FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 4, 2019

STAR QUARRIES LLC, Contestant	CONTEST PROCEEDINGS
	Docket No. SE 2019-0063-RM Order No. 9425093; 12/19/2018
v.	Docket No. SE 2019-0064-RM Order No. 9425094; 12/19/2018
	Docket No. SE 2019-0065-RM Order No. 9425096; 12/20/2018
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	Mine: Star Quarries Mine ID: 08-01103
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2019-0091 A.C. No. 08-01103-483379
v.	
STAR QUARRIES LLC, Respondent	Mine: Star Quarries

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon Notices of Contest and a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Solicitor has filed a motion to approve settlement proposing a reduction in the penalties from $1,791.00 to $789.00. The Solicitor states that Citation No. 9425093 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *E.g.*, *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Solicitor also requests that:

Citation No. 9425094 be modified to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial; and

Citation No. 9425096 be modified to reduce the level of negligence from moderate to low and the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

In the settlement motion, the Solicitor contends that the Secretary has the "unreviewable discretion to withdraw" a designation of significant and substantial. Settlement Mot. at 3 (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996)). However, the Solicitor presents an overbroad reading of *Mechanicsville*. In *Mechanicsville*, The Commission addressed whether a Commission administrative law judge could *sua sponte* designate a violation as significant and substantial when the Secretary had not designated a violation as significant and substantial. The Commission ruled that there is "no material difference between the Secretary's discretion . . . on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as [significant and substantial]." *Mechanicsville Concrete, Inc.*, 18 FMSHRC at 879. The Commission iterated that the designation of a violation as significant and substantial "in the first instance" is a prosecutorial decision akin to the decision to vacate a citation. *Id.* at 880.

However, *Mechanicsville* does *not* address situations—such as here—where the Secretary has *already* exercised his discretion to designate a violation as significant and substantial and now the parties come before a Commission judge to approve a settlement. This situation fits squarely within the plain language of section 110(k) of the Mine Act. Section 110(k) states that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." The matter before the undersigned involves the parties' request for "the approval of the Commission" to "compromise[], mitigate[], or settle[]" a violation already designated as significant and substantial. That's a far cry from supplanting the Secretary's discretion through an authorized representative to designate a violation as significant and substantial in the first instance. Accordingly, the undersigned rejects the Solicitor's contention that the Secretary has the unreviewable discretion to remove a designation of significant and substantial.

The Secretary also argues that "[t]he Secretary's use of [the 30 C.F.R. § 100.3] regular assessment tables in settlement is a *prima facie* indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest." Settlement Mot. at 4-5. However, not only is the Commission not bound by 30 C.F.R. § 100.3, but it is the purview of the Commission—not the Secretary or regulations issued by the Secretary—to determine whether a settlement is appropriate under the criteria set forth in section 110(i) of the Act. *Sellersburg Stone Co., v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties. . . . [W]e find no basis upon which to conclude that these MSHA [penalty] regulations also govern the Commission."); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) ("The Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i)." (quoting 30 U.S.C. § 820(i))).

In order to overcome its burden the Secretary must present evidence to a judge—exercising his or her independent authority—to satisfy the six criteria set forth in section 110(i). Simply pointing to its own regulations does not overcome this burden. Therefore, the undersigned rejects the Solicitor's contention that the application of § 100.3 establishes a *prima facie* case for a reasonable settlement.

Consequently, the undersigned evaluated the settlement agreement absent the arguments rejected above.

The undersigned considered the representations and documentation submitted in this case. Despite the fallacy of the Secretary's legal arguments noted and rejected above, the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
9425093	$181.00	$0.00
9425094	$902.00	$631.00
9425096	$708.00	$158.00
	$1,791.00	$789.00

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9425094 be **MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is **ORDERED** that Citation No. 9425096 be **MODIFIED** to reduce the level of negligence from moderate to low and the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is further **ORDERED** that the operator pay a total penalty of $789.00 within thirty days of this order.*

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

* Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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