ability or right to understand what [had] happened” if a vacatur in the settlement context reduced a penalty to zero. *Id.* at 604.

As we further explained in *Crimson Oak*, the cases relied on by the Secretary are readily distinguishable. *Cuyahoga Valley* (upon which *RBK* relies) was brought under the Occupational Safety and Health Act (“OSH Act”) rather than the Mine Act. Significantly, the OSH Act does not contain any provision parallel to section 110(k) authorizing the Commission to review the Secretary’s proposed settlements. Additionally, the motions to dismiss in *Cuyahoga Valley* and *RBK* were brought in the context of voluntary dismissal, not settlement. Finally, in both cases the administrative agency provided the court with an explanation as to why the withdrawal or vacatur was taken. *Id.* at 601-02.

Consistent with our subsequent analysis in *Crimson Oak*, the Judge in this matter found that allowing the Secretary to vacate citations in the settlement context without review would thwart Congress’ intent in drafting section 110(k) of the Act. Dec. Order at 2-3. She also similarly noted that *RBK* was distinguishable because it did not involve settlement of penalties and relied on a case arising under the OSH Act.¹⁰ Oct. Order B at 7. Accordingly, she properly rejected the Secretary’s claim of unreviewable discretion to vacate citations in the settlement context. Dec. Order at 2-3.

The parties’ November 29, 2022, filing was a settlement motion. All settlement motions, including vacaturs in the settlement context, must be supported by sufficient justifications for the Judge to determine if the proposed terms are fair, reasonable, appropriate under the facts, and protective of the public interest. *Crimson Oak*, 46 FMSHRC at 598; *AmCoal I*, 38 FMSHRC at 1981. Here, the Judge denied the November 29, 2022, motion because the parties provided *no* justifications. Dec. Order at 2. The Judge did not abuse her discretion in denying the settlement. *AmCoal I*, 38 FMSHRC at 1984-85; *Crimson Oak*, 46 FMSHRC at 598.

¹⁰ The Judge’s analysis of the Secretary’s claim of unreviewable discretion is primarily found in her October Order. Oct. Order B at 6-7. The Judge then incorporated “the rationales given for denying the settlement proposed originally” into her December Order. Dec. Order at 3. The motions addressed in the October Order include proposed modifications which are absent from the motion addressed in the December Order. If the Judge intended to incorporate her *factual analysis* of those *proposed modifications*, that would constitute plain error since those terms were superseded by the later proposal. However, both sets of motions include proposed vacaturs of citations without factual support. The Judge’s *legal analysis* of the Secretary’s claim of *unfettered discretion to vacate in the settlement context* may rationally be incorporated into her later order. Even if the Judge committed reversible error by inappropriately incorporating certain rationales, remand for reconsideration is unnecessary. For the reasons above, the November 29, 2022, motion must be denied consistent with *Crimson Oak*, 46 FMSHRC 593 (Aug. 2024).

IV.

Conclusion

For the reasons set forth above, we affirm the Judge's denial of the proposed settlements. The dockets are hereby remanded to the assigned Judge for further proceedings.



Mary Lu Jordan, Chair



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

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