FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 24, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0554 AC No. 46-08626-560349 Mine: Tug Fork Preparation Plant

DECISION APPROVING SETTLEMENT

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 the Motion to Approve Settlement for the citations and orders involved in this matter. The parties move to modify one citation, as stated below. The total penalty would be reduced from the original assessed amount of **$1,365.00** to **$511.00.** This represents a **63%** reduction in the overall penalty for this docket.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9566748	$1,069.00	$215.00	Violation of 30 C.F.R. § 77.1606 (c). **Penalty reduction of 80%**
9566745	$296.00	$296.00	Violation of 30 C.F.R. § Sustained as Issued - No penalty reduction
TOTAL	**$1,365.00**	**$511.00**	**Total penalty reduction of 63%**

Citation No. 9566748 was *regularly* assessed at $1,069.00. It involved a now-admitted violation of 30 C.F.R. § 77.1606(c). That standard pertains to loading and haulage

equipment and its inspection and maintenance. The cited subsection (c) provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used."

The citation described the condition as follows: "The Co. No. 541, 733D Caterpillar haul truck, is not being maintained free of defects affecting safety, as required. When checked, the offside railing at the top of the ladder is broke free in all but one spot, allowing the railing to move back and forth. This truck is operated 5 days per week, 12 hours per day. Left uncorrected, this condition, will expose the miner(s) to hazards associ[iat]ed with falling from elevated heights, causing permanently disabling injury[] to the miner(s). From the ground to the landing where the railing is broke free is approx. 8-9 feet. The operator immediately removed the truck from service until repairs are made."

Petit. for civil penalty at 10.

Evaluating the violation, the inspector marked the injury as reasonably likely to occur with permanently disabling injuries. Accordingly, the inspector listed the violation as "significant and substantial." Negligence was marked as 'low.' *Id.*

The violation was terminated the same day with the inspector stating that "[a] qualified person has replaced/corrected the condition, the railing now appears to be secure to the machine." *Id.*

In support of the **80% (eighty percent) reduction in the penalty**, resulting in a penalty of $215.00, from the original regular assessment of $1,069.00, the Secretary offers the following:

> 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 condition cited is not a discrete safety hazard to miners. Respondent contends that the equipment operator is not routinely exposed to the off-side railing, which is not in the access path to the operator's cab. Additionally, the Respondent would argue that the railing was loose, but still intact and would still perform the necessary duties to prevent a miner from falling from the elevated platform. The Secretary has exercised his discretion to modify the significant and substantial designation associated with citation #9566748 and to modify the penalty per part 100.3 accordingly.

Motion at 3.

The Court is dismayed that the Secretary has bought into the Respondent's argument that the hazard is unlikely to occur. Given all the attendant conditions associated with this violation: that the offside railing at the top of the ladder was *broken free in all but one spot*, allowing the railing to move back and forth and given that *the truck is operated 5 days per*

week, 12 hours per day and given *that a fall involved 8 to 9 feet*, a height which presumptively would result in a permanently disabling injury, the Secretary's agreement is hard to understand. Not one of the conditions noted by the inspector is disputed.

The Court notes that if the inspector had taken a photograph of the hazardous condition he found, the Secretary might have been foreclosed from agreeing to this de minimis penalty.

That agreement is coupled with the Secretary's oft-claimed assertion that he can remove a significant and substantial designation with impunity. That is incorrect. In a motion, the Secretary can assert that a violation was unlikely to occur, but it is only by that redesignation that a non-significant and substantial violation may follow. As the Court has informed many times before, the cases cited by the non-attorney representative do not stand for the notion that he can independently drop a significant and substantial designation, as if by an edict.

The two cases continually cited by the Secretary, *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996)) do not support the claim that the Secretary may peremptorily delete a significant and substantial finding. Such a modification can only occur upon determining that at least one of the two elements of such a finding is missing: that a reasonably likelihood of reasonably serious injury was not present.

A seemingly impenetrable wall, as noted above, CLRs continue to assert that "[t]he Secretary has exercised [the] discretion to modify the significant and substantial designation associated with citation #9566748 and to modify the penalty per part 100.3 accordingly. 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))." Motion at 3.

Mechanicsville only holds that *the judge* may not essentially make a prosecutorial decision to designate a citation as S&S *in the first instance*, as that is an exercise of enforcement authority reserved for the Secretary. Thus, presented with a citation with no significant and substantial designation, a judge may not add that designation on his or her own.[1] *Am. Aggregates* simply echoes *Mechanicsville*, holding "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the particular expertise of MSHA in judging whether a violation is S&S. Indeed, *if MSHA does not*

[1] In *Mechanicsville*, 18 FMSHRC 877, (June 1996), the Commission held that it agreed "with the Secretary that the judge erred in determining on his own initiative that the violation was S&S. … [Referring to another of its decisions the] Commission reasoned that the modification was not appropriate because the judge *added new findings* to create a section 104(b) order. ... Here, the judge similarly erred by adding a new finding and conclusion, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." *Id.* at *879-880.* (citations omitted).

charge an S&S violation, the Commission cannot make an S&S finding. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996). Commission Judges do not have the discretion to make such elevated finding *unless it is asserted in the first instance by MSHA*." *Am. Aggregates* at 576 (emphasis added).

Make no mistake, here *both* citations in this Appalachian Resource docket *were* designated by the MSHA inspector as significant and substantial. Thus, clearly, *Am. Aggregates* and *Mechanicsville* do not apply. The Court does not criticize the CLRs for habitually inserting this claim; no doubt they do it at the behest of attorneys for the Secretary, as the CLRs are not attorneys, and it is unlikely that they all developed an analysis of the cases cited on their own. That the Secretary may have this position on its *wish list* is not the same thing, as Commission decisions have not, up to this point, agreed with that claim. The Court has pointed this out several times before, but no doubt the CLRs will continue to cite those inapposite holdings, because they are told to do so.

The unsafe railing violation must also be viewed in context.

Earlier on the same day as the defective railing violation was found, the inspector found a second, significant, violation *on the same piece of equipment*. The inspector found that the equipment operator of this haul truck was not wearing the seat belt, citing 30 C.F.R. §77.403-1(g), with its requirement that "[s]eat belts required by § 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped with ROPS by § 77.403-1."

As with the other violation associated with this truck, the inspector marked an injury occurrence as 'reasonably likely' to occur, producing lost workdays or restricted duty, although in his evaluation he stated that the "condition will cause and or contribute to an accident of a reasonably serious nature, when the driver will receive fractures and lacerations, resulting in at least lost workdays or restricted duty." Petit at 9.

Thus, two noteworthy hazards were at play with the same truck, hazards which were not divorced from one another. Both, at least by the view of the issuing inspector, were significant and substantial. To the Court, the distinguishing feature is that the seatbelt violation only involved $296.00, while the railing violation was assessed at $1,069.00. As the Court has remarked in numerous cases, it does appear that the larger assessments are the ones most often subjected to significant penalty reductions, with the minimal penalties more often paid as assessed. Whether this frequent result is mere happenstance is unknown.

Reasonable Inquiry is not Permitted

Despite the Court's analyses and expressed concerns for Citation No. 9566748, 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.[2] 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).

[2] 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.

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.

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.[3] 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.

[3] 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.* Motion at 2 (emphasis added). Such boilerplate claims are almost always hollow, in view of the actual modifications and penalty reductions that makeup these motions.

Accordingly, on that basis only, the motion to approve settlement is **GRANTED**, Citation No. 9566748 is **MODIFIED** as set forth above and Respondent Appalachian Resource West Virginia, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$511.00, as opposed to the initial total proposed penalty of $1,365.00,** within 30 days of this decision.[4]

William B. Moran

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Administrative Law Judge

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[4] 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.