

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2020

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2020-0004
A.C. No. 46-09091-499508

v.

MARFORK COAL COMPANY, LLC,
Respondent

Mine: Horse Creek Eagle

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

Before: Judge McCarthy

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

The 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 has filed a motion to approve settlement proposing a reduction in the penalties from \$29,612.00 to \$24,842.00. Citation No. 9162703 remains unchanged, but the CLR justifies the reduction in penalty by stating there is a legitimate factual and legal dispute regarding gravity and negligence. The CLR has stated that Citation No. 9243753 has been vacated. The Secretary claims the unreviewable discretion to vacate a citation under *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The CLR also requests that Citation No. 9167505 be modified to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

Pursuant to 29 C.F.R. § 2700.1(f) and Federal Rule of Civil Procedure 12(f), the undersigned strikes paragraph 3(B) from the Secretary's Motion. This paragraph states definitively that the Secretary's discretion to vacate a citation at any time—including after the proposed penalty has been contested—is unreviewable. However, section 110(k) requires that *any* contested penalty cannot be compromised, mitigated, or settled without the approval of the Commission.

In *RBK Construction*, the Commission relied on the Supreme Court's ruling in *Cuyahoga Valley Ry. Co. v. United Transport Union*, 474 U.S. 3, 7-8 (1985), and ruled that the Secretary has the unreviewable discretion to vacate citations. However, *Cuyahoga Valley* concerns the Occupation and Safety Health Act, a law that lacks any requirements similar to those in section 110(k). *See generally* 29 U.S.C. § 651 *et seq.* Furthermore, although the Commission in *RBK Construction* summarized the Secretary's argument that section 110(k) only applies to settlements of penalties and not to vacations of citations or orders, the Commission never addressed that argument or provided any basis for a ruling that the reduction of a contested proposed penalty to zero does not qualify as compromising, mitigating, or settling a contested proposed penalty under section 110(k).

Additionally, the Commission did not explain in *RBK Construction* how—if the Secretary has the unreviewable discretion to eliminate proposed penalties through vacating citations and orders—the Commission can uphold the intent of Congress that section 110(k) act to “assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided” and “that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties.” *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) (quoting *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978)) (emphasis removed). It would appear that the unreviewable discretion to eliminate citations, orders, and entire proposed penalties holds the potential to hide the very abuses Congress intended the Mine Act to address.

Given the requirements in section 110(k) and the fact that the Commission did not fully address them in *RBK Construction*, the undersigned considers this case law questionable and will not rely on it to evaluate this Motion.

Nonetheless, the undersigned considered the enforcement value of the settlement as a whole when evaluating the Secretary's vacation of Citation No. 9243753.

The undersigned considered, absent the paragraph struck above, 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 at 1976, and is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9162702	\$2,172.00	\$2,172.00
9162703	\$4,464.00	\$2,665.00
9162704	\$2,172.00	\$2,172.00
9161855	\$604.00	\$604.00
9161861	\$977.00	\$977.00
9167495	\$3,241.00	\$3,241.00
9161869	\$1,577.00	\$1,577.00
9167500	\$3,511.00	\$3,511.00
9167501	\$3,511.00	\$3,511.00
9167502	\$1,852.00	\$1,852.00
9161874	\$1,852.00	\$1,852.00
9243753	\$168.00	\$0.00
9167505	\$3,511.00	\$708.00
	<u>\$29,612.00</u>	<u>\$24,842.00</u>

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

It is **ORDERED** that Citation No. 9167505 be **MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is further **ORDERED** that the operator pay a total penalty of \$24,842.00 within thirty days of this order.*

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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

Distribution:

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