November 2024

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Review Was Denied in the Following Case During The Month Of November 2024

Secretary of Labor v. Cactus Canyon Quarries, Inc., Docket No. CENT 2024-0120, Judge Paez (October 8, 2024) Interlocutory Review

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 1, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2022-0003
COUNTY LINE STONE CO., INC.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. PENN 2021-0108
CONSOL PENNSYLVANIA COAL COMPANY LLC	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2022-0260
RAMACO RESOURCES, LLC	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY: THE COMMISSION

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The cases are before the Commission on interlocutory review for our consideration of whether section 110(k) of the Mine Act authorizes a Commission Judge to review the Secretary of Labor's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations.[1]

[1] Commission Procedural Rule 76 provides that "the Commission, by a majority vote . . . may grant 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(a)(2).

The Commission recently affirmed that the Mine Act provides a Commission Judge with the authority to review a proposal to vacate a contested citation in a settlement agreement. *Crimson Oak Grove Res, LLC,* 46 FMSHRC 593 (Aug. 30, 2024). We determined that the Mine Act clearly authorizes a Judge to review proposed settlement agreements which contain an agreement to vacate a contested citation. Accordingly, for the reasons described herein, these cases are remanded to the Judge for further proceedings consistent with this decision and our decision in *Crimson Oak.*[2]

I.

Factual and Procedural Background

In each of these matters, the Secretary filed a motion to approve settlement proposing to vacate at least one of the contested citations, citing *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993).[3] In consideration of the motions, the Judge asked if the Secretary's representative could attest that the proposal to vacate any citation was independent from, and not contingent upon, the compromise or settlement of other citations. The Secretary did not provide the requested assurance. The Secretary instead filed motions for certification of interlocutory review, requesting that the Judge certify the question of whether the Secretary has the unreviewable discretion to vacate a contested citation. The Judge denied the motions for interlocutory review as well as the motions to approve settlement. Thereafter, the Secretary filed a petition for interlocutory review directly with the Commission.

On August 5, 2022, the Commission granted interlocutory review of the Judge's denial orders and consolidated these captioned proceedings.[4] The Judge's orders are before us now in consideration of the question of his authority to review proposed settlements under the Mine Act. The pertinent settlement terms presented in each motion are as follows.

A. County Line Stone Co., Inc., YORK 2022-0003

The Secretary's motion to approve settlement in *County Line Stone* includes a proposal to vacate two of the five citations at issue, reducing the total originally proposed civil penalty from $625 to $375 ($125 civil penalty per citation). The Secretary now proposes to vacate Citation No. 9663313, issued for an alleged violation of 30 C.F.R. § 56.20011, which requires barricades

[2] On September 10, 2024, the Secretary of Labor appealed the Commission's decision in *Crimson Oak* to the United States Court of Appeals for the District of Columbia Circuit. On October 22, 2024, the Secretary filed an unopposed motion with the Commission seeking to hold these captioned cases in abeyance pending a decision from the D.C. Circuit in *Crimson Oak*. After considering the Secretary's motion and the arguments therein, the motion for stay is hereby denied.

[3] Sec'y's Mot., No. YORK 2022-0003 at 3; Sec'y's Mot., No. PENN-2021-0008 at 5; Sec'y's Mot., No. WEVA 2022-0260 at 5.

[4] The cases were consolidated pursuant to our authority under Commission Procedural Rule 12, 29 C.F.R. § 2700.12.

or warning signs in areas where there are safety hazards. In addition, the Secretary proposes to vacate Citation No. 9663308, issued for an alleged violation of 30 C.F.R. § 56.12018, which requires labeling of power switches. The operator agrees to pay the penalties for the three remaining citations.

B. Consol Pennsylvania Coal Co., PENN 2021-0108

The Secretary's motion to approve settlement in *Consol Pennsylvania* includes a proposal to vacate two of the seven citations at issue. The Secretary proposes vacating Citation Nos. 7033996 and 7033997, which were issued for alleged electrical wiring defects in violation of 30 C.F.R. § 77.516. The operator agrees to accept the other five contested citations with some modifications. In total the parties propose to reduce the original proposed penalty of $1,730 to $636.

C. Ramaco Resources, LLC, WEVA 2022-0260

The Secretary's motion to approve settlement in *Ramaco Resources* includes the proposal to vacate one of the seven citations at issue. The Secretary proposes to vacate Citation No. 9562673 and its $10,868 civil penalty without additional factual support or explanation. The citation alleges that the operator was not following the mine's approved ventilation plan in violation of the requirements in 30 C.F.R. § 75.370(a)(1). The citation states:

> The approved ventilation plan is not being followed along the bleeder entries that is used to access the 50 psi seals at the top end of the #2 Mains panel. The roof in the two bleeder entries inby cross cut 32 has severely deteriorated preventing the weekly examiner from traveling the area safely. The ribs bolts have rolled out in the center of the entry and the mine roof is not sound. The last examination that was conducted was on 12-13-21 of the bleeder and 5 psi seal area. This condition could cause serious injury to the examiner traveling through this area.
>
> Standard 75.370(a)(1) was cited 7 times in two years at mine 4609495 (7 to the operator, 0 to a contractor).

The parties agree to additional reductions in proposed civil penalties and other modifications for many of the other six citations at issue. The parties agree to settle the original total proposed civil penalty of $35,346 for $6,464.

II.

Disposition

The Secretary argues that she has the unreviewable prosecutorial discretion to vacate contested citations and that section 110(k) of the Mine Act does not provide the Commission the authority to review the Secretary's vacatur decisions.[5]

The Commission refuted these same arguments in *Crimson Oak*, holding that the Secretary's position is "clearly inconsistent with section 110(k) of the Mine Act." 46 FMSHRC at 604. For reasons stated more fully in that decision, sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. § § 820(k) and 820(i), circumscribe the Secretary's enforcement discretion and supply a meaningful standard to review motions to approve proposed settlements of citations and civil penalties contested before the Commission.

Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), provides that:

> 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.

Section 110(k) specifically "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." *Crimson Oak*, 46 FMSHRC at 599 (citing *Knox County Stone Co*., 3 FMSHRC 2478, 2479 (Nov. 1981)).

The Commission has recognized that "although Congress gave the Secretary most of the enforcement powers under the Act, it expressly chose to give to the Commission the authority to assess penalties and approve settlements – powers that usually are given to an enforcement agency." *The American Coal Co*., 38 FMSHRC 1972, 1979 (Aug. 2016) ("*AmCoal I*"). Under the Mine Act, all contested penalties ultimately become part of a final decision of the Commission.[6] 30 U.S.C. § 823(d).

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[5] The Secretary filed a brief in this case prior to our issuance of *Crimson Oak*. The operators did not file briefs.

[6] The Mine Act's legislative history notes that when investigating the then recent catastrophic mine disasters and associated regulatory failures, the Senate Committee discovered that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement 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). The Senate Report states that by enacting section 110(k) "the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as

(continued…)

Commission Procedural Rule 31, 29 C.F.R. § 2700.31(b)(1), specifies that motions to approve settlement shall require, for each violation at issue, "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."[7] The decision whether to grant a settlement motion is left "to the 'sound discretion' of the Commission and its judges." *Crimson Oak*, 46 FMSHRC at 599 (citing *Madison Branch Mgmt*., 17 FMSHRC 859, 864 (June 1995)).

In claiming unreviewable discretion to vacate a contested citation, in the context of a settlement agreement, the Secretary relies, *inter alia*, upon *Cuyahoga Valley Ry. Co., v. United Transp. Union*, 474 U.S. 3 (1985) and *RBK Construction Inc*., 15 FMSHRC 2099 (Oct. 1993). In *Crimson Oak*, the Commission demonstrated why neither of those two decisions concern the Commission's authority to review a settlement agreement. *Crimson Oak*, 46 FMSHRC at 601-02. In *Cuyahoga Valley*, the Supreme Court held that the Secretary's power to issue citations pursuant to the Occupational Health and Safety Act of 1970 ("OSH Act") includes the power to withdraw the citations. However, the Federal Mine Safety and Health Review Commission *unlike* its OSH Act counterpart has been assigned the authority and the responsibility to review settlements. The OSH Act lacks any provision that is analogous to section 110(k). *Id*. at 601. Thus, the cases currently before us are clearly distinguishable.

The Secretary's reliance on *RBK Construction* is also misplaced. In *RBK Construction*, the Federal Mine Safety and Health Review Commission found that the Secretary had the authority to vacate citations presented in a motion to dismiss, relying on *Cuyahoga Valley*. Similar to *Cuyahoga Valley*, in *RBK Construction*, the Secretary vacated the citations after determining that a different regulatory agency had jurisdiction over the operator; in that case OSHA.[8] 15 FMSHRC at 2099. Notably, the vacated citations were *not* vacated as part of an agreement to settle the case, contingent upon the resolution of other citations.

In *Crimson Oak*, the Commission rejected the Secretary's attempt to extend her authority to vacate citations to situations in which the proposal to vacate is presented as a settlement term.

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[6] (…continued)
a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." *Id*. at 44-45; *see Black Beaut*y, 34 FMSHRC 1856, 1862 (Aug. 2012) (Congress assigned the Commission the responsibility to review the parties' agreements to settle contested penalties "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and [protect] the public interest.").

[7] The requirement to provide factual support in the settlement proposal has been largely unchanged since the inception of the Commission's procedural rules. *See* 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).

[8] The Secretary provides *no explanation* for her decision to vacate *any* of the contested citations in the subject motions to approve settlement. Notably, in *Cuyahoga Valley* the Secretary vacated the OSHA citations only after she determined that the operator was under the jurisdiction of the Federal Railway Administration instead.

The Commission held that the Secretary does not have unreviewable discretion to settle cases by vacating citations under the Mine Act. Specifically, the Commission stated:

> 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.

Crimson Oak, 46 FMSHRC at 599-600.

Furthermore, despite the Secretary's argument to the contrary, the Mine Act provides a "meaningful standard" for the review of a motion to approve settlement. *Id*. at 600 ("the Commission's parameters of review are set out in section 110(i), the Act's legislative history, and the Commission's Procedural Rules."). To summarize, section 110(i) of the Mine Act sets forth six factors for the Commission to consider in assessing penalty amounts.[9] *Id*. (citing *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*. (citing *AmCoal I*, 38 FMSHRC at 1976). The Commission requires that the information contained within the motion to be "sufficient to establish that the penalty reduction does, in fact, protect the public interest." *Black Beauty*, 34 FMSHRC at 1862.

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[9] Section 110(i), 30 U.S.C. § 820(i), provides that:

> 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.

III.

Conclusion

Accordingly, we affirm the Judge's orders denying the motions to approve settlement. We reiterate that a Commission Judge has the authority to review motions to approve settlement, including instances in which there is a proposal to vacate a citation.

These captioned cases are remanded to the Judge for further proceedings consistent with this decision, as well as our decision in *Crimson Oak.* The parties are invited to resubmit motions to approve settlement before the Judge with additional information or different terms, if not both.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 5, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2022-0403
GREENBRIER MINERALS, LLC	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), involves the interlocutory review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Greenbrier Minerals, LLC ("Greenbrier").

At issue is whether the Secretary has unreviewable discretion to remove a significant and substantial ("S&S") designation[1] from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[2] This same issue was recently decided by the Commission in *Knight Hawk Coal, LLC*, 46 FMSHRC 563 (Aug. 2024).[3] For the reasons

[1] 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 or health hazard . . . ."

[2] Section 110(k) provides in relevant part:

> 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.

30 U.S.C. § 820(k).

[3] On September 10, 2024, the Secretary appealed the Commission's decision in *Knight Hawk* to the United States Court of Appeals for the District of Columbia Circuit. On October 22, 2024, the Secretary filed an unopposed motion with the Commission seeking to hold this case in abeyance pending a decision from the D.C. Circuit in *Knight Hawk*. S. Mot. at 1. After considering the Secretary's motion and the arguments therein, the motion for stay is hereby denied.

set forth below and as more fully discussed in our lead decision in *Knight Hawk*, we answer that question in the negative, affirm the Judge's denial of the settlement motion, and remand the case to the Judge.

I.

Factual and Procedural Background

The Secretary filed a motion to approve settlement involving six citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Greenbrier. The parties proposed that: (1) for two citations, the negligence levels would be modified from moderate to low, and the proposed penalties would be lowered; (2) for three citations, the allegations would remain as written, and the proposed penalties would remain the same; and (3) for one citation, Citation No. 9563253, the gravity level would be modified from "reasonably likely and S&S" to "unlikely and non-S&S," and the proposed penalty would be lowered from $1,593 to $302.

As relevant here, the motion to approve settlement provided in part that Citation No. 9563253, the last citation listed above, alleged an S&S violation of 30 C.F.R. § 75.1725(a)[4] because the operator failed to maintain a feeder breaker in a safe operating condition. Specifically, the emergency stop switch was "tied to the bearing plate of a roof bolt installed for permanent roof support, rendering the . . . switch inoperable." Mot. to App. Settlement at 4. The parties also included Greenbrier's contention that "no hazard was present," and that it would argue at hearing that there were "precautionary measures" that would preclude an injury-producing event from occurring. *Id.* Specifically, the area around the feeder breaker had sufficient room to allow miners to safely work and travel in the area, and the feeder breaker had reflectors to delineate its boundaries. *Id.* In addition, the Secretary stated that she may exercise her discretion to make this modification as part of a settlement, citing *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996). *Id.*

The Judge contacted the parties and requested further information regarding why the violation alleged in Citation No. 9563253 posed no hazard. In response to the Judge's request, the Secretary submitted an amended motion to approve settlement. The parties amended the motion to state that the stop switch was not "integral to the safe operation of the machine," and that an injury-producing event due to the switch being tied off was remote and highly unlikely. Amended Mot. to App. Settlement at 4. The amended motion recognized that Greenbrier asserted that "no hazard was present, thus the likelihood of injury would more appropriately be described as 'Unlikely' due to the cited condition." *Id.*

[4] 30 C.F.R. § 75.1725(a) provides that "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The Judge subsequently informed the parties that he was unable to approve the settlement based upon the factual support provided. The parties requested that the Judge enter an order denying settlement so that the Secretary could move for interlocutory review.

The Judge issued an order denying the motion to approve settlement. Unpublished Order dated Nov. 22, 2022 ("Order"). He held that the parties must provide facts in support of the modification for each violation so that the Judge may set forth reasons for his approval when reviewing settlements. *Id.* at 3. The Judge reasoned that the facts provided by the parties should be substantive and relevant and, "taken as true, should enable a [J]udge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify." *Id.* He noted that for removal of an S&S designation, the facts should challenge one of the S&S factors set forth in *Mathies Coal Company*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Judge concluded that the parties provided legal conclusions and facts that did not address the hazard, that is, the inability to stop the machine in an emergency, and were precedentially irrelevant to an S&S analysis. *Id.* at 3-4. Accordingly, the Judge denied the settlement motion, certified the matter for interlocutory review, and stayed the proceedings pending the decision on interlocutory review.

The Commission granted interlocutory review on the issue of "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." 44 FMSHRC 706 (Dec. 2022).

II.

The Parties' Arguments

The Secretary essentially makes the same arguments here as she did in *Knight Hawk.* The Secretary asserts that she has unreviewable prosecutorial discretion to remove an S&S designation because S&S designations are "enforcement decisions," and not "penalties," under the language of section 110(k). S. Br. at 1, 9. The Secretary cites to the Commission's decisions in *Mechanicsville Concrete, Inc*. and *American Aggregates of Michigan, Inc*. to support her position that she need only depend on her discretion when vacating S&S designations in settlements. S. Br. at 3-4, 9, 11-12. Finally, the Secretary argues that the role of the Commission is limited to adjudicating disputes and that other considerations support the Secretary's unreviewable discretion to remove S&S designations, such as fairness to operators, public confidence in Mine Act enforcement, and the Equal Access to Justice Act ("EAJA"). *Id.* at 14, 16-20.

The operator filed a response brief agreeing with the Secretary's arguments and stating that the Commission should vacate the Judge's denial of the settlement motion and approve the settlement.

III.

Disposition

A. The Secretary does not have unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k).

For the reasons set forth below and as stated more fully in *Knight Hawk*, we hold that sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. §§ 820(k) and 820(i), demonstrate an intent to circumscribe the Secretary's enforcement discretion, and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings.

Agency decisions not to enforce, including an agency's decision to settle, are generally committed to the agency's discretion, and are therefore presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459-60 (D.C. Cir. 2001). However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an *intent to circumscribe* agency enforcement discretion, and has provided *meaningful standards* for defining the limits of that discretion." 470 U.S. at 834 (emphasis added).

The Commission has held that, in the settlement context, section 110(k) provides an exception to the general rule of unreviewability. Section 110(k) expressly curtails the Secretary's authority to settle a case. As stated in *American Coal Co.*, 38 FMSHRC 1972, 1980 (Aug. 2016) ("*AmCoal I*"), "[s]ection 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability" under *Heckler*.

As to the scope of the intended circumscription, a review of the language of the Mine Act, the legislative history, comparisons to other health and safety statutes, and practical considerations all signal an expansive role for the Commission. This includes the authority to review S&S removals in citations within settlements as a necessary component of its settlement review authority. In reaching this holding, we do not grant the Commission any new settlement review authority beyond that of *AmCoal I* and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"). 46 FMSHRC at 567.

With respect to the language of section 110(k), the inclusion of the terms "compromised," "mitigated," and "settled" indicates a Congressional intent for Judges to apply a holistic approach to reviewing settlements. The fact that Congress chose these words instead of using narrower language specifying that a penalty amount may not be lowered without Commission approval demonstrates that Judges must be able to review more than the mere settlement of civil penalty dollar figures. Congress' choice of broad language demonstrates that penalties are closely intertwined with the allegations set forth in citations in settlement proceedings.

Our reading of section 110(k) is consistent with previously announced interpretations of the Mine Act. For instance, the Commission has recognized that Judges must "accord due

consideration to the *entirety* of the proposed settlement package, including *both its monetary and nonmonetary aspects*." *See, e.g.*, *AmCoal II*, 40 FMSHRC at 989 (emphases added). During settlement review, a Judge cannot be limited to looking solely at discrete penalty dollar amounts. Judges may look at compromises of the citation's allegations, and those compromises may impact the penalty amount or have other legal consequences.

The legislative history and policy considerations of section 110(k) reinforce the need for Commission review of the Secretary's removal of S&S designations in settlement proceedings. As we have previously recognized, Congress unquestionably delegated to the Commission the power to administer section 110(k) by granting the Commission the authority to review *all* settlements of citations under the Act. *See AmCoal I*, 38 FMSHRC at 1976. Congress explained that section 110(k) was intended to assure that prior abuses involved in the unwarranted lowering of penalties, because of off-the-record negotiations, would be avoided by providing for independent Commission settlement review. S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632–33 (1978). Section 110(k) serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing her authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1976 (citing S. Rep. No. 95-181, at 44). The Commission cannot effectively review the Secretary's reduction of a penalty without examining the factors that go into it. This underscores the importance of a meaningful, all-encompassing review by the Commission that goes beyond mere dollar amounts.

As the Commission recognized in *Knight Hawk*, Congress' intent is further reinforced by a comparison of the Mine Act to the Occupational Safety and Health Act ("OSH Act"). 46 FMSHRC at 568-69. The OSH Act provides that the Secretary is *authorized* to take such actions to compromise, mitigate, or settle *without approval* by the Occupational Safety and Health Review Commission ("OSHRC"). However, in the Mine Act – which was passed seven years later – Commission approval is required. *Compare* 29 U.S.C. § 655(e) *with* 30 U.S.C. § 820(k). As with the Mine Act's legislative history, this comparison between the language of the statutes elucidates Congress' intent, in drafting the Mine Act, to avoid the abuses arising from off-the-record negotiations by the Secretary, by envisioning a greater role for the Commission under the Mine Act.

Practical and common-sense considerations support an interpretation of the statute that grants broad authority to the Commission to approve or deny settlement motions. Here, during a settlement proceeding, the Secretary's removal of an S&S designation of a citation resulted in a reduced penalty amount. Whether the penalty amount is appropriate cannot be properly determined without consideration of how other changes to the citation impact the penalty.

As to the requirement for the provision of a meaningful standard, in *Knight Hawk*, we held that sections 110(i) and 110(k) provide a "judicially manageable standard . . . for judging how and when [the Secretary] . . . should exercise [her] discretion" in removing S&S designations in settlement proceedings. 46 FMSHRC at 570 (quoting *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008) (other citations omitted)). Section 110(i) provides a judicially manageable standard by setting forth the six penalty factors that the Commission

must consider in assessing a penalty. Although section 110(i) does not explicitly reference S&S, it does require consideration of evidence of the "gravity" of the violation. The Commission has held that gravity and S&S, although not identical, are "based frequently upon the same or similar factual circumstances." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (Sept. 1987), *citing* 30 U.S.C. §§ 820(i), 814(d). S&S is essentially the interplay between the "likelihood" and "severity" components of "gravity" in the Mine Act and its related regulations. *See, e.g.*, 30 C.F.R. § 100.3, Tables XI, XII. In short, the Commission's review of the Secretary's decision to remove an S&S designation is not arbitrary but is instead guided by the statutory language in section 110(i) regarding gravity.

In addition to section 110(i), the Commission has interpreted section 110(k) to require settlements to be "fair, reasonable, appropriate under the facts, and [to] protect[] the public interest." *AmCoal I*, 38 FMSHRC at 1976. This standard also applies with respect to the Secretary's decision to remove an S&S designation. Accordingly, as we held in *Knight Hawk*, the *Heckler* presumption of unreviewability for the Secretary has been overcome. *Knight Hawk*, 46 FMSHRC at 571 (citing *Heckler*, 470 U.S. at 834).

We reiterate that neither *Mechanicsville* nor *American Aggregates* support the parties' positions in this case that S&S determinations made in the context of a settlement are presumptively unreviewable "enforcement decisions." 46 FMSHRC at 571.

Mechanicsville is distinguishable in two respects. First, *Mechanicsville* involved a *Judge's* attempt to *add* an S&S designation while the current case involves a proposal by the *Secretary* to *eliminate* an S&S designation. 18 FMSHRC at 879-80 (holding that, where MSHA has not charged an S&S violation, a Judge may not make an S&S finding on his or her own initiative). Second, *Mechanicsville* relies on a line of precedent stemming from a case brought under the OSH Act. *See RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), citing *Cuyahoga Valley Railway Co v. United Transportation Union*, 474 U.S. 3, 6-7 (1985). As noted above, the OSH Act and the Mine Act diverge regarding the Secretary's authority over settlements. Therefore, precedent developed under the OSH Act does not inherently apply to the Mine Act in the settlement context.

Meanwhile, in *American Aggregates*, the Commission reversed the Judge's denial of a settlement, including the removal of the S&S designation, solely because the Judge had failed to consider the relevant factual support provided. *Am. Aggregates*, 42 FMSHRC at 576–79. Nothing in that case supports the parties' broad, sweeping position that the Secretary's decision to remove an S&S designation in a settlement constitutes unreviewable prosecutorial discretion.

B. Parties must provide sufficient reasoning and justification to support the removal of an S&S designation in a settlement motion.

Long-standing Commission caselaw holds that Commission Judges must review all settlements of citations. The Commission has consistently required its Judges to consider reasoning and justifications that are both substantive and relevant to proposed modifications before a motion to approve any settlement may be granted. *See, e.g., Solar Sources Mining, LLC*, 41 FMSHRC 594, 601, 605, 606 (Sept. 2019) (reversing Judge's determination that the parties presented no justification to support settlement, when the parties "actually presented relevant facts," including the non-applicability of the standard); *Hopedale Mining, LLC*, 42 FMSHRC 589, 597-98 (Aug. 2020) (reversing the Judge's settlement denial because the Secretary had provided relevant justification in part to support the lowering of negligence and gravity).

Here, the Secretary failed to submit sufficient support showing why Citation No. 9563253, alleging a failure to maintain machinery in safe operating condition, was not S&S. The parties stated that the emergency stop switch on the cited feeder breaker was "inoperable." Mot. to App. Settlement at 4; Amended Mot. to App. Settlement at 4. The parties provided information that the area around the feeder breaker had sufficient room for miners to work and travel and the feeder breaker had reflective tape showing its boundaries. *Id.* While such facts might show compliance with other safety standards, such information does not show that the hazard contributed to by the cited violation itself was decreased or eliminated. As the Judge found, these "conditions do not address the hazard – inability to stop the machine in an emergency," and do not adequately support the modification to Citation No. 9563253 as non-S&S. Order at 3; *see Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018).

Although Judges need not engage in fact-finding, weighing conflicting evidence, or making credibility determinations, they must still "probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Hopedale Mining*, 42 FMSHRC at 595; *see also Solar Sources Mining LLC*, 41 FMSHRC at 602 (stating that Judges are "expected to . . . determine whether the facts support the penalty agreed to by the parties"). Here, the parties failed to provide the Judge with a sufficient justification for why the citation alleging an inoperable emergency stop switch was not an S&S failure to maintain safe operating machinery under *AmCoal I*.[5]

In sum, we conclude that sections 110(k) and 110(i) of the Mine Act demonstrate an intent to circumscribe the Secretary's enforcement discretion and that they supply a meaningful

[5] As in *Knight Hawk*, we reject the Secretary's argument that the Act's split-enforcement scheme precludes Commission review of the Secretary's S&S decisions during settlement proceedings. 46 FMSHRC at 573-74. We further hold that the Secretary's remaining policy arguments relying on fairness to operators, public confidence in Mine Act enforcement, and EAJA considerations are not sufficiently compelling reasons to withhold Commission review of S&S removals in settlements. *Id.* at 574-75.

standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. We find unpersuasive the Secretary's arguments to the contrary.

IV.

Conclusion

For the reasons stated above, we hold that the Secretary does not possess unreviewable discretion to remove an S&S designation from 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 remove an S&S designation under such circumstances. We therefore conclude that the Judge did not abuse his discretion by denying the settlement motion. Accordingly, we affirm the Judge's denial of the motion and remand the case to the Judge.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 15, 1024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CACTUS CANYON QUARRIES, INC, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2024-0120 A.C. No. 41-00009-592668 Mine: Fairland Plant & Qys

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). Cactus Canyon Quarries, Inc. ("Cactus Canyon") filed with the Commission a "Petition for Discretionary Review of Claim Preclusion Misapplied to FRCP 12(b)(1) Defense of Lack of Subject Matter Jurisdiction." The filing challenges an order issued by a Commission Administrative Law Judge denying the operator's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Although Cactus Canyon has styled its document as a petition for discretionary review, no hearing on the merits has taken place in this matter, and there has been no final decision of the Commission under section 113(d)(1) of the Act. 30 U.S.C. § 823(d)(1). We therefore construe the petition as a petition for interlocutory review under Commission Procedural Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1). *See, e.g.*, *Cactus Canyon Quarries of Texas, Inc.*, 25 FMSHRC 528 (Sept. 2003) (construing a pleading styled as a petition for discretionary review as a petition for interlocutory review); *Southmountain Coal, Inc*., 16 FMSHRC 28 (Jan. 1994) (same).

Under Commission Rule 76(a)(1), interlocutory review is a matter of sound discretion of the Commission. Review cannot be granted unless a "judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding; or . . . the Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification." 29 C.F.R. § 2700.76(a)(1).

Upon consideration of the filings of Cactus Canyon and the Secretary, and the issuances of the Judge, the Commission concludes that the procedural requirements in Commission Rule 76(a)(1) have not been met. *See* 29 C.F.R. § 2700.76(a)(1); *Appalachian Res. WVA, LLC*, 44 FMSHRC 721 (Dec. 2022) (denying petition for interlocutory review as premature); *Cty Line Stone Co.*, 44 FMSHRC 507, 508 (July 2022) (same).

Accordingly, Cactus Canyon's petition is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

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November 20, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of ALVARO SALDIVAR, Complainant v. GRIMES ROCK, INC., Respondent	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. WEST 2021-0178-DM MSHA Case No: WE MD 21-06 Grimes Rock, Inc. Mine ID: 04-05432

DECISION UPON REMAND

Before: Judge Richard W. Manning

On November 28, 2023, the Commission issued a decision in this case affirming in part and reversing in part orders issued by former Commission Judge Margaret Miller and remanding other matters for further determination. 45 FMSHRC 947 (Nov. 2023). The Commission's instructions on remand require a "recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final" [1] and "a determination of any remaining temporary reinstatement payments and interest owed[.]" 45 FMSHRC at 961.[2]

On August 5, 2024, I ordered the parties to file briefs on the remanded issues and to suggest possible resolution of those issues.[3] For the reasons set forth below, Grimes Rock is ordered to pay Saldivar a total of $2,634.80 in temporary economic reinstatement payments and interest.

[1] Judge Miller issued her decision in the discrimination case on the merits on June 17, 2022. *Sec'y of Labor on behalf of Alvaro Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ). Neither party appealed that decision in which Judge Miller dismissed the complaint of discrimination.

[2] The history of this case is long, complicated, and has been laid out in prior issuances by Judge Miller, the Commission, and this court. I decline to do so again.

[3] The Commission also remanded to this court the issue of whether consequential damages are appropriate. On September 6, 2024, I issued an order denying the Secretary's motion for consequential damages. 46 FMSHRC 842 (Sept. 2024) (ALJ).

SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary argues that Grimes Rock owes Saldivar a total of $2,634.80 in temporary economic reinstatement payments and interest. Sec'y Br. 1.

The Secretary asserts that Grimes Rock owes Saldivar $2,427.56 in additional temporary economic reinstatement payments for the period after Judge Miller issued her June 17, 2022, Enforcement Order until her decision on the merits in the discrimination case became final. Sec'y Br. 4. Judge Miller's decision on the merits in the discrimination case became final 40 days after its issuance, i.e., July 27, 2022. Sec'y Br. 5-6; Sec'y Resp. 7-9. Although there were 26 workdays during the 40-day period after Judge Miller issued her decision, Saldivar was only available to work during 19 of those days. Sec'y Br. 6. Judge Miller previously held that Grimes Rock was not responsible for paying Saldivar during periods he was unavailable to work. Sec'y Br. 3. Consequently, the Secretary claims that Grimes Rock owes Saldivar $2,427.56[4] in temporary economic reinstatement payments for the 19 workdays he was available during the period after Judge Miller issued the Enforcement Order until her decision on the merits became a final order of the Commission under Section 113(d)(1) of the Mine Act. Sec'y Br. 7.

The Secretary asserts that, utilizing the Commission's general framework for computation of interest in 105(c) cases set forth in *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona*, 5 FMSHRC 2042 (Dec. 1983), Grimes Rock owes Saldivar $207.24 in interest on the late paid temporary economic reinstatement payments, i.e., those payments that were the subject of Judge Miller's Enforcement Order that were ultimately paid on August 22, 2022.[5] Sec'y Br. 7-11.

Finally, the Secretary asserts that, contrary to Grimes Rock's claims otherwise, Saldivar had no duty to mitigate temporary reinstatement, Saldivar is entitled to interest on the late paid temporary economic reinstatement payments during periods he was incarcerated and allegedly subject to arrest, and Grimes Rock is not entitled to reimbursement or offset for any amount Grimes Rock alleged that it previously paid Saldivar. Sec'y Resp. 10-15.

Grimes Rock argues that this court should not award any additional temporary economic reinstatement payments or interest in this matter. In support of its argument that additional temporary economic reinstatement payments are not due, Grimes Rock asserts that due to multiple instances of failing to get court-ordered drug tests, admitted drug use, and incarceration, Saldivar was unavailable to work during the entire 40-day period after Judge Miller terminated the temporary economic reinstatement order. Grimes Br. 10-11. It argues that the temporary

[4] The Secretary calculated this amount by multiplying the number of days Saldivar was available for work during the 40-day period (i.e., 19) by the daily rate of pay in Judge Miller's Enforcement Order. Sec'y Br. 3, 6-7. The daily rate of pay was calculated by dividing the gross total Judge Miller ordered Grimes Rock to pay for the period between May 17, 2022 and June 17, 2022, which incorporated the offset of pay from other employers, by the number of workdays Saldivar was available to work during that period. Sec'y Br. 3, 6-7.

[5] The Secretary provided a detailed explanation of her calculation to arrive at the amount of interest she alleges is due. For brevity's sake, I have not summarized that explanation.

reinstatement order was properly terminated as of the date of Judge Miller's decision in the discrimination case on the merits, and that this court should not retroactively apply the Commission's "wrongly decided" decision in *Sec'y of Labor on behalf of Hargis v. Vulcan Construction Materials, LLC*, 46 FMSHRC 523 (Aug. 2024) ("*Hargis*"). Grimes Br. 11-14.

In support of its claim that this court should not award any interest, Grimes Rock makes several arguments, including that the Secretary and Saldivar waived and/or forfeited any claimed right to interest by failing to timely raise that issue before Judge Miller, that the Commission exceeded its jurisdiction in ruling on and remanding the issue of interest to this court, and that Grimes Rock is not obligated to pay interest associated with the temporary economic reinstatement order because Saldivar failed to mitigate damages claimed. Grimes Br. 15-22. Further, Grimes Rock asserts that no interest should be awarded for the period Saldivar was a fugitive or incarcerated, that the Secretary should be estopped from claiming any interest prior to the Commission's November 28, 2023 decision due to prior inconsistent statements made by Secretary regarding whether interest was accruing, and that if interest is ordered by this court it should be at most $803.36.[6] Grimes Br. 22-28.

Finally, Grimes Rock argues that Judge Miller erred when she ordered that Grimes Rock should not be reimbursed for temporary economic reinstatement payments made to Saldivar when he was a fugitive or incarcerated and that Grimes Rock should either be reimbursed for those payments, or alternatively, that the same amount should be credited as an offset to any payments that are allegedly still due.[7] Grimes Br. 26-28.

DISCUSSION

As an initial matter, it is important to understand what issues are and are not before me. In its November 28, 2023, decision in this matter the Commission, among other things, vacated Judge Miller's order dissolving the temporary reinstatement as of the date of the Enforcement Order and decision on the merits in the discrimination case, affirmed Judge Miller's Enforcement Order, and granted the Secretary's motion for interest. 45 FMSHRC 947 (Nov. 2023). Judge Miller issued her Enforcement Order on June 17, 2022, the same day as she issued her decision on the merits in the discrimination case. 44 FMSHRC 497 (June 2022)(ALJ).

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[6] Grimes Rock provided a detailed explanation of its calculation to arrive at the maximum potential amount of interest that could be ordered. For brevity's sake, I have not summarized that explanation.

[7] Grimes Rock's initial filing was captioned as a motion for summary decision. However, for purposes of this decision, I have treated it as a brief on the limited issues before me, which is what I instructed the parties to file in my August 5, 2024, Order to File Briefs. Grimes Rock also filed an opposition to the Secretary's brief on the remanded issues, which I have treated as a response brief. The response brief raises essentially the same arguments as the original brief, with a few additions, including, among other things, that the Secretary should be sanctioned for failing to inform Grimes Rock that Saldivar was incarcerated for part of July 2022, and that any interest awarded should be recalculated to exclude those days that Saldivar was incarcerated, avoiding drug testing, or admitted to drug use. Grimes Resp. 1-2, 4-5, 29-31.

I am not in a position to review already decided questions of law and fact in this case. Consequently, I do not address the issues of whether temporary economic reinstatement was properly terminated at the time Judge Miller issued her decision in the discrimination case on the merits, whether interest is appropriate, whether the Secretary waived any right to interest, whether the Commission had jurisdiction over the issue of interest and had authority to remand the issue to this court for calculation of said interest, whether the Secretary should be estopped from claiming any interest due to prior inconsistent statements made by Secretary regarding whether interest was accruing, and whether Judge Miller erred when she ordered that there would be no return or reimbursement for temporary economic reinstatement payments that had already been made to Saldivar. The remaining issues are addressed below.

Temporary Economic Reinstatement Payments

The Commission, in its decision, determined Judge Miller "erred when she ended the order of temporary reinstatement concurrently with her merits decision." 45 FMSHRC 947, 955-956. Accordingly, it remanded to this court the task of recalculating the temporary economic reinstatement payments owed between the time Judge Miller issued her June 17, 2022, Enforcement Order and the date her discrimination decision on the merits became final.[8] Neither party appealed Judge Miller's discrimination decision on the merits in which she dismissed the complaint of discrimination. Accordingly, her decision became a final order of the Commission 40 days after its issuance, i.e., July 27, 2022. *Hargis v. Vulcan Construction Materials*, LLC, 46 FMSHRC 523 (Aug. 2024) ("*Hargis*").[9]

The Secretary asserts, and the court agrees, that there were 26 possible workdays during the 40-day period after Judge Miller issued her Enforcement Order.[10]

In her Enforcement Order, Judge Miller held that Grimes Rock was not responsible for paying Saldivar during periods he was unavailable to work.[11] 44 FMSHRC at 498. Here, although the parties agree Saldivar was unavailable to work during the days he was incarcerated

[8] The Secretary, in her response to this court's August 15, 2024 Order to Provide Information, confirmed that Grimes Rock's temporary economic reinstatement obligations were satisfied through June 17, 2022.

[9] Grimes Rock argues that *Hargis* was "wrongly decided and should not be applied to this case[.]" Grimes Br. 14. I reject the argument. I note that the Commission, in its decision in this matter, specifically referenced that the issue of the proper termination date for temporary reinstatement was before it in the *Hargis* case. 45 FMSHRC at 956 n. 16.

[10] By the court's reasoning, the 26 days include a five-day work week and excludes holidays from the total number of possible workdays during the 40-day period.

[11] Judge Miller specifically noted two separate "periods of unavailability." 44 FMSHRC at 498. A review of the record reveals that Saldivar was incarcerated during those two periods.

during the 40-day period[12], they disagree regarding his availability to work during the remainder of that period. Whereas the Secretary asserts that Saldivar was available to work during the other possible workdays, Grimes Rock asserts that Saldivar was unavailable to work for the entirety of the 40-day period due to multiple failures to take drug tests and admitted drug use. I agree with the Secretary[13] and find that Grimes Rock is responsible for temporary economic reinstatement payments equivalent to 19 days of work, i.e., the total number of possible workdays he was not incarcerated, which amounts to $2,427.56.[14]

Interest

The Commission, in its decision, granted the Sercetary's motion for interest and remanded to this court the issue of determining the amount of interest due Saldivar on any temporary reinstatement payments that were paid late. [15] In *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co*., 5 FMSHRC 2042, 2051-52 (Dec. 1983) ("*Arkansas-Carbona*") the Commission adopted a "quarterly method' for computation of interest awards. Under the *Arkansas-Carbona* method interest is assessed on a quarterly basis at the adjusted prime interest rate and begins accruing beginning with the last day of the quarter in which payment was due until the date of payment. *Id*. Interest amounts accrued for each quarter's net unpaid amount are then summed to yield a total interest award. *Id*. In *Local Union 2274, District 28, United Mine Works of America v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) ("*Clinchfield*"), the Commission retained the "quarterly method" but modified the *Arkansas-Carbona* framework to switch from using the adjusted prime interest rate to the short-term Federal rate applicable to the underpayment of taxes for the calculation of interest due.

Here, the Secretary applied the Commission's *Arkansas-Carbona* framework, as modified by *Clinchfield*, to the late temporary reinstatement payments that were included in

[12] Both parties attached to their respective briefs documentation supporting the fact that Saldivar was incarcerated from July 6, 2022 to July 15, 2022. Sec'y Br. Ex. 5; Grimes Br. Ex. 9, 40.

[13] I reject Grimes Rock's argument that Saldivar was unavailable for the entire 40-day period. Failure to drug test and admitted drug use, while certainly not advisable, do not amount unavailability. Saldivar was available for work during that period, he had been employed as a welder by a different employer and, consistent with Judge Miller's determination in the Enforcement Order, his earnings at other employment have been used to offset the total amount that would have otherwise been due for the days he was available during the 40-day period.

[14] The court agrees with the Secretary regarding how this amount was calculated and incorporates the Secretary's explanation in her brief as part of this decision.

[15] The Secretary, in both her original motion for interest filed with the Commission and her brief filed with this court, did not seek interest on the unpaid temporary economic reinstatement payments discussed above, i.e., payments for the period after the Enforcement Order was issued until the discrimination decision on the merits became final.

Judge Miller's Enforcement Order and not paid until August 22, 2022.[16] Based on the Secretary's calculations, Grimes Rock is obligated to pay Saldivar a total of $207.24 in interest on late temporary reinstatement payments. I agree and incorporate the Secretary's explanation and calculations in her brief by reference.[17]

I reject Grimes Rock's argument that it should not be obligated to pay interest associated with the temporary economic reinstatement because Saldivar failed to mitigate damages claimed. I agree with the Secretary that, although a duty to mitigate damages exists in the context of back pay awards in discrimination cases, no such duty exists in the context of temporary reinstatement. Sec'y Opp'n 10. As noted by the Secretary, in *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589, 592-593 (Mar. 2011), the Commission distinguished between discrimination awards, which include back pay and a duty to mitigate, and temporary reinstatement, the goal of which is to quickly put a miner back to work during the pendency of the discrimination case on the merits. There, the Commission "reject[ed] the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us." *Id*. at 593. Here, there was no back pay award which would give rise to a duty to mitigate. Rather, the monetary amount due Saldivar was a result of an agreement between the parties to temporarily economically reinstate Saldivar, which was approved by Judge Miller and ultimately affirmed by the Commission.

[16] Judge Miller's Enforcement Order required Grimes Rock to pay a total of $12,533.94 in past due temporary economic reinstatement payments for a period between November 2021 and June 2022, i.e., three quarters beginning with the fourth quarter of 2021 and ending in the second quarter of 2022. As a result, interest accrued during the first, second and third quarters of 2022 until Grimes Rock paid $12,533.94 on August 22, 2022. The short-term Federal rate applicable to the underpayment of taxes for the three subject quarters was 3% for Q1, 4% for Q2 and 5% for Q3 2022. IRS Quarterly Interest Rates, https://www.irs.gov/payments/quarterly-interest-rates (last visited November 18, 2024). Utilizing the appropriate rates for the relevant quarters, and August 22, 2022 as the date which interest stopped accruing, the Secretary arrived at a total of $207.24 in interest pursuant to the instructions outlined in *Arkansas-Carbona* and *Clinchfield*. Sec'y Br. 7-11.

[17] I reject Grimes Rock's argument that interest should not be awarded for the period Saldivar was a fugitive or incarcerated. In *Clinchfield* the Commission cited the NLRB's explanation that the purpose of interest is to compensate for the loss of use of money. 10 FMSHRC at 1500. Here, the Commission granted the Secretary's motion for interest and held that Grimes Rock was obligated to pay interest on payments that were paid late to Saldivar. Neither Judge Miller's Enforcement Order ordering the subject payments, nor the Commission's decision on review, allowed for further adjustment of those payments based upon whether Saldivar was a fugitive or incarcerated. Moreover, the ordered payments already reflect a reduction that accounts for when Saldivar was incarcerated. Consistent with the Commission's decision granting the Secretary's motion for interest, interest must be paid for all periods in which it accrued on the $12,533.94 in late paid temporary economic reinstatement payments.

ORDER

For the reasons set forth above, Grimes Rock is ordered to pay Saldivar a total of $2,634.80 in temporary economic reinstatement payments and interest within 30 days of the date of this decision.[18 & 19]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM

[18] Grimes Rock's request for sanctions included in its response brief is **DENIED**. Counsel for the Secretary attested that, prior to September of 2024, the Secretary had no knowledge of Saldivar's incarceration during July 2022, i.e., the days for which the Secretary agrees Grimes Rock does not owe temporary economic reinstatement payments. Sec'y Reply. 1-2 and Ex. 1.

[19] Having addressed all issues remanded to me by the Commission, this is my final decision in this case under Commission Procedural Rule 69. 29 C.F.R. § 2700.69. Given my findings, Grimes Rock's Motion for Evidentiary Hearing, which was filed alongside its brief in this matter, is **DENIED**.