FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2013

SIGNATURE MINING SERVICES, LLC, Applicant	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	Docket No. EAJ 2012-02
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Coalburg No. 1 Mine ID: 46-09082:

DECISION and ORDER

Before: Judge McCarthy

The case is before me is on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. § 504). Signature Mining Services, LLC filed its application against the Secretary of Labor's Mine Safety and Health Administration based upon a negotiated settlement that the parties reached in the underlying contest proceedings.

I. Factual Background

On August 25, 2011, adverse roof and rib conditions developed at the Coalburg No. 1 Mine at the 003 MMU-2 East Panel, a retreat mining section. Order No. 8139507; Signature App. at 1-2. These conditions initially affected several entries on the right side of the section along and inby the last open crosscut. Order No. 8139507. After MSHA inspectors observed pillars taking weight on the 2 East Panel, MSHA issued imminent danger Order No. 8139507 pursuant to Section 107(a) of the Act. Order No. 8139507; Sec'y Answer at 3. This order covered the #6 and #8 entries along and inby the last open crosscut. Order No. 8139507.

Signature and the Secretary both represent that the conditions began to spread from the mouth of the 2 East Panel to the Mains. Signature App. at 3; Sec'y Answer at 3. In response to this development, Signature began withdrawing miners from the affected area, removing equipment, dangering off the affected area, and setting Heintzman jacks along the roadway at break 15 along the Mains, which was outby the area affected by the adverse roof conditions. Richmond Dep. 30:9-31:10; Canterbury Dep. 11:21-12:13; Mackowiak Dep. 60:11-14, 65:2-5, 66:14-15; 75:11-19. At 1:30 a.m. on August 27, 2011, the Coalburg No. 1 foreman reported that the pillars at the mouth of the 2 East Panel were taking weight. Richmond Dep. 18:21-19:8. Randel Richmond, Signature's President, was then informed by his representatives that the

ground failure had migrated into the Mains. Richmond Dep. 19:6-21:8. Before 10 a.m., Richmond spoke with Terry Price, MSHA's Field Office Supervisor, and John Kinder, a representative of the West Virginia Miner's Health, Safety, and Training, to inform them about the adverse ground conditions. Richmond Dep. 30:20-32:2. Richmond told Price that Signature had stopped production and pulled out all its miners still working in the area. Richmond Dep. 30:22-31:3. He also provided Price with assurances that Signature had taken steps to monitor and correct the conditions. Richmond Dep. 31:5-10, 36:14-22.

Approximately fifteen minutes later, Joe Mckowiak, MSHA Assistant District Manager, called Frank Canterbury, a mine foreman at Signature, to further inquire about the adverse conditions. Mackowiak Dep. 57:8-12. Canterbury informed Mackowiak that the ground failure had migrated into the Mains and that men were underground setting jacks to prevent further migration of the adverse ground conditions. Mackowiak Dep. 73:22-74:20, 97:3-13. Mackowiak was also told that an abandoned mine existed 75 feet below the Coalburg No. 1, the ventilation controls had been crushed, and the water sumps had gone dry. Order No. 8126005; Mackowiak Dep. 81:16-82:19. The subsidence led Mackowiak to conclude that the pillar failures and ground conditions created regional instability. Mackowiak Dep 92:14-94:8. As a result, Mackowiak orally issued imminent danger Order No. 8126005 pursuant to Section 107(a) of the Act over the phone. Mackowiak Dep. 87:12-14. He also emphasized that the situation was so dangerous that everyone ought to be withdrawn, without exception. Mackowiak Dep. 99:16-19, 103:2-5.

After issuing Order No. 8126005 orally, Mackowiak contacted Price about dispatching inspectors to Coalburg No. 1 to reduce the Order to writing. Mackowiak Dep. 87:21-88:11. Mackowiak then spoke with Price and faxed him instructions to issue the imminent danger order with "[n]o exceptions," which meant that no one was allowed to be in the mine site. Mackowiak Dep. 102:8-15; Price Dep. 54:10-20, dated Nov. 8, 2011. When Price and James Jackson, another MSHA employee, arrived at Coalburg No. 1, they reduced the Order to writing. Price Dep. 56:19-57:4. At the time they arrived at the mine, fourteen men were underground. Price Dep. 60:22-61:6. Although none of these individuals were involved in running coal, Price and Jackson did not conduct any further investigation as to the reason why these men had been underground. Price Dep. 60:7-15. Price then provided further instruction that the entire mine site was to be closed and no one was to be permitted underground without first receiving MSHA's approval. Price Dep. 62:14-18, 63:4-64:8; *see* Richmond Dep. 36:15-20, 38:16-39:1. Price and Jackson did not travel underground to further examine the adverse conditions. Price Dep. 64:14-65:5.

On August 29, 2011, MSHA inspectors, Signature personnel, and Alpha Engineering traveled underground to observe the adverse conditions and check to see if the ground failure event had stopped. Richmond Dep. 40:23-41:13. Their inspection revealed that it was primarily the 2 East Panel and approximately ten crosscuts inby break 15 that had been affected by the roof and rib conditions. *See* Appl. For Fees and Other Expenses, at 3, dated Jan. 6, 2012. Mackowiak heard pillars breaking and continued to express concern that the ground failure posed a regional

threat given the conditions of the underlying mine. Mackowiak Dep. 141:22-144:17. As a result, the imminent danger order remained in effect for the entire mine site. Order No. 8126005; *see* Mackowiak Dep. 140:7-21. Signature filed a Notice of Contest to Order No. 8126005.

On August 30, 2011, MSHA issued withdrawal Order No. 7257539 pursuant to Section 103(k) of the Act. Order No. 7257539. In this Order, MSHA alleged that "coal and floor rock outburst accident" had occurred and all mining activities inby had been disrupted. *Id*. The order covered the entire mine due to hazards presented by the crushed ventilation controls and the instability of the mine pillars. *Id*. MSHA claims that the agency was still unsure of the extent of damage at the Coalburg mine site or the need to conduct an accident investigation. Sec'y Answer at 4. On August 31, 2011, Signature filed a Notice of Contest to Order No. 7257539.

II. Procedural Background

Six days before the scheduled hearing of the contest proceedings, the parties entered into settlement negotiations. On December 2, 2011, the Secretary of Labor, MSHA, and Signature filed a "Joint Motion to Continue" in which the parties presented the terms of settlement reached with respect to the two Section 107(a) imminent danger orders and the Section 103(k) withdrawal order. Jt. Mot. to Continue at 3-4. With respect to the Section 107(a) imminent danger orders, Signature agreed to withdraw its Notice of Contest to Order No. 8139507 in exchange for MSHA's promise to vacate Order No. 8126005. *See* Jt. Mot. to Continue, at 3. While negotiations on Order No. 7257539 were still ongoing at the time the Joint Motion was filed, MSHA had agreed to narrow the area of the mine affected by Order No. 7257539 and to approve Signature's ventilation plan. Jt. Mot. to Continue, Ex. 2. On December 5, 2011, the undersigned granted the parties' Joint Motion to Continue. Order Granting Continuance.

On December 16, 2011, the undersigned granted Signature's motion to partially withdraw its Notice of Contest to Order No. 8139507. My Order also noted that the Secretary had promised to vacate Order No. 8126005 and directed the matter to be addressed in either a subsequent settlement motion or during the hearing. On January 4, 2012, I granted the Secretary's motion to vacate Order No. 8126005.

On January 20, 2012, Signature filed a motion to dismiss its Notice of Contest to Order No. 7257539. By Order dated January 26, 2012, I granted Signature's motion.

III. Disposition and Analysis

A. Prevailing Party Status

1. Legal Background

The Supreme Court has rejected the "catalyst theory" as a basis for achieving "prevailing party" status, which had previously enabled a plaintiff to prevail if he achieved any favorable

change in a defendant's conduct in the course of litigation. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001). To be a prevailing party, the Court determined that a plaintiff must be "awarded some relief by the court," which results in a "material alteration of the legal relationship of the parties' necessary to permit an award." *Id.* (internal citations omitted). In holding that consent decrees constitute such judicial relief, the Court distinguished consent decrees from private settlements and stated, "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees. . . unless the terms of the agreement are incorporated into the order of dismissal." *Id.* at 604, n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). While *Buckhannon* dealt with the question of prevailing party status under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA), courts have consistently applied its rationale to the EAJA. *See USA Cleaning Serv. & Bldg. Maint.* ("*USA Cleaning*"), 33 FMSHRC 2264, 2268, (Sept. 2011), (ALJ).[1]

Although the Supreme Court held that consent decrees are sufficient to satisfy the prevailing party requirement, courts have differed in the way they examine settlement agreements lacking a formal consent decree designation. Notably, the Fourth Circuit developed a functional approach for assessing such settlement agreements. *See Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002). The court resisted the idea that *Buckhannon* set out a formalistic rule and stated, "[w]here a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court's approval and the attendant judicial over-sight … may be equally apparent." *Id.* A settlement agreement under these circumstances "may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs." *Id.* The majority of Circuit Courts of Appeal have adopted a similar approach.[2]

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[1] This decision was upheld by the Seventh Circuit after the Commission declined to review the case. *Jeroski v. FMSHRC*, 697 F.3d 651, 655 (7th Cir. 2012) ("The Court's approach in *Buckhannon* supports the position that eight circuits have taken with respect to the meaning of 'prevailing party,' and we bow to this heavy weight of authority.").

[2] *See, e.g., Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009)*; Perez v. Westchester Cnty. Dep't of Corr.,* 587 F.3d 143, 151-52 (2d Cir. 2009)*; T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002);; *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 166 (3rd Cir. 2002); *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006) (determining that the "touchstone" for the "prevailing party" requirement is whether there was a "material alteration of parties' legal relationship" arising from "an enforceable judgment . . . or comparable relief through a consent decree or settlement." (citations omitted); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134, n.5 (9th Cir. 2002) (determining that a party prevailed after obtaining a settlement agreement that is legally enforceable); *but see Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (holding that a party can only prevail if it receives either an enforceable judgment on the merits or a formal consent decree).

The Eastern District Court of Virginia has held that a voluntary dismissal with prejudice is sufficient to confer prevailing party status. *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 495, 509, 512 (E.D. Va. 2006). Significantly, the court held that the decision to grant voluntary dismissal under Rule 41(a)(2) of the Federal Rule of Civil Procedure "is committed to the discretion of the district court." *Id.* at 508. Although the court's holding was limited to voluntary dismissals with prejudice, the court indicated that other conditions imposed on Rule 41(a)(2) dismissals can confer prevailing party status. *Id.* at 511, n.15. ("In many cases, conditions short of a dismissal with prejudice may be sufficient to confer prevailing party status."). The court went on to suggest that the central factor in assessing conditions imposed on voluntary dismissal is the "nature of the terms and conditions that district courts can impose . . . ." *Id.*

Another influential opinion comes from the Seventh Circuit, which also held that a voluntary dismissal with prejudice made a movant a prevailing party. *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) (applying prevailing party to the FHA fee shifting scene in accordance with the principles set forth in *Buckhannon*). Most notably, the court determined, "[t]he critical fact is not what prompted the district court to act; it is instead what the district court decided to do." *Id.* at 719. Therefore, consistent with *Samsung* and *Claiborne*, I find that the level of discretion a court exercises, rather than a merits determination, is most relevant for purposes of the prevailing party inquiry.

Courts have also applied *Buckhannon* to fee-shifting provisions in the context of administrative proceedings. Because *Buckhannon* refers to "judicial action," courts have determined that *Buckhannon*'s principles cannot be applied literally when differentiating between "purely *administrative*… proceedings that give rise to a plaintiff's 'prevailing party' status" since doing so would prevent fee-shifting provisions from being applied to administrative proceedings. *A. R. Ex rel R.V. v. N.Y.C. Dep't of Educ.*, 407 F.3d 65, 76 (2d Cir. 2005). For example, the Second Circuit recognized that the Individuals with Disabilities Education Act's (IDEA) fee-shifting provision required the court to "give effect to the IDEA's intent to permit awards to winning parties in administrative proceedings even where there has been no judicial involvement." *Id.* As a result, the Second Circuit concluded that the combination of an adjudicative official's exercise of administrative imprimatur, a change in the legal relationship of the parties arising from such exercise of discretion, and subsequent judicial enforceability conferred prevailing party status on an IDEA plaintiff. *Id.* In applying these three criteria to settlements achieved in the course of administrative proceedings, the court determined that a party is entitled to "prevailing party status" where they achieve the "administrative analog of a consent decree." *Id.* at 77. The Third Circuit has also adopted this approach. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 854 (3d Cir. 2006).

For the implementation of the EAJA in Commission proceedings, "[a]n eligible party may receive an award when it prevails over MSHA, unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust." 29

C.F.R. § 2704.103(a). Applicable adversary adjudications include,"[c]ontests of citations or orders issued under section 104 or 107 of the Mine Act (30 U.S.C. 814, 817)." 29 C.F.R. § 2704.103(a)(1).

In applying the standard set out in *Buckhannon*, the Commission's rules require the undersigned to "give effect" to the EAJA's intent to permit the award of attorney's fees to parties' that "prevail" in the course of Commission proceedings. *See A.R.*, 407 F.3d at 77; *P.N.*, 442 F.3d at 854. The purposes underlying the administration of the Mine Act thereby support adoption of the functional approach set out in *Smyth* to examine settlement agreements reached in the course of contest proceedings. 282 F.3d at 281.

Parties in contest proceedings may present the terms of a settlement arrangement to a judge though a motion. In deciding whether to approve the motion, a judge may decide to substantively review the terms of the settlement agreement. Where a judge provides such review, exercises discretion in granting the parties' motion, and incorporates the reasons set forth by the parties in their motion into an administrative order, the parties' "obligation to comply" with the terms of settlement is made part of the administrative order. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. at 381; *Smyth*, 282 F.3d at 281. In this way, the judge's "oversight" and "approval" becomes the basis for which the parties will carry out the terms of their settlement. *See Buckhannon*, 532 U.S. at 604, n.7. Additionally, the issuance of the order reveals a change in the legal relationship between parties arising from the exercise of a judge's administrative imprimatur and further permits parties to have their agreement subsequently enforced. *See A.R.,* 407 F.3d at 77; *P.N.*, 442 F.3d at 854. In determining whether a judge has afforded an EAJA plaintiff adequate administrative relief, the "critical fact" becomes the level of discretion a judge exercises in permitting parties to carry out the finalized terms of a settlement. *See Claiborne*, 414 F.3d at 719; *Samsung*, 440 F.Supp.2d at 511 n.15.

Therefore, an EAJA plaintiff achieves the functional equivalent of a consent decree in Commission proceedings where a judge substantively reviews settlement terms presented by parties in the underlying proceeding and conditions the issuance of a dispositive order on the parties' decision to be bound by the terms of the settlement agreement.

2. The Parties' Arguments

The Secretary argues that Signature is not a prevailing party because *Claiborne* requires a voluntary dismissal with prejudice. Sec'y Resp. to Signature's Reply, at 3, dated May 31, 2012. Because there was no such judgment, the Secretary claims that the dismissal of Order No. 8126005 and Order No. 7257539 amounted to "judicial housekeeping." Sec'y Resp. to Signature's Reply, at 4. The Secretary also contends that the settlement negotiations were distinct from any court order or judicial pronouncement. *Id.*

In response, Signature argues that the dismissal of Order No. 8126005 and Order No. 7257539 resulted in a court-ordered change in the parties' legal relationship. Signature's Answer in Opp'n, at 2, filed April 23, 2012. While Signature admits that the Secretary has discretion to vacate Order No. 8126005, it argues that the dismissal order resolved all issues relating to the

August 2011 incident, deprived the Commission of its jurisdiction to consider any related citations or orders,[3] and precluded the Secretary from pursuing any other 107(a) Orders. *Id*. Signature also claims that the undersigned had discretion to approve Signature's motion to Withdraw its Notice of Contest to Order No. 7257539, and such approval was necessary to end the parties' litigation. *Id*. at 3.

3. Analysis of Parties' Settlement Negotiations

While the parties only examine the dismissal orders related to Order No. 8126005 and Order No. 7257539, the undersigned examines the totality of circumstances in the underlying proceeding consistent with the functional approach in *Smyth*. Accordingly, I begin with analyzing the parties' Joint Motion to Continue.

With respect to the 107(a) Orders, the Joint Motion stated, "Signature *will* withdrawal (sic) its contest of Order No. 8139507. . . MSHA *will* vacate Order No. 8126005 issued August 27, 2011." Joint Mot. To Continue at 3 (emphasis added). The use of the word "*will*" indicates that Signature and the Secretary reached a final agreement and decided to be bound by the terms set forth in the Joint Motion. This language is particularly notable since the discretion to vacate an order is vested in the Secretary. *RBK Constr. Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993). By presenting a *quid pro quo* styled arrangement in finalized terms, the parties apprised the Commission as to the fundamental bargain agreed to in resolving the 107(a) Orders.

With respect to the 103(k) Orders, the Joint Motion states, "[t]he parties *anticipate* that Signature will complete the work required by the plan in approximately three weeks. The parties will report the *progress* of these negotiations on December 21, 2011." Joint Mot. To Continue at 7 (emphasis added). Although the Joint Motion presented an attached version of Signature's ventilation plan and evidence that the Secretary had narrowed the scope of the area affected by Order No. 7257539, the language that the parties used indicates that the negotiations were still ongoing at the time the Joint Motion was filed.

When presented with the parties' Motion to Continue impending litigation, I had discretion to approve the Joint Motion. Under Commission Rule 55, the undersigned possesses broad administrative discretion to dispose of procedural requests or similar matters and make decisions in the underlying proceeding. 29 C.F.R. § 2700.55. In issuing an Order Granting Continuance, I exercised administrative discretion. The Order states, "[t]he Court hereby **GRANTS** the parties' Joint Motion to Continue *for the reasons set forth in the motion*" (emphasis added). The "reasons set forth in the motion" include the final terms of settlement reached on the 107(a) Orders and the parties' intention to settle the 103(k) Order.

[3] The Commission's discretion to retain jurisdiction and grant declaratory relief after the Secretary has vacated an enforcement action need not be addressed in the case at bar. Signature did not seek declaratory relief or request additional relief following the dismissal of Order No. 8126005. *See Sec'y v. N. Am. Drillers*, *LLC*, 34 FMSHRC 352, 357 (Feb. 2012).

Looking next at the dismissal order granting Signature's Motion to Partially Withdraw its Notice of Contest to Order No. 8139507, my administrative approval was required for Signature to execute its side of the bargain. Commission Rule 11 states that "[a] party may withdraw a pleading at any stage of a proceeding *with the approval* of the Judge or the Commission." 29 C.F.R. §2700.11. In this way, I had the administrative discretion to alter the parties' legal posture and substantively review the terms of Signature's Motion to Partially Withdraw its Notice of Contest.

In deciding to grant this Motion, I incorporated the parties' settlement terms into a dispositive order. Signature's Motion directly refers to the agreement the parties reached on the 107(a) Orders. Pl. Mot. to Partially Withdraw Notice of Contest, at 4. Signature moved for leave to Partially Withdraw its Notice of Contest based on this agreement, noting that the Secretary had promised and agreed to vacate Order No. 8126005 in exchange. Pl. Mot. to Partially Withdraw Notice of Contest, at 5-6. Central to my decision to grant Signature's motion was my endorsement of the parties' settlement arrangement. The Order Granting Respondent's Motion to Partially Withdraw its Notice of Contest states, "The court hereby **GRANTS** the Contestant's Motion to Partially Withdraw Notice of Contest in that docket *for the reasons set forth in the motion*." Order Granting Resp't. Mot. to Partially Withdraw Notice of Contest (emphasis added). The Order reveals that I actually examined the terms of agreement and conditioned my approval on these terms, which in turn made the parties' settlement part of my dispositive order. *See Smyth*, 282 F.3d at 280-81.

My Order also imposed an additional condition on the parties' settlement arrangement. The Order states, "[t]he Motion also notes that the Secretary has agreed to vacate Order No. 8126005. . . That matter *should be addressed* in any subsequent settlement motion or hearing in Docket No. WEVA 2011-2346R." Order Granting Resp't. Mot. to Partially Withdraw Notice of Contest (emphasis added). In directing the Secretary to address his promise to vacate Order No. 8126005, the parties were mutually obligated to comply with the terms of the negotiated settlement. Furthermore, this Order provided Signature with a means through which it could have its settlement arrangement judicially enforced. The incorporation of settlement terms and the imposition of conditions requiring the parties to address their obligation to comply with the agreement amounted to administrative relief.

Having granted Signature relief on the 107(a) Orders, my Order granting Signature's Motion to Partially Withdraw its Notice of Contest to Order No. 8139507 materially altered the legal relationship between the parties. The undersigned set the terms of dismissal, afforded Signature the benefit of its bargain, indicated that the parties were obligated to comply with the terms of settlement, and provided Signature with a basis for subsequent administrative review and judicial enforceability. In satisfying the three criteria set out in *A.R.* and *P.N.*, Signature achieved the administrative equivalent of a consent decree sufficient to confer "prevailing party" status. *A.R.*, 407 F.3d at 76; *P.N.*, 442 F.3d at 854.

The Secretary's insistence that a dismissal with prejudice is required misconstrues the standard set forth in *Claiborne*. Although the court in *Claiborne* held that a merits determination had been rendered, the court did not address the issue of a court imposing conditions short of

dismissal with prejudice. This issue was the precise question left open in *Samsung*, where the court indicated that the proper focus in analyzing a voluntary dismissal is "the *nature of the terms and conditions* that district courts *can impose*." *Samsung*, 440 F. Supp. 2d at 511, n. 15 (emphasis added). In concluding that "conditions short of a dismissal with prejudice may be sufficient" under *Buckhannon*, *Samsung* shows that the determining factor is the court's exercise of discretion. *Id.* Although I did not dismiss the case with prejudice, I exercised sufficient judicial imprimatur when I incorporated the terms of settlement into a dispositive administrative Order and required the Secretary to address its obligation to comply with the terms of the negotiated settlement. Because these terms of agreement were entered into the administrative Order, the agreement became "embodied" into the dispositive Order. *See Smyth*, 282 F.3d at 280-81.

It should also be noted that the Secretary's discretion to vacate an order does not cast doubt on this analysis. As the dismissal order in Docket No. WEVA 2011-2300-R indicates, "the Secretary's discretion to vacate a citation or order is not subject to review." Order Granting Mot. to Withdraw Contest. Nevertheless, the exchanging of terms relating to the underlying 107(a) orders deals with a distinct issue: *the obligation* of the Secretary to vacate an order *once the Secretary has already exercised his discretion and determined to be bound* by the parties' settlement terms. Although the Secretary is correct that the dismissal order following the Secretary's decision to vacate Order No. 8126005 was a procedural formality, Signature had already obtained administrative relief in the form of a favorable *quid pro quo* arrangement stamped with the undersigned's administrative "approval and oversight." *See Buckhannon*, 532 U.S. at 604 n. 7.[4] Therefore, the Secretary's discretion to vacate an order is distinguishable from the issue of whether the undersigned provided Signature with administrative relief and exercised administrative discretion in a way that brought about a material change in the parties' legal relationship.

Before examining the dismissal order granting Signature's motion to withdraw its Notice of Contest to Order No. 7257539, it should be noted that the Order Granting Continuance only approved of the parties' mutual decision to engage in settlement negotiations. While this Order permitted the parties to continue talks and report on the progress of settlement at a later date, the

[4] Signature appears to confuse this point as well in arguing that "all issues relating to the August 2011 incident were resolved" and "the Secretary was precluded from pursuing any other 107(a) orders" once the Secretary vacated Order No. 8126005. Under *Buckhannon*, a party must show that it achieved "some relief" that results in a material change in the parties' legal relationship. *Buckhannon*, 532 U.S. at 603. *Claiborne* then clarifies that the "critical fact" is "what the district court decided to do." *Claiborne*, 414 F.3d at 719. Achieving a favorable outcome in the course of an underlying proceeding is distinct from achieving administrative relief that arose from a judge's exercise of administrative discretion. It was only upon receiving the administrative equivalent of a consent decree that Signature "prevailed." Had the Secretary decided to vacate the order as a result of private negotiations or its own internal review, the dismissal of Order No. 8126005 would merely return the parties to the legal position they held prior to these administrative proceedings. *See USA Cleaning*, 33 FMSHRC at 2268.

parties were not bound to participate in these negotiations, nor were they obligated to comply with any specific set of terms. Before the Joint Motion for Continuance was filed, the Secretary already narrowed the area covered under Order No. 7257539. Additionally, the Joint Motion did not indicate that the Secretary was required to modify the "Condition and Practice" section of Order No. 7257539. *See* Order Granting Continuance. Whether Signature would withdraw its Notice of Contest was dependent on the progress of the parties' negotiation. The Order Granting Continuance merely postponed trial so that they could further attempt to reach settlement. Such procedural relief does not amount to a consent decree or an exercise of judicial imprimatur sufficient to confer prevailing party status.

The dismissal Order Granting Signature's Motion to Withdraw its Notice of Contest to Order No. 7257539 further confirms that Signature failed to obtain administrative relief. In granting this motion, all the undersigned "decided to do" was grant Signature leave to withdraw its Notice of Contest and have the case dismissed. *Claiborne*, 414 F.3d at 719. Because the parties had never presented the undersigned with a finalized settlement arrangement, the dismissal order was silent on the content of the parties' agreement and the substance of the terms that the parties had reached. As a result, the terms that the parties reached could not be entered into as an order of the court.

Finally, the Secretary's decision to modify the 103(k) Order had been secured before Signature filed its Motion to Withdraw its Notice of Contest to Order No. 7257539. While the prospect of Signature withdrawing its Notice of Contest likely enticed the Secretary to modify the Order, incentives and good litigation tactics do not amount to administrative relief arising from a judge's exercise of imprimatur. Without such relief, the Secretary's compliance with settlement of the 103(k) Order was completely voluntary. *Buckhannon* thus requires the undersigned to reject Signature's claim that it prevailed on the 103(k) Order, as a voluntary change in conduct of the sort encompassed by the "catalyst theory" cannot be a basis for achieving "prevailing party" status. *Buckhannon*, 532 U.S. at 605.

B. Substantial Justification

1. Legal Background

Under the EAJA, a prevailing party is entitled to an award of attorney's fees and expenses "unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make the award unjust." 29 C.F.R. § 2704.100. Therefore, a court must, "examine… the Government's litigation position and the conduct that led to litigation." *Fed. Election Comm'n v. Rose,* 806 F.2d 1081, 1090 (D.C. Cir. 1986). The government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998)(quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The agency bears the burden of establishing that its view of the facts was reasonable. *Id.* at 967 (citing *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir.1992)).

An imminent danger exists whenever "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992). For an imminent danger order to be issued under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* The Secretary bears the burden of proving the reasonableness of the imminent danger order by a "preponderance of the evidence." *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993).

In assessing the actions of an inspector, a judge "must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority." *Wyoming Fuel*,14 FMSHRC at 1291 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)). An inspector is considered to have abused his discretion "if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners." *Island Creek*, 15 FMSHRC at 345. The abuse of discretion standard also "includes errors of law." *See, e.g., Utah Power*, 13 FMSHRC 1617, 1623, n. 6 (Oct. 1991).

_____2. Validity of Order No. 8126005

Signature's contention that there was no imminent danger is without merit. Although Signature had withdrawn its miners from the affected area and took steps to mitigate the adverse conditions at the time it contacted MSHA, the adverse roof and rib conditions could reasonably be expected to place miners in immediate danger were "if normal mining operations were permitted to proceed . . . ." *See Wyoming Fuel Co.*, 14 FMSHRC at 1290. The ground failure establishes that there was an imminent danger.

Signature's contention that the issuance of an imminent danger order required MSHA to go underground to physically examine the adverse conditions must also be rejected. The Commission has "resisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose." *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987); s*ee also Clintwood Elkhorn Mining Co., Inc.*, 35 FMSHRC 365, 369 (Feb. 25, 2013). Although Signature argues that words "upon inspection or investigation" in Section 107(a) require MSHA to conduct a physical inspection, "common usage does not limit the meaning of 'inspection' to an observation of presently existing circumstances nor restrict the meaning of 'investigation' to an inquiry into past events." *Id. at* 1547-48. Rather, "[b]oth words can encompass an examination of present and past events and of existing and expired conditions and circumstances." *Id.* at 1548. Therefore, the meaning assigned to the words "investigation or inspection" depends on the particular provision within which it appears. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 55 (D.C. Cir. 1988) (finding that the Mine Act "resists . . . tidy construction" of the words "inspection" and "investigation).

With respect to an imminent danger order issued under Section 107(a), the critical fact is whether an inspector "finds that an imminent danger exists." 30 U.S.C.A. § 817(a). While this

language indicates that an imminent danger order must address an existing danger, the word "finds" is "not confined to the mere accidental discovery of things but extends as well to detection by effort, analysis and study." *Emerald Mines Co.*, 863 F.2d at 55 (quoting *Nacco Mining Co.,* 9 FMSHRC at 1550). Therefore, so long as an inspector acquires a level of information sufficient to enable an imminent danger finding, off site contacts are a permissible method of "inspection or investigation."

Having collected information about the ground failure at Coalburg No. 1 through ongoing phone contacts with Signature, MSHA conducted an "investigation" consistent with Section 107(a). MSHA need not place its inspectors in the midst of imminent dangers at the time they occur, as doing so would undermine the provision's goal of correcting existing adverse conditions and ensuring the safety of individuals at an affected mine site.

To assess the scope of Order No. 8126005, the undersigned must evaluate the conduct of the inspectors that issued the Order and the validity of MSHA's decision to defend the Order in the underlying contest proceeding. While inspectors possess broad authority to issue an imminent danger order, Section 107(a) grants an operator a statutory right to maintain individuals in an adversely affected area for abatement purposes. Under Section 107(a), an inspector can issue an imminent danger order "to cause all persons, *except those referred to in Section 104(c) of this title*, to be withdrawn from, and to be prohibited from entering, such area . . . ." 30 U.S.C.A. § 817(a) (emphasis added). Section 104(c) includes, "any person whose presence in such area is necessary, *in the judgment of the operator* or an authorized representative of the Secretary, to eliminate the condition described in the order." 30 U.S.C.A. § 814(c)(1) (emphasis added). Because the 104(c) exception takes effect upon MSHA's issuance of an imminent danger order, an operator may not be deprived of its statutory rights under 104(c). Therefore, MSHA cannot withdraw or inhibit persons an operator determines to be necessary for abatement efforts at a mine site affected by an imminent danger.

In his deposition, Mackowiak revealed that he intended to deprive Signature of its statutory rights under the 104(c) exception. Although he made brief reference to the Section 104(c) exception when he spoke to Canterbury, he mentioned the exception in passing and did not otherwise explain the provision. Mackowiak Dep. 99:16-19. He also emphasized his preference that everyone be withdrawn from the mine, without exception, despite being informed that production had been halted, all miners had been withdrawn, and Signature had only kept individuals underground to prevent the further spread of conditions. Mackowiak Dep. 101:9-10; 103:2-5. His deposition provides, in relevant part:

> Q: So there was nothing to stop him from going in the mine, after 10:50 a.m. on August 27th, 2011?
>
> A: The 107(a) imminent danger order as written probably led him to believe that no one could go in the underground coal mine.

> Q: Well –
>
> A: Which was my preference, absolutely, was my preference.
> …
>
> Q: Okay. You wrote the order to give the impression that nobody could go in; is that what you are saying?
>
> A: Yeah, but not purposely …
> …
>
> Q: When you sent Terry Price out to the mine, did you tell Terry Price when he issued this to explain that the company had the right to go in and abate the condition?
>
> A: Absolutely not.
>
> Q: And why did you make that obtuse?
>
> A: I told Terry I didn't want anyone going in that underground mine at all. And in doing so I quite likely infringed upon 104(c).

Mackowiak Dep. 101:3-10, 101:15-18, 102:8-15.

Although the Secretary contends that Mackowiak equivocated as to whether he knowingly obscured the 104(c) exception, an inspector's motives are irrelevant. Sec'y Answer 4. Instead, the undersigned must examine "*the conduct* that led to litigation." *Fed. Election Comm'n v. Rose,* 806 F.2d at 1090 (emphasis added). Mackowiak's deposition establishes that he took concrete steps towards withdrawing all individuals from the Coalburg No. 1 – both in the way he designed the written order and in the way he gave instructions to Price. In acting to deprive Signature of its statutory rights, Mackowiak abused his discretion.

The way in which Price relayed Mackowiak's instructions to Signature is also of particular relevance in determining whether Signature was deprived of its statutory rights. In relevant part, Price's deposition states:

> Q: Did you give any instructions or did you tell anyone at Signature that no one was allowed underground?
>
> A: I think Joe already had and I probably confirmed it. I don't know – they had already pulled everybody out and it was understood."
> …

> Q: Okay. Does the operator need the government's permission to correct an imminent danger, when an imminent danger order has been issued?
>
> A: I think if I've got it closed, yeah. Then I need to modify and allow him to do what he needs to do with the consultants or whoever is going to do whatever he is going to do.
>
> Q: So in order to exercise his right under section 104 of the Act, to abate the imminent danger, the operator needs the Government's permission?
>
> A: He needs a plan and I need to modify it to allow people in the mine. [My notes] now says, "No one in the mine."

Price Dep. 62:14-18, 63:21-64:8.

Price indicates that both he and Mackowiak gave direct instructions to Signature that it withdraw all persons from the mine site. Even after Signature had been required to close off the entire site, the company received further instructions that it was required to get approval from MSHA if it planned to send anyone underground to correct the adverse conditions. Such instructions and contacts are in direct contravention of the 104(c) statutory exception prescribed by Congress. In prohibiting Signature from exercising its rights under the 104(c) exception, Price carried out an illegal order under Mackowiak's instruction. As a result, Order No. 8126005 was overbroad and amounted to an abuse of discretion.

Price's improper understanding of the 104(c) exception also confirms why he and Jackson did not conduct a further investigation at the time they arrived at the Coalburg No. 1. At the time Richmond contacted Price, Price was aware that production had been halted, all miners had been withdrawn, and Signature had taken steps to monitor the situation. Richmond Dep. 30:22-31:10. When Canterbury spoke with Mackowiak, Mackowiak was informed that men were kept underground to prevent the spread of the pillar failure. Mackowiak Dep. 75:11-16. Despite Signature's statutory right to keep individuals underground to abate the adverse ground conditions, Mackowiak indicated to Canterbury that these men should be withdrawn and directed Price that all persons were to be withdrawn from the area, without exception. Mackowiak Dep. 102:8-15; Price Dep. 54:7-20, 62:14-18. As a result, when Price arrived at Coalburg No. 1 and found fourteen of Signature's representatives still underground, he chose not to further investigate why Signature had kept individuals underground, directed Signature to withdraw these individuals, and further instructed Signature that it was required to get MSHA's approval before anyone was permitted to reenter the site. Price Dep. 60:16-61:11, 63:21-64:8. As a matter of law, Price was obligated to investigate whether the men remaining underground were involved in abatement efforts and abused his discretion when he placed additional requirements on Signature's ability to exercise its statutory rights.

This conclusion finds further support from Richmond's deposition. When Price and Jackson arrived at the Coalburg No. 1, Richmond expressed his desire to reenter the site to further investigate the adverse conditions. Richmond Dep. 35:23-36:7. Richmond also expressed his opposition to closing off the entire site to its representatives, explaining that Signature had halted production efforts, withdrew its miners from the affected area, monitored the progression of the situation, and taken steps to correct the conditions. Richmond Dep. 36:14-22, 38:14-39:1. Despite Richmond's objections, Price further advised Richmond to follow MSHA's instructions. R. Richmond Dep. 38:14-39:1. By failing to address Richmond's objections and advising Richmond to follow Mackowiak's improper instructions, Price transgressed the 104(c) exception.

On August 29, 2011, the facts also show that Richmond engaged in discussions with Mackowiak after returning from an underground inspection of the adverse conditions. With respect to these discussions, Richmond stated, "Rather than us send a plan over and them send it back a couple days later and having both agencies that *we needed to get approval from any rehab or recovery*, I was asking if we could draw up a plan and agree to have a meeting." Richmond Dep. 45:4-8. It is no coincidence that Richmond, after receiving direct instructions from Price to this effect, shared Price's improper understanding of the 104(c) exception at the time the Order was issued.[5]

The text of Order No. 8126005 also reveals that MSHA's officials intended to circumvent the 104(c) exception. On August 27, 2011, Signature received a modification that reads, "This order is hereby modified *only* to allow the operator to travel approximately 2 breaks underground for the purpose of charging their mantrips." Order No. 8126005. (emphasis added). On August 31, 2011, Signature received an identical modification when it was permitted to travel 2 breaks underground under the supervision of a mine foreman. Order No. 8126005. The use of the word

[5] It should be noted that Mackowiak and Richmond present contradictory accounts of the meeting they had after the underground inspection. While Mackowiak claims that Richmond only asked about recovering the affected equipment, Richmond claims that he had asked about setting up a meeting to establish a plan to recover equipment and rehabilitate the adverse conditions. Mackowiak Dep. 105:3-15, 109:1-4, 109:14-110:14; Richmond Dep. 45:21-46:13. Although it seems improbable that an experienced mine operator would not bring up the issue of rehabilitation following an underground inspection of an imminent danger (and the burden is on the Secretary to establish its view of the facts by a "preponderance of the evidence"), the facts still reveal that Mackowiak abused his discretion in the course of these conversations. Both accounts indicate that Richmond was primarily concerned with the length of time it would take Signature to get approval from MSHA in submitting a plan to reenter the mine. This is particularly significant because Price had relayed Mackowiak's instructions that no one could reenter the mine without MSHA's prior approval. Because Mackowiak was constructively aware that Signature had been provided improper instructions regarding its right to reenter the mine for abatement purposes, Mackowiak was required to inform Signature of its rights under the 104(c) exception. In failing to adequately address the operator's concerns and requests following the underground inspection, Mackowiak abused his discretion.

"only" is suggestive, as it confirms that Signature was only allowed to reenter the mine to take these trips , and could not exercise its statutory rights under the 104(c) exception. This conclusion finds additional support in Jackson's deposition, as it was Jackson who was responsible for drafting the order and drew up the modification to allow mantrips under Price's direction. Jackson Dep. 22:11-21, 24:4-7. Specifically, Jackson testified that the Order precluded all persons from entering the mine at the time he wrote and modified it. Jackson Dep. 28:11-23. These findings are further corroborated by Mackowiak's own admission that the written order was designed to give Signature the impression that no person was permitted to enter the mine. and by the fax that Price received indicating that the mine was to be closed off to all persons, with "no exceptions." Mackowiak Dep. 101:5-11; Price Dep. 54:16-20.

MSHA and its representatives may not issue imminent danger orders that seek to deprive an operator of its statutory rights under the 104(c) exception. As the Commission has held, "[w]hile safety must be the paramount concern, the extraordinary measure of shutting down a mine with a withdrawal order compels safeguards to ensure that an inspector's discretion is not abused." *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 556 (Aug. 2006). To ensure that MSHA inspectors do not abuse their discretion, I find that inspectors must be evenhanded in explaining the 107(a) statutory requirements. Although there is no affirmative duty to remind an operator of its statutory rights under the 104(c) exception, MSHA inspectors cannot mislead, misrepresent, or circumvent Section 107(a) statutory requirements.

Having examined the conduct that led to the litigation, the undersigned is required to examine "the Government's litigation position." *Fed. Election Comm'n v. Rose,* 806 F.2d at 1090. Despite the fact that the breadth of Order No. 8126005 was an abuse of discretion, MSHA set out to defend the validity of the Order in the underlying contest proceeding. Further, MSHA used its promise to vacate this overbroad Order as a bargaining chip in settlement negotiations with Signature. The Secretary's decision to defend Order No. 8126005 was without merit and cannot be substantially justified.

The undersigned need not address the additional issue of whether Order No. 8126005 was overbroad in terms of the area affected.

V. Order

The Secretary has requested an evidentiary hearing on the adequacy of Signature's balance sheet and on the issue of whether Signature is acting as a proxy for Patriot Coal Co. ("Patriot"). Although the Secretary's arguments appear to be without merit as a matter of first impression, the Secretary has a right to request further proceedings. 29 C.F.R. 306(b).

Further proceedings shall address: 1) whether Signature's balance sheet meets EAJA's financial eligibility requirements; 2) whether Patriot controlled the underlying contest proceedings; and 3) the amount of attorney's fees to which Signature is entitled to after prevailing on Order No. 8139507 and Order No. 8126005.

IT IS ORDERED that the parties advise the undersigned within fifteen days how they intend to proceed.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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