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SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0428 A.C. No. 46-08930-551112
v.	
APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	Mine: Grapevine South Surface Mine

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

This case is before the Court on a Petition for the Assessment of a Civil Penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d), filed May 31, 2022, and the Secretary of Labor's Motion to Approve Settlement, filed October 14, 2022. The Secretary has refused to provide the 104(b) order associated with a 104(a) citation in this docket. The absence of the associated 104(b) order frustrates the Court's ability to faithfully review the record and properly evaluate the proposed settlement. Further, the idea that the Secretary may unilaterally decide to secrete public records from the official file for a Petition for the Assessment of Civil Penalty he filed is inimical to the Congressional structure and purpose of the Mine Act.

Accordingly, for the reasons which follow, the Court **CERTIFIES** under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that this interlocutory ruling involves a controlling question of law – whether the Secretary is obligated, upon a judge's request, to supply a 104(b) order associated with a 104(a) citation in a docket before the judge on a Motion to Approve Settlement – for which, in the Court's opinion, immediate review will materially advance the final disposition of the proceeding.

Background

This docket was originally part of a larger docket, Docket No. WEVA 2022-0301, which consisted of 33 citations. By virtue of an Order for docket reallocation, dated June 29, 2022, this new docket was created. Order for Docket Reallocation at 1. It consists of 16 citations

moved from that original docket. Upon examination of the motion for approval of settlement and Exhibit A, the Court discovered that the record was incomplete for one of the citations, Citation No. 9563157, in that a section 104(b) order issued in connection with that citation was absent. The Citation involved a now-admitted violation of 30 C.F.R. § 77.1606(c). That standard directs that equipment defects affecting safety shall be corrected before the equipment is used. It is no exaggeration to say that the citation was a doozy. Issued January 18, 2022, it reported the following 10 equipment defects affecting safety:

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

For gravity, likelihood of injury was found to be "unlikely," but the 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. Understandably, the negligence was found to be "high." *Id*. at 68.

Nearly a week after issuance of the citation, on January 24, 2022, the inspector issued a "Subsequent Action," in which he informed that the "[r]epair 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." Citation No. 9563157-01, Petition at 68. The inspector extended the date for correcting the multiple defects until January 28, 2022.

After that, the file, in a manner of speaking, went dark. Exhibit A, however, gives away that there was subsequent action in that a section 104(b) order was issued.

The Secretary moved to keep the citation as issued, with no reduction in penalty. Mot. to Approve Settlement at 3. The penalty was assessed at $4,624.00.

In light of the missing 104(b) document(s), on November 9, 2022, the Court e-mailed the parties, requesting the missing information pertaining to Citation No. 9563157. Though the subject of a related Order certifying for interlocutory review arising out of the parent document, WEVA 2022-0301, also issued today, it is worth noting that there are seven (7) missing (b) orders from that document. To be clear, as originally constructed, for the 33 citations initially constituting WEVA 2022-0301, there were eight (8) instances in total where the (b) orders are absent. This Order speaks solely to the missing document(s) for Citation No. 9563157, which is part of WEVA 2022-0428.

On Tuesday, November 15th, the Secretary's non-attorney representative, conference and litigation representative David Trent, responded, speaking to the missing documents from *both* dockets:

> For the violations listed [by] Judge Moran request[ing] the terminations, no penalty is being compromised except for Citation No. 9563141. Therefore, the Secretary will not provide the terminations for these violations. For Citation No. 9563141 there is no termination to provide for this violation.[1]

E-mail from CLR Trent to the Court, November 15, 2022.

On the same day as Mr. Trent's response, Counsel for the Respondent, Attorney K. Brad Oakley, taking a cooperative approach, emailed the Court, responding that he could only locate a termination sheet for Citation No. 9563139, which termination sheet he attached to his email. He added that the violation was terminated upon repairs being made to lights on a dozer and that

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[1] Mr. Trent was referring to a citation found in the original docket and *not* reallocated to this docket, WEVA 2022-0428. No explanation was provided for the lack of any termination paper. It will be mentioned in the Court's companion certification for interlocutory review regarding Docket No. WEVA 2022-0301. The settlement for this citation represents another incongruity with the Secretary's position, as he stands by the inspector's evaluation in all aspects, yet accedes to a penalty reduction in the face of five (5) independent defects on a haulage truck. The justification presented by the mine operator is that there were other lights working on the truck. All lights, however, are not the same. Here, among the defective lights, brake lights weren't working and, an independent concern unrelated to lights, the truck's horn was also not working.

there was no (b) order associated with it. E-mail from Attorney Oakley to the Court, November 15, 2022.

However, that citation is not part of this docket, Docket No. WEVA 2022-0428. Rather, it is part of Docket No. WEVA 2022-0301 which is the subject of the Court's separate certification for interlocutory review, also being issued today.

Attorney Oakley also informed in the same email that he had not been able to locate the termination sheets in the package of citations that his client provided to him, nor in the petition filed by Mr. Trent and that he believed that all of the remaining citations have 104(b) orders associated with them. For that reason he opined that it was possible that MSHA did not issue terminations for the underlying citations. *Id.* To the Court, that makes sense as the (b) orders would supersede the (a) citations.

On November 22, 2022, the Court e-mailed the parties again, advising, in relevant part, that for Docket No. WEVA 2022-0428, the documents related to Citation No. 9563157 continued to be missing the section 104(b) order. Subsequently, on November 28, 2022, the Court updated the status of information missing from that docket, advising that a new deficiency had been discovered, namely that Citation No. 9563158 was missing entirely from the Petition. Accordingly, the Court advised that "[i]n addition to supplying the court with copies of the missing 104(b) orders, as previously requested, the Court also requests a copy of Citation No. 9563158." E-mail by the Court to the Parties (November 28, 2022). Thereafter, also on November 28, 2022, the CLR responded via e-mail, providing the missing citation, while reiterating that the Secretary would not provide the missing termination sheets. E-mail from CLR Trent to the Court (November 28, 2022).

Analysis

As explained below, the Court believes that this matter pertains to a bedrock principle of the Mine Act and the Commission's role in protecting the safety and health of miners. Further, in no way does it conflict with the Commission's interpretation of its review responsibilities under its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

Simply put, the question is whether the Secretary of Labor has the authority to deprive the Commission, miners and the public from seeing section 104(b) orders issued in connection with citations. The Secretary's legal position is that if a citation is paid in full and without any modifications, it may withhold such orders from the Commission's eyes and everyone else.

To the Court at least, such a position is inimical to the unique statutory provision created by Congress under section 110(k) of the Mine Act. As the Court views the Secretary's posture, it may be compared to a police officer telling a curious onlooker at the scene of a violation to 'move along, nothing to see here.' The problem with such an imperious attitude is that it is the Commission, acting through its 'front line oversight' by the Court of the settlement process, that

makes it far more than an onlooker. Rather, under Congressional mandate, once a petition for the assessment of a civil penalty has been filed, it is not the Secretary but the Commission which occupies the role as the overseer of the settlement process.

One would think that the Secretary, who has the important initial role in protecting the safety and health of miners, would be on the same page as this Court on the issue of disclosure of the record of citations and any orders which may ensue from them. However, regrettably and inexplicably, that is not the case.

As this Court remarked in *Perry County Resources,* 44 FMSHRC 501 (June 2022), a matter which also involved the Secretary, again acting through a non-attorney representative, refusing to provide a section 104(b) order issued following a section 104(a) citation. In that case the Court expressed that it did 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 [for a citation which] is part of this docket . . . 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.
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> 30 U.S.C. § 814(b).
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> As the Commission has noted, such orders have significance in their own right. It has observed that:

First of all, 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 added).

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).

The Secretary, seeking what appears to be more territorial gain in the Commission's presently limited review role for settlement motions, now is attempting to further limit that role by foreclosing the Commission's ability to even see relevant documents associated with citations, in this case (b) orders. The public purpose behind the Secretary's decision to prevent the Commission, miners, and the public from seeing these relevant documents is unfathomable.

Given the Secretary's obligations, as stated above, when 104(b) orders have been issued his refusal to disclose them creates the appearance of something being askew. It is noteworthy that the Secretary is not asserting that he does not have the documents. Instead, the Secretary is contending that the Commission may not view them. To the Court, this is a position at odds with the Commission's unique gatekeeper role per section 110(k) of the Mine Act.

For the reasons stated above, the Court certifies upon its own motion that this interlocutory ruling involves a controlling question of law for which in the Court's opinion, immediate review will materially advance the final disposition of the proceeding,

William B. Moran

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William B. Moran
Administrative Law Judge

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