FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0428[1] AC No. 46-08930-551112 Mine: Grapevine South Surface Mine

DECISION APPROVING SETTLEMENT[2]

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement for the citations and order involved in this matter.[3] The parties move to modify the citations and order, as stated below. The penalty would be reduced accordingly, from the original assessed amount of **$28,246.00** to **$20,070.00.**

All citations were regularly assessed. Citation Nos. 9563155, 9563156, 9563158, 9563159, 9563160, 9563161, 9563171, 9563172, 9563173, 9563174, 9563175, 9563176, 9563183, 9563188, and 9563189 were issued as 104(a) citations, with a 10% penalty reduction for good faith. The one exception to the good faith reductions was Section 104(a) Citation No. 9563157, which was issued on January 18, 2022. Thirteen (13) days later, the cited conditions not having been corrected, the inspector issued a 104(b) order. The proposed penalty for that

[1] This docket was created when 16 citations (including one 104(a) citation with an associated 104(b) order) from WEVA 2022-0301 were reallocated into this new docket. Order for Docket Reallocation, June 29, 2022.

[2] This Decision Approving Settlement is being issued simultaneously with the Court's Decision Approving Settlement in WEVA 2022-0301 and the Court's Decision regarding the Secretary's December 20, 2022 Motion to Strike and to Approve Settlement for both dockets.

[3] In spite of the Chief Judge's Order for Docket Reallocation, the Secretary elected, in effect, to re-consolidate the dockets into a single Motion, though it was filed on eCMS for each docket. The Court, consistent with the Reallocation Order, continues to treat the dockets separately.

citation was issued without the 10% penalty reduction for "good faith" abatement efforts.

Citation	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9563155	$407.00	$407.00	Violation of 30 C.F.R. § 77.205(a), safe means of access not provided and maintained on 993K Caterpillar Front-End Loader Co. No. L465. Sustained as Issued- No penalty reduction
9563156	$661.00	$661.00	Violation of 30 C.F.R. § 77.404(a), 993K Caterpillar Front-End Loader Co. No. L465 not maintained in safe operating condition. Sustained as Issued- No penalty reduction
9563157 (Associated 104(b) order No. 9563179)	$4,624.00	$4,624.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety existed on 785C Caterpillar Haulage Truck Co. No. RT263. Sustained as Issued- No penalty reduction
9563158	$296.00	$296.00	Violation of 30 C.F.R. § 77.1605(k), rocks located along elevated roadway with no berms or guards to prevent equipment or vehicle from traveling into sump. Sustained as Issued- No penalty reduction
9563159	$252.00	$252.00	Violation of 30 C.F.R. § 77.1605(b), park brake on white Dodge Blasting Truck not functioning properly when tested. Sustained as Issued- No penalty reduction
9563160	$252.00	$252.00	Violation of 30 C.F.R. § 77.1606(a), failure to record and report defects affecting safety after pre-operational examination of white Dodge Blasting Truck. Sustained as Issued- No penalty reduction
9563161	$4,161.00	$1,869.00	Violation of 30 C.F.R. § 77.1303(h), certified blaster did not sure all persons were cleared from blast area or sheltered. Modify the negligence from "moderate" to "low." **Penalty reduction**

			of 55%.
9563171	$1,471.00	$1,471.00	Violation of 30 C.F.R. § 77.1001, loose hazardous material not stripped for a safe distance along the highwall in the Sustained as Issued- No penalty reduction
9563172	$1,156.00	$1,156.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety in D11R Caterpillar Dozer Co. No. DZ040. Sustained as Issued- No penalty reduction
9563173	$407.00	$407.00	Violation of 30 C.F.R. § 77.205(a), safe means of access not provided and maintained on 785D Caterpillar Haulage Truck Co. NO. MSY113. Sustained as Issued-No penalty reduction
9563174	$1,156.00	$1,156.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on 785C Caterpillar Haulage Truck Co. No. RT001. Sustained as Issued- No penalty reduction
9563175	$4,884.00	$4,884.00	Violation of 30 C.F.R. § 77.1000, failure to follow established ground control plan. Sustained as Issued- No penalty reduction
9563176	$296.00	$296.00	Violation of 30 C.F.R. § 77.1713(c), failure to record nature and location of hazardous conditions after examination. Sustained as Issued- No penalty reduction
9563183	$442.00	$442.00	Violation of 30 C.F.R. § 77.1606(c), damage to driver's seat belt on Freightliner Mechanic Truck Co. No. MT-665. Sustained as Issued- No penalty reduction

9563188	$4,507.00	$910.00	Violation of 30 C.F.R. § 48.26, independent contract mechanics working on the property not provided Experienced Miner Training. Modify the gravity from "reasonably likely" to "unlikely" and from "S&S" to "non-S&S" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 80%.**
9563189	$3,274.00	$987.00	Violation of 30 C.F.R. § 77.1606(c), defects affecting safety on Volvo Fuel and Oil Service Truck Co. No. 900. Modify the gravity from "fatal" to "lost workdays or restricted duty" with a penalty reduction in accordance with 30 C.F.R. part 100.3. **Penalty reduction of 70%**
TOTAL	**$28,246.00**	**$20,070.00**	**Total penalty reduction of 29%**

Citation No. 9563157 and Associated 104(b) Order No. 9563179

Citation No. 9563157 was issued on January 18, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

The citation read:

> The following defects affecting safety existed on the 785C Caterpillar Haulage Truck co. No. RT263:
> 1. The left rear strut is bottoming out.
> 2. The bed gusset located near the left side of the bed hinge pin area is cracked.
> 3. The bed gusset located near the right side of the bed hinge pin area is cracked.
> 4. Excessive slack existed from the right side top hoist cylinder. This is where the cylinder connects to the truck bed.
> 5. An excessive antifreeze leak existed from the left side are of the engine. Steady streams of antifreeze could been seen running down from the left side.
> 6. The left side front strut is bottoming out.
> 7. The right front strut is leaking oil.
> 8. A wire was disconnected front he right rear brake canister over stroke switch.
> 9. The drivers side window would not roll up when tested.
> 10. Drivers side door seal was damaged and paper towels were stuffed in areas to seal the door in the back corner. Also the door striker is taped up to keep the door closed completely.

> This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be correct before the equipment is used.
>
> Standard 77.1606(c) was cited 53 times in two years at mine 4608930 (53 to the operator, 0 to a contractor).
>
> Pet. for a Civil Penalty at 66-67.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 66. The violation was not found to be significant and substantial. *Id.* Negligence was found to be "high." *Id*. The citation was continued on January 24, 2022, when

> Repair work has been hampered by limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.
>
> *Id*. at 68.

The Secretary moves to keep the citation as issued, with no reduction in penalty. Mot. to Approve Settlement at 3.

Order No. 9563179 was issued on February 1, 2022, as a 104(b) order in connection with Citation No. 9563157. The Secretary refused to supply the Court with the (b) order. The mine operator, through its counsel, provided the document. The Court has entered the document in eCMS for this docket. The order read:

> A reasonable effort was not made by the mine operator to insure that all conditions were corrected on the 785C Caterpillar Haulage Truck Co. No. RT263. 8 conditions have not been corrected in a reasonable amount of time based on the conditions that existed.
> **Standard 77.1606(c) was cited 58 times in two years at mine 4608930 (58 to the operator, 0 to a contractor).**
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> 104(b) Orders Addendum at 9 (emphasis added).

The order was terminated on February 10, 2022, when "[a]ll defects affecting safety, on the 785C Caterpillar Haulage Truck, Co. No. RT263, that is operated on the Grapevine North Pit, have been corrected by a qualified person." *Id*. at 10.

Analysis of Section 104(a) Citation No. 9563157 with its associated 104(b) Order No. 9563179

Citation No. 9563157 has settled for the full amount proposed under the regular assessment calculation. The 10% reduction for good faith attempt to achieve rapid compliance was denied. This is not surprising as the Respondent failed to achieve compliance for the violation only after a section 104(b) order was issued 13 days after the 104(a) citation was issued. The Secretary refused to provide the Court with the 104(b) order, even though it is undeniably an important and vital part of the enforcement record for the violation. Ironically, the mine operator's attorney stepped forward and provided the Court with the (b) order.

The Citation reflects both the significant nature and extent of the transgressions for the defects affecting safety subsection cited at 30 C.F.R. § 77.1606(c). Ten independent defects, all of them conceded, were involved. Worse, and underscoring the importance of the associated (b) order, thirteen days later eight (8) of the defects remained uncorrected. This great delay in abating the many defects is an important part of the story associated with this violation, and therefore while the Secretary's hiding it is inappropriate in all instances, it is particularly so in this instance. **When a matter is before the Commission, as it is in this instance by the filing of a petition for the assessment of a civil penalty, it is before the Commission. All of it. Not just those parts the Secretary unilaterally wishes to reveal.**

As the Commission has noted:

> **[t]he purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. … The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations kijuland refuses to comply**. See 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

Hopkins County Coal, 38 FMSHRC 1317, 1335-1336 (June 2016) (emphasis added).

Presented with the Secretary's contention that the Commission has no business viewing section 104(b) orders where a citation is affirmed as issued and the proposed penalty is paid in full, the Court posits "Why stop there?"

There is no logical reason or distinction for the Secretary not to expand its 104(b) order ban to also prevent any and all 104(a) citations from the Commission's eyes post the filing of its civil penalty petition, blocking their review where a citation is paid in full with

no changes to the inspector's evaluation. If that doesn't make sense, and the Court agrees it does not, there is similarly no rational basis to block review of (b) orders. Such orders are as much a part of the enforcement record as 104(a) citations.

One might also ask, "what's the harm?" The answer is that anyone reading the motion would be seriously misled about the enforcement history for these citations. On the face of the motion, one would not learn that the elevated enforcement step, issuance of section 104(b) orders, was required. This does a disservice to miners and the public. The Commission, in this Court's view, should not be a party to the incomplete recounting. To allow it is analogous to issuing a book with the last chapter missing, but with no alert to the reader that there was more to the story.

It is perplexing that the Secretary, acting through MSHA would take this recalcitrant attitude and that the mine operator, through its cooperative legal counsel, would be the source for the relevant information.

In its December 13, 2022, Order Certifying Case for Interlocutory Review, the Court noted the importance of (b) orders:

The structure of the Mine Act underscores the importance of 104(b) orders. As the Court noted in its June 22, 2022 Order in *Perry County Resources*, 44 FMSHRC 501 (June 2022),

> The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. § 820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. [The Citation in issue] is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.
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> A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:
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> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein … and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in

subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty…. 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and **miners' representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]*. The notice of proposed **penalty** to operators in such cases shall state that a [**104**(**b**)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate

Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.').

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: "[t]he notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.*" *Id.* at 593. (emphases in original Order).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners' representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court's review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full

amount proposed or some lesser amount.

> Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example*, *Argus v. U.S. Dept Agriculture,* 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, *5 U.S.C. § 552.* To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).
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> *Id.* at 503-506 (footnotes omitted).

Analysis of the Citations involving the Secretary's modifications of the inspector's evaluations with accompanying significant penalty reductions.

Citation No. 9563161

Citation No. 9563161 was issued on April 19, 2022, for a violation of 30 C.F.R. § 77.1303(h). Titled "Explosives, handling and use," the standard specifies that "Ample warning shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting." 30 C.F.R. § 77.1303(h).

The citation read:

> The certified blaster did not ensure that all persons were cleared from the blast area or that all persons were in suitable blasting shelter to protect persons endangered by flyrock from blasting. A front-end loader was hit by flyrock from blasting. The loader operator was setting inside the operators cab when the flyrock hit the loader. The rock hit the left side tilt cylinder in front of the cab where the pin is located. It is reasoanbly likey if this condition continues to exist an accident will occur. All

> persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.
>
> Pet. for a Civil Penalty at 82.

For gravity, likelihood of injury was found to be "reasonably likely," and that the injury could reasonably be expected to be "fatal," affecting one person. *Id*. Accordingly, the violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on January 24, 2022, when "[t]he mine operator ha[d] retrained the blaster and blaster helpers on the Blasting Safety Precautions in the Acknowledge[d] Ground Control Plan. The training has been documented. Also observed the loading and blasting cycle." *Id*. at 83.

The Secretary moves to modify the citation, changing the negligence finding from "moderate" to "low," offering the following in support:

> Citation #9563161 will be modified to "low" negligence, with a reduction in penalty in accordance with the 30 CFR part 100.3. The Respondent contends that the negligence of the citation was overevaluated and should not have been issued as "moderate". Respondent would argue at hearing that the company was in compliance with their approved plan at the time of the accident. Additionally, no adverse conditions were observed by the certified blaster prior to the shot. The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the negligence from "moderate" to "low", and reduce the penalty for citation #9563161 from $4,161 to $1,869, and the Respondent has agreed to pay the reduced penalty.
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> Mot. to Approve Settlement at 3-4.

Analysis for Citation No. 9563161

Citation No. 9563161. The Secretary has agreed to a **55% reduction in the penalty** for this now-admitted violation. In pursuit of the very large reduction in the regularly assessed penalty and the accompanying redesignation of the negligence from moderate to low, the Secretary asserts that *the judge* "might find merit in the facts and arguments presented by the Respondent," but does not reveal his own evaluation of the merits of those assertions. Given the presented facts, these changes do not appear to be warranted.

The standard, now admitted as having been violated, presents no exceptions to its requirement that "[a]ll persons shall be cleared and removed from the blasting area …to protect men endangered by concussion or flyrock from blasting." 30 C.F.R. § 77.1303(h). Here, the uncontested facts are that a "front-end loader was hit by flyrock *from blasting*. The loader

operator was s[i]tting inside the operators cab when the flyrock hit the loader." Pet. for a Civil Penalty at 82 (emphasis added). Obviously, as the loader was hit by flyrock and the operator was in the loader at that time, the standard was violated.

The justification for designating the negligence as low, with low meaning the presence of *considerable* mitigating circumstances, is without merit. This is because the company's claim that it was in compliance with their approved plan at the time of the accident and that no adverse conditions were observed by the certified blaster prior to the shot are of the 'other safety measures taken' ilk. These excuses do not cut it, per decisions by the U.S. Courts of Appeals.[4]

It is undeniable that all persons were not cleared and removed from the blasting area. Thus, the harm the standard addresses occurred.

The Court also notes that the issuing inspector had marked the negligence associated with the citation as "moderate." That means the inspector had already determined there were

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[4] Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

mitigating circumstances. However, qualifying for "low negligence" requires the presence of "**considerable** mitigating circumstances." 30 C.F.R. §100.3, Table X- Negligence (emphasis added). The provision states: "When applying this criterion, **MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices**." *Id*. at 100.3(d) (emphasis added). Clearly, no actions taken by the operator to prevent or correct hazardous conditions or practices have been identified. In the absence of "considerable mitigation," it is especially disconcerting that the Secretary would agree to reclassifying the negligence to "low" where the operator occupied front-end loader was hit by flyrock from a blast.

The standard, for which strict liability applies, was violated as all persons were not cleared and removed from the blasting area. The claim that the operator was in compliance with its approved plan is beside the point, as is the contention that the certified blaster did not observe any adverse conditions. Neither of these arguments reduce the negligence involved and certainly do not constitute *considerable* mitigation. If flyrock from a blast hitting a miner occupied front-end loader can satisfy a low negligence designation for the reasons presented by the operator, then it is hard to conjure what would constitute moderate negligence. Undermining the operator's claims, the inspector noted that the blaster and the blaster operators were retrained on the blasting safety precautions in the acknowledged ground control plan. Pet. for a Civil Penalty at 83.

In the Court's opinion, based on this record, the Secretary should not have acceded to this $2,292.00 reduction in the regularly assessed penalty. Were it permitted, the Court would have asked several questions seeking the basis for the claimed "considerable" mitigation.

Citation No. 9563188

Citation No. 9563188 was issued on February 2, 2022, for a violation of 30 C.F.R. § 48.26. For this now-admitted violation, titled "Experienced miner training," in relevant part, the standard specifies that:

> (b) Experienced miners must complete the training prescribed in this section before beginning work duties. Each experienced miner returning to mining following an absence of 5 years or more, must receive at least 8 hours of training. The training must include the following instruction:
> (1) ***Introduction to work environment.*** The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.
> (2) ***Mandatory health and safety standards.*** The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.
> (3) ***Authority and responsibility of supervisors and miners' representatives.*** The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and

miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(4) ***Transportation controls and communication systems.*** The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) ***Escape and emergency evacuation plans; firewarning and firefighting.*** The course must include a review of the mine escape system and the escape and emergency evacuation plans in effect at the mine, and instruction in the firewarning signals and firefighting procedures in effect at the mine.

(6) ***Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.*** The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) ***Hazard recognition.*** The course must include the recognition and avoidance of hazards present in the mine.

(8) ***Prevention of accidents.*** The course must include a review of the general causes of accidents applicable to the mine environment, causes of specific accidents at the mine, and instruction in accident prevention in the work environment.

(9) ***Emergency medical procedures.*** The course must include instruction on the mine's emergency medical arrangements and the location of the mine's first aid equipment and supplies.

(10) ***Health.*** The course must include instruction on the purpose of taking dust, noise, and other health measurements, where applicable; must review the health provisions of the Act; and must explain warning labels and any health control plan in effect at the mine.

(11) ***Health and safety aspects of the tasks to which the experienced miner is assigned.*** The course must include instruction in the health and safety aspects of the tasks assigned, including the safe work procedures of such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. Experienced miners who must complete new task training under § 48.27 do not need to take training under this paragraph.

(12) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

30 C.F.R. § 48.26.

The citation read:

> **The independent contract mechanics that work throughout mine property on a daily bas[i]s were not provided Experience[d] Miner Training**. The operator must withdraw both mechanics from the property until the required training is received. **The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to themselves and others.**

Petition at 103 (emphasis added).

For gravity, likelihood of injury was found to be "reasonably likely," with the injury reasonably be expected to be "fatal," affecting two persons. *Id.* The violation was found to be significant and substantial. *Id.* Negligence was found to be "moderate." *Id*. The citation was terminated on February 2, 2022, when "Both mechanics have been provided with the required Experience Miner Training and the training has been documented on a MSHA Form 5000-23." *Id*. at 104.

The Secretary moves to modify the citation, reducing gravity from "reasonably likely" to "unlikely" and removing the significant and substantial designation, offering the following in support:

> Citation #9563188 will be modified to "unlikely" and "non S&S" gravity, with a reduction in penalty per 30 CFR part 100.3. The Respondent contends that the gravity was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that the independent contractors were experienced miners and had been working on mine property for several weeks. Additionally, all workers had been verbally informed of any and all hazards on mine property. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9563188. The Secretary may exercise that discretion as part of a settlement. *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "reasonably likely" to "unlikely" and deleting the "S&S" finding, and reduce the penalty for citation #9563188 from $4,507 to $910, and the Respondent has agreed to pay the reduced penalty.

Motion at 4.

Analysis for Citation No. 9563188

Citation No. 9563188 states that "[t]he independent contract mechanics that work throughout mine property on a daily bas[i]s were not provided Experience[d] Miner Training." Petition at 103. The mechanics were withdrawn from the mine until the required training was received. That event occurred later that day, at which point the citation was terminated. For this now-admitted violation, the Secretary has agreed to redesignate the violation from reasonably likely to 'unlikely.' Motion at 4. The recharacterization of gravity to 'unlikely' destroys the significant and substantial designation.

The reasons advanced by the Respondent are, in the Court's estimation, suspect. Those reasons – that that the independent contractors were experienced miners and had been working on mine property for several weeks and that all workers had been verbally informed of any and all hazards on mine property – if endorsed, effectively emasculates the standard. As the inspector noted, the Mine Act itself declares an untrained miner to be a hazard to himself and others. 30 U.S.C. §814(g)(1). By accepting the assertion that the mechanics were experienced and they'd been working on the mine for several weeks and they had been told *verbally* of 'any and all hazards' on the mine property," the Secretary has discarded his own safety training standard. There is no exception in the standard for the excuses advanced by the mine operator. To the contrary, that the mechanics had been working, without the required training, is an aggravating factor. Asserting that the mechanics had been verbally apprised of all hazards, an outlandish claim, is no substitute either. In the Court's opinion, on this record the Secretary has eviscerated the standard's statutory and regulatory requirement by adopting the operator's excuses as grounds for characterizing the gravity as unlikely.

Thus, the Court believes that the Secretary's agreement to reclassify the likelihood of an injury or illness occurring to "unlikely" makes a mockery of the standard's requirements. It is, after all, described as "experienced" miner training. Because it addresses such *experienced miners*, the idea that because the independent contractors were experienced miners by background, but not by the MSHA required training and the remark that they had been working on mine property for several weeks suffices, neuters the standard. The latter argument amounts to a claim that by continuing to work without the MSHA required training, that training requirement evaporates. **The agreement for an 80% (eighty percent) reduction in the penalty confirms this observation.** The standard does not speak of 'experience' in a vacuum. Instead, it spells out, in detail, the required subjects of *required* training. Additionally, the idea that because the contractors had been on the job "for several weeks," (an indisputably short period of time), makes the hazard unlikely, is another instance of effectively negating the force of the standard. Last, the standard, detailed as it is, does not endorse the idea that *verbally* informing all miners of "any and all hazards" is a substitute. The Court believes that the Secretary should not be in the business of emasculating MSHA's training requirements.

Citation No. 9563189

Citation No. 9563189 was issued on February 2, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that

> (a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.
> (b) Carriers on aerial tramways, including loading and unloading mechanisms, shall be inspected each shift; brakes shall be inspected daily; ropes and supports shall be inspected as recommended by the manufacturer or as physical conditions warrant. Equipment defects affecting safety shall be reported to the mine operator.
> (c) Equipment defects affecting safety shall be corrected before the equipment is used.
>
> 30 C.F.R. § 77.1606.

The citation read:

> The following defects affecting safety existed on the Volvo Fuel & Oil Service Truck Co. No. 900:
> 1. An air leak existed on the fuel line switch which was causing the air to drop from both the primary and secondary tanks.
> 2. The regulator on the air compressor was not functioning properly when tested.
> This truck is operated throughout mine proper to service equipment. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 63 times in two years at mine 4608930 (62 to the operator, 1 to a contractor).

Petition at 105.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "fatal," affecting one person. *Id.* The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id.* The citation was terminated on February 8, 2022, with the justification that

> The following actions have been taken to correct the conditions:
> 1. Installed a new air line on fuel valve and a air line under the rear of the truck.
> 2. Installed a new fitting on the air compressor.

Id. at 106.

The Secretary moves to modify the citation, changing the gravity from "fatal" to "lost workdays or restricted duty," offering the following in support:

> Citation #9563189 will be modified to "lost workdays or restricted duty" gravity, injury or illness expected, with a reduction in penalty in accordance with the 30 CFR part 100.3. The Respondent contends that the gravity of the citation was over-evaluated and should not have been issued as "fatal". Respondent would argue at hearing that the cited conditions would not cause fatal injuries to miners. The cited truck is only used to fuel, oil, and grease equipment on level loads at slow speeds. Additionally, all brakes worked properly when tested. The Secretary recognizes that the ALJ might find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to modify the gravity from "fatal" to "lost workdays or restricted duty," and reduce the penalty for citation #9563189 from $3,274 to $987, and the Respondent has agreed to pay the reduced penalty.
>
> Motion at 5.

Analysis for Citation No. 9563189

This Citation involves not one, but two, safety defects on a fuel and oil service truck. For this now-admitted violation, the inspector found both an air leak on the fuel line switch, causing the air to drop from both the primary and secondary tanks, and additionally that the regulator on the air compressor was not functioning properly upon being tested. Further, the corrections demonstrated that the admitted hazards required significant actions as new air lines had to be installed on the fuel valve and on the rear of the truck, plus the air compressor required a new fitting. To arrive at the Secretary's 70% reduction in the penalty, the gravity was reduced to lost workdays or restricted duty. The Secretary, per his customary approach, does not inform whether he consulted with the issuing inspector's view regarding this new assessment of the reasonably expected injury. The assertion that the cited truck is only used to fuel, oil, and grease equipment on level loads at slow speeds does not speak to the claim that lost workdays or restricted duty would result. Those claims do not translate to demonstrate that hazards from a fuel line leak and the improperly functioning air compressor would result in such diminished injuries. Nor is the association between the assertion that the brakes were properly working and the twin conceded defects explained.

Further, examining the particulars in claimed support that an injury would not be fatal, the Respondent's offering does not explain the relevance of the information, nor does the motion present the alternative injury that would result. Would the injury be permanently disabling, result in lost workdays, or no lost workdays at all? No explanation is offered, merely the bald assertion that it would not be fatal. Certainly the assertion that the cited truck is only used to fuel, oil, and grease equipment on level loads at slow speed does not explain the claim that no fatality would result. Nor does the claim that all brakes worked properly when tested, as

both are of the alternative putative safety considerations not to considered. The Court, were it permitted, would have several questions to ask of the Respondent regarding its claim. Finally, it is noted that the Secretary remains mum regarding the Respondent's claims, preferring once again to state only that *the Court* might find merit in them.

Last, it is noted that the standard cited for this now-admitted violation requiring that equipment defects affecting safety shall be corrected before the equipment is used, has been cited **63 times** in the two years at this mine, a fact which should give pause by itself. Even within the original parent docket, WEVA 2022-0301, which entailed 33 citations, before 16 of them were reallocated to this docket, 12 (twelve) of the original 33 (thirty-three) citations involved violations of the cited *subsection* for this standard, 30 C.F.R. § 77.1606**(c).** Those numbers alone should make one blanch when the Secretary has agreed to a **70% (seventy percent)** reduction in the penalty for this violation, producing a $2,287.00 (two-thousand two-hundred eighty-seven dollars) penalty reduction from the regularly proposed assessment.

Reasonable Inquiry is not Permitted

Despite the Court's analysis and concerns, regarding the three citations with significant penalty reductions, it is not permitted to make reasonable inquiry about the contentions advanced in settlement motions. This is because, under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *AmCoal* and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

The Commission has stated that the administrative law judges have "**front line oversight**" of the settlement process and as such that it is an adjudicative function **that "necessarily involves wide discretion**." Despite those muscular words, the Commission has clearly set forth that the Secretary is not required to offer any comment at all as to the merits of the Respondent's arguments.

Per the Commission's decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. Meeting the first two requirements is automatic and perfunctory.

(1) **The motion must state the penalty proposed by the Secretary**.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

(2) **The amount of the penalty agreed to in settlement**.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

(3) **"Facts," as the Commission has employed that term, in support of the penalty agreed to by the parties**.

In the context of settlement motions, "facts" have an atypical meaning.[5] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *AmCoal* at 990. The only associated requirement with such *"facts"* is that *"there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*" *Id.* (emphasis added).

Accordingly, the Commission rejected the view that a respondent's assertions of fact need to "present legitimate questions of fact," and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . . " *Id.*

It should not come as a surprise that, under the Commission's *AmCoal* test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-*AmCoal*, those decisions have met with reversals by the Commission. *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020), *American Aggregates*, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

As the motion meets the Commission's standard for approving settlement motions and as the Court is duty-bound to faithfully apply the Commission's present decisional holdings regarding review of settlement motions according to the way the Commission has interpreted its review responsibilities under the unique review provision set forth in section 110(k) of the Mine Act and, applying those holdings, the Court determines that this settlement, *as with all settlement motions presented to this Court post-AmCoal*, also meets the Commission's review criteria and therefore the motion is to be approved as appropriate.

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[5] In settlements, "facts" do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fact (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

Typically found in the Secretary's motions for approval of settlement is language along the lines that the parties seek to have the Court accept that it *acknowledges and accepts the explanation for the agreed upon settlement* contained in the parties' settlement motion and amendments. In this instance, the Secretary includes as proposed language that the Court has "considered the representations and documentation submitted, f[ound] that the assessment is reasonable and . . . conclude[d] that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act." Draft Order at 3. The Court cannot subscribe to such language.[6] Rather, the Court's review of settlement motions is confined to comparing the parties' motion with the three criteria set forth by the Commission in its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it meets that decision's standard of review. Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$20,070.00** within 30 days of this decision.[7]

William B. Moran

William B. Moran
Administrative Law Judge

[6] Nor does the Court endorse, or agree with, the assertions commonly found in the Secretary's motions for approval of settlements in which the Secretary claims that *a final resolution of this matter in which all violations are resolved is of significant enforcement value to the Secretary.* Neither does the Court endorse or agree with the Secretary's claim that *the modifications to the citations are immaterial,* nor with the accompanying claim that *the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions.* The Court has never been informed of any such value. Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

[7] It is preferred that penalties be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to:
U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is important to include Docket and A.C. Numbers with the payment.

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