

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 21, 2020

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

WARRIOR MET COAL MINING, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2019-0116
A.C. No. 01-01401-485027

Docket No. SE 2019-0143
A.C. No. 01-01401-487207

Docket No. SE 2019-0169
A.C. No. 01-01401-491187

Mine: No. 7 Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon Petitions for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR and the Solicitors have filed motions to approve settlement proposing a reduction in the penalties from \$41,657.00 to \$25,535.00. The CLR and the Solicitor in Docket No. SE 2019-0143 state that Citation Nos. 9132879, 8314141, and 9133552 have 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). Citation Nos. 8535986, 9132861, 9133539, 8535988, 8535989, 8535991, 9133540, 9133541, 9133543, 9133544, 9133545, 9133546, 8314484, 8314485, 8314483, 9133270, 9133271, 9133272, 8314489, 8536072, 9133550, 9133701, 9133703, and 8369985 remain unchanged, but the settlement motions indicate that, given the number of citations involved in this settlement and the non-monetary aspects of the settlement, the parties have agreed to an across-the-board reduction of 20% for these Citations. The CLR and Solicitors also request that

Citation Nos. 9133536, 9133538, and 8536070 be modified to reduce the levels of negligence from moderate to low;

Citation Nos. 9136933, 9133548, 8531885, and 9133702 be modified to reduce the levels of negligence from high to moderate;

Citation Nos. 8531887, 8538990, 9133547, 8536000, 8536075, and 8536078 be modified to reduce the likelihoods of injury or illness from reasonably likely to unlikely and to remove the designations of significant and substantial;

Citation No. 9133555 be modified to reduce the number of persons affected from three to two; and

Citation No. 9133708 be modified to reduce the number of persons affected from two to one.

The Solicitors contend that the Secretary has the “unreviewable discretion to withdraw” a designation of significant and substantial. Settlement Mot. at 4 (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996)). However, the Solicitors present 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*, 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 Solicitors’ contention that the Secretary has the unreviewable discretion after contest to remove a designation of significant and substantial.

The Solicitors also argue 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” and that “[i]t is appropriate to defer to the judgment of the parties’ in arriving at a modified penalty based on the § 100.3 tables.” Settlement Mot. at 6. However, the Commission is not bound by 30 C.F.R. § 100.3, and 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 or that the undersigned should defer to the parties on this matter.

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

The undersigned considered the representations and documentation submitted in this case, and 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 § 110(i) of the Act. The settlement amounts are as follows:

Docket No. SE 2019-0143

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9133272	\$142.00	\$114.00
8314141	\$1,242.00	\$0.00
8314489	\$142.00	\$114.00
8536070	\$708.00	\$320.00
8536072	\$344.00	\$275.00
8536000	\$832.00	\$168.00
9133550	\$708.00	\$566.00
8531885	\$1,577.00	\$474.00
8536075	\$319.00	\$122.00
9133701	\$142.00	\$114.00
9133702	\$4,836.00	\$2,173.00
8536078	\$344.00	\$122.00
9133703	\$832.00	\$666.00
9133552	\$270.00	\$0.00
8369985	\$230.00	\$184.00
	<u>\$12,668.00</u>	<u>\$5,412.00</u>

Docket No. SE 2019-0116

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
8535986	\$168.00	\$134.00
9132861	\$214.00	\$171.00
9133536	\$768.00	\$383.00
9133538	\$902.00	\$450.00
9133539	\$293.00	\$234.00
8535988	\$768.00	\$614.00
8535989	\$768.00	\$614.00
8535990	\$768.00	\$383.00
8535991	\$768.00	\$614.00
9133540	\$1,146.00	\$917.00
9133541	\$1,146.00	\$917.00
9133543	\$2,993.00	\$2,322.00
9133544	\$2,353.00	\$1,882.00
8133545	\$2,353.00	\$1,882.00
9133546	\$2,353.00	\$1,882.00
9133548	\$2,353.00	\$787.00
9133547	\$708.00	\$135.00
8314484	\$142.00	\$114.00
8314485	\$142.00	\$114.00
8314483	\$142.00	\$114.00
9133270	\$142.00	\$114.00
9133271	\$270.00	\$216.00
	<u>\$21,660.00</u>	<u>\$14,993.00</u>

Docket No. SE 2019-0169

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9132879	\$121.00	\$0.00
8531887	\$1,057.00	\$214.00
9133555	\$977.00	\$832.00
9136295	\$708.00	\$708.00
9136933	\$2,353.00	\$1,323.00
9136081	\$1,345.00	\$1,345.00
9133708	\$768.00	\$708.00
	<u>\$7,329.00</u>	<u>\$5,130.00</u>

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

It is **ORDERED** that Citation Nos. 9133536, 9133538, and 8536070 be **MODIFIED** to reduce the levels of negligence from moderate to low.

It is **ORDERED** that Citation Nos. 9136933, 9133548, 8531885, and 9133702 be **MODIFIED** to reduce the levels of negligence from high to moderate.

It is **ORDERED** that Citation Nos. 8531887, 8538990, 9133547, 8536000, 8536075, and 8536078 be **MODIFIED** to reduce the likelihoods of injury or illness from reasonably likely to unlikely and to remove the designations of significant and substantial.

It is **ORDERED** that Citation No. 9133555 be **MODIFIED** to reduce the number of persons affected from three to two.

It is **ORDERED** that Citation No. 9133708 be **MODIFIED** to reduce the number of persons affected from two to one.

It is further **ORDERED** that the operator pay a total penalty of \$25,535.00 within thirty days of this order.¹

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

¹ 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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