FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

April 25, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	: : : :	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0129 A.C. No. 36-07230-561904
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	: : :	Mine: Bailey Mine

DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed settlement. The originally assessed total amount for the citations at issue was **$9,036.00** and the proposed total settlement amount is **$1,897.00, reflecting a 79% (seventy-nine percent)** overall reduction, as reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9205312	$6,898	$1,393	Citation modified to moderate negligence; **80% reduction in penalty**
9204928	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
9205356	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
TOTAL REVISED PENALTY	**Original total: $9,036.00**	**Revised total: $1,897.00**	**79% overall reduction in penalty**

The Citations in issue

Citation No. 9205312

This citation invoked 30 U.S.C. §876(b), pertaining to "**Communication facilities; locations and emergency response plans**." The section addresses telephone service or equivalent two-way communication facilities, which are to be approved by the Secretary or his authorized representative. Such communication facilities shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal. The cited subsection addresses the plan requirements.

The section 104(a) citation for this now-admitted violation stated:

> The Mine Operator failed to comply with their Approved Emergency Response Plan (Approved 9-11-2020), in that, there were no leaky feeder line (communication) or tracking tags installed in the 2-K Working Section (009-0 MMU) Alternate Escapeway (number 3 entry of 2-K) from the loading point inby 8 crosscut outby to the 5 South Mains Right (K) Track at the number 80 crosscut (2420 feet in length). Therefore **there was no redundant communication between the Primary or Alternate Escapeways** and **no communication or tracking at all in the alternate escapeway** or **at the Working Section refuge alternative/SCSR cache from the alternate escapeway**. After issuance of this citation, the Operator removed the persons from the working faces to outby the loading point until the condition can be corrected.
>
> The Following statements are from the Approved Mine Emergency Response Plan and have not been complied with:
>
> 1. Page 1, Communication, 2. Coverage Area, line b.,- The system will also generally provide continuous coverage along escapeways and a coverage zone approximately 200' feet inby and outby strategic areas of the mine. Strategic Areas are fixed work locations where miners are normally required to work, section SCSR caches, working section power centers and manned belt transfers.
>
> 2. Page 2., 6.,- Survivability, a. The post accident communication system will generally provide redundant signal pathways to the surface component. b.- Redundancy will be achieved by two or more systems installed in two or more entries, or one system with two or more pathways to the surface; provided that a failure in one system or pathway does not affect the other system or pathway. c.,- Redundancy means that the system can maintain communication with the surface when a single pathway is disrupted. Disruptions can include major events in an entry or component failure.
>
> 3. Page 3, Tracking System, 1. Performance, aiii.,- Locate Miners in escape-way at intervals not to exceed 2000 feet. iv.,- Locate miners within 200 feet of

strategic areas. Strategic Areas are fixed work locations where miners are normally required to work, section mass SCSR caches, working section power centers and manned belt transfers. vii.,- Locate miners at the key junction in the escape-ways. viii.,- Locate miners within 200 feet of refuge alternatives. d.- The electronic tracking system will be installed in active daily traveled areas of the mine Primary and Secondary escapeways.

4. Page 5, 8. Maintenance, d. In the event of system or component failures, the miners will be notified of the problem. The affected miners will begin manual zone tracking and continue to advise the surface communication facility of their travel until the system is repaired. Repairs will start immediately if there is a loss in tracking capabilities. e.- The system will be examined weekly to verify that it is maintained in proper operating condition and the results of the examination will be entered in a record book.

5. Page 5, 9. Purchase and Installation,- b. If there is system failure the mine will revert to manual tracking system that was previously used.

Petition for Civil Penalty at 11-13.

The citation was terminated the following day, with the inspector noting:

Through a visual observation after traveling the 2K MMU 009-0 #3 entry (return) (Alternate Escapeway) in its entirety and having communication throughout and verifying through the tracking software on the Mine's surface of this inspectors locations, this citation is hereby terminated. The system is working in the previously mentioned entry/area. Secondly, the Mine Operator is carrying a record/ledger (weekly exam) to show the systems functioning properly.

Id. at 13.

The issuing inspector, who diligently recorded the aspects of the Approved Mine Emergency Response Plan provisions which were not complied with, listed the "Gravity" of the injury or illness as 'Unlikely,' but listed such injury or illness as "Fatal" if it were to occur. Marked as non-significant and substantial, nine miners would be affected. Given the multiple subjects of non-compliance, the inspector listed the negligence as "High." *Id.*

Analysis for Citation No. 9205312

The penalty, which was *regularly* assessed at $6,898.00, is now proposed to be settled at $1,393.00, representing **an 80% reduction**. This figure is apparently derived by designating the negligence from 'High' to "Moderate.' Motion at 3. The justification for this is short, the Motion relating that the "Respondent has represented to the Secretary that it had assigned miners to install the missing equipment that is the subject of the citation, but that the work was not timely completed because of supply problems." Undercutting this claim is that the inspector found *five* instances of non-compliance, yet all five violative conditions were somehow corrected

the next day, the supply problems apparently having vanished rapidly. This is the sole basis presented in the motion for listing the negligence as moderate.

In support of the Secretary's contention, the Solicitor's attorney looks to *Vindex Energy Corporation*, 34 FMSHRC 223, 224 (Jan. 2012) (ALJ) ("*Vindex*"), asserting 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." Motion at 3. The Solicitor's attorney is apparently unaware that an administrative law judge's decision is not precedential. Commission Procedural Rule 69(d) provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). *Rain for Rent,* 40 FMSHRC 976, 980 (July 2018), *Tilden Mining,* 36 FMSHRC 1965 (Aug. 2014). The Secretary also errs in asserting that there is an evidentiary dispute regarding the appropriate level of negligence but offers nothing to support the notion that the negligence should be deemed "Moderate," other than the vague remark about the short-lived claim of 'supply problems.' Merely asserting 'supply problems' is apparently sufficient to carry the day.

Citation No. 9204928

This section 104(a) citation, invokes 30 C.F.R. § 75.1403, well known as the 'safeguard standard.' It is also a statutory provision which requires that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

For this now-admitted violation, on July 8, 2022 the inspector identified multiple violations of the provision, noting that "[t]he 2K section (MMU 009-0) #2 entry track from 0xc - 9.5xc has failed to be properly maintained as identified by the safeguards for the Bailey Mine in the aspect: **39 loose track bolts**, a **loose fish plate and a missing bolt** are allowed to exist on this track. Also, at the #8 crosscut **the rail is out of alignment** by 1/4 inch at the time of the exam.

Petition for Civil Penalty at 15 (emphasis added).

The citation noted that the safeguard standard had been cited **59 times in two years** at the mine. *Id.*

The citation was terminated four days later, on July 12, 2022, after the identified violations were corrected with the inspector stating that the "operator was able to tighten the loose bolts with approved means, and properly adjust the rail at #8 crosscut, however will need to burn a hole in the rail to install the missing bolt on the right side of the track at #8 crosscut. Because the mine is currently operating on shutdown and minimal people are working, additional time is granted to get specialized manpower to this location to cut the rail to install the bolt. *Id.* at 16.

Analysis for Citation No. 9204928

The Secretary's attorney cites an administrative law judge decision as precedent, misconstrues the Commission's decision in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, (June 1996), and does not provide 'facts' to support the requirements for settlement, per

the Commission's *AmCoal* decisions: 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

If the basis for the 80% penalty reduction regarding the previously discussed Citation, No. 9205312, is arguably justified, the same cannot be said for Citation No. 9204928. This is so because the offering by the Secretary does not even meet the Commission's requirements for settlement motions. The justification, *in its entirety*, provides only that:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 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.

Motion at 3-4.

The Secretary's attorney cites once again to the ALJ decision in *Vindex*, asserting 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." *Id*. The inapplicability of ALJ decisions as precedent has been discussed above.

The Secretary then adds that she "possesses unreviewable discretion to withdraw an S&S designation," citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879 (June 1996) ("*Mechanicsville*") (finding "no material difference between the Secretary's discretion on the one hand to vacate a citation [pursuant to *RBK Construction, Inc*., 15 FMSHRC 2099, 2101 (Oct. 1993)] and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S."[1] Motion at 4 ("*RBK*").

The Secretary continues to inappropriately cite *Mechanicsville* as authority. This Court and other judges have noted that *Mechanicsville* does not support the Secretary's claim that she possesses unreviewable discretion to withdraw an S&S designation. Yet, the Secretary continues to assert otherwise. It's time to be clear about the Commission's holding in *Mechanicsville.*

At the outset of its decision in *Mechanicsville*, the Commission very plainly set forth the issue before it, stating that it "raises the issues of *whether a judge on his own initiative* can designate a violation of a mandatory safety standard to be significant and substantial." 18 FMSHRC 877. The Commission's answer to the issue was equally plain, stating that it "agree[d] with the Secretary that the judge erred in determining *on his own initiative* that the violation was S&S." *Id.* at 879 (emphasis added). Thus, the decision was expressly limited to the Commission's holding *that the judge 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 880 (emphasis added). The Commission's decision

[1] *RBK* holds only that the Secretary has the authority to *vacate* the citations. 15 FMSHRC at 2101

added nothing more to that holding.

That the Commission's decision in *Mechanicsville* did not go beyond the very words it employed in that decision was made additionally clear in *Spartan Mining*, 30 FMSHRC 699 (August 2008). There, Spartan tried to expand *Mechanicsville* but the Commission would have nothing of it, informing that it "*reject[ed]* Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. … Spartan unpersuasively relies on *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. *However, Mechanicsville is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not.*" *Spartan* at *22 (emphasis added).

Accordingly, there is *no* basis for the Secretary's habitual citation to *Mechanicsville* as authority for the claim that she possesses unreviewable discretion to *withdraw* an S&S designation. It is one thing for the Secretary *to argue* that the Commission's holding in *Mechanicsville* should be *expanded* beyond that holding, but to assert that the decision affords the Secretary with unreviewable discretion to withdraw such a finding is beyond the pale. Here, the Secretary does not present its contention as an argument. Instead, the Secretary's attorney presents his position as the state of the law. It is not.

Attorneys have an obligation not to misstate case law. *Teamsters Local No. 579 v. B & M Transit, Inc.,* 882 F.2d 274, 280 (7th Cir.1989). Rule 11 of the Federal Rules of Civil Procedure requires attorneys to inquire about the … law before filing pleadings. … an attorney who submits a pleading must certify that: 'to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry [the pleading] is … warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Dzwonkoski,* 2008 WL 2163916 (May 16, 2008) (S.D. Ala. 2008) citing *Howard v. Liberty Memorial Hosp*., 752 F.Supp. 1074, 1080 (S.D.Ga.1990).

Therefore, unless and until the Commission revises its holding in *Mechanicsville*, the Secretary, both her attorneys and her non-attorney representatives, (Conference and litigation representative, "CLRs,") should cease invoking that decision for propositions not supported by it.

REVISITING PRESENT COMMISSION LAW FOR SETTLEMENT MOTIONS AS APPLIED TO THIS MATTER.

Fundamentally, the Secretary's Motion in this matter does not meet the Commission's test for settlement approvals, as set forth in *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

Once past the obvious preliminaries – that a motion for settlement must state the penalty amount originally proposed by the Secretary and the new amount the parties have agreed to pay,

the Commission's decision in *AmCoal II* sets forth the present requirements deemed sufficient for its judges in carrying out their "front line oversight of the settlement process" in order "to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 985, 987.

The Commission repeatedly spoke of the need for 'factual support' for penalty reduction. *Id*. at 989, 990. Though the Commission advised that such 'facts' "are not limited to facts related to the section 110(i) penalty criteria or to the alleged violations," the Commission still required that facts be presented. *Id.* at 986. Accordingly, it has "required parties *to submit facts* supporting a penalty amount agreed to in settlement." *Id.* at 987. It noted, "[i]n particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation "the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, *and facts* in support of the penalty agreed to by the parties." *Id.*

The Commission rejected the need for a respondent to present *legitimate* questions of fact which can only be resolved through the hearing process and also rejected that there is a need to show any *legitimate* factual disagreement. *Id*. at 991. As such, the Commission stated that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement. Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id.*

Despite the above, the Commission's *AmCoal II* decision still requires the submission of 'facts.' Such facts must be "mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 991. Here, no facts have been presented.

It is not an exaggeration to describe the basis for the Secretary's justification as essentially '*because we can*.' Though set forth above, it is worth repeating what the Secretary presented here, to wit:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 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.

Motion at 3-4.

None of this amounts to mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, *appropriate under the facts*, and protects the public interest.

Citation No. 9205356

This citation also invokes 30 C.F.R. § 75.1403. Issued on July 20, 2022, the inspector's Condition or Practice section of the citation states:

> The Mine Operator failed to maintain an unobstructed travelway of at least 24 inches in width on walk side of the 11-L Conveyor Belt between the outby end of the storage unit andthe bottom step of the 6 south Mains Left Track overcast stairs for a distance of 30 feet in length. Old pieces of conveyor belt were humped up in the air, there were 2 small rolls of conveyor belt, splicing nail buckets, splices, a conveyor belt cutter and splicing template filling most of the required walkway in the cited area. The walkways in this area was wet, muddy and very slippery without having to traverse this extraneous materials. The Operator immediately started to clear the extraneous materials after the issuance of this citation. **Standard 75.1403 was cited 61 times** in two years at mine 3607230 (60 to the operator, 1 to a contractor).

Petition for Civil Penalty at 18 (emphasis added).

The citation was terminated on July 21, 2022, with the inspectors remarking that "[a]ll of the extraneous materials have been cleaned out of the cited travelway/walkway. There is now at least 24 inches of clear, unobstructed travelway, therefore this citation is terminated. *Id.* at 19.

Analysis for Citation No. 9205356

As the Secretary's attorney seeks the same modifications to this citation as he did for Citation No. 9204928 and offers the same justification, the Court's previous analysis applies.

Summary:

As discussed above, the Secretary has cited to inapplicable precedent, by relying upon an administrative law judge decision, inappropriately cited to *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, (June 1996), for a proposition that case does not support, and failed to meet the Commission's standards for an acceptable motion to approve settlement, per its decisions in *AmCoal I* and *AmCoal II*.

That said, because the Commission has, to the best of this Court's understanding, a 100% approval rate for settlement motions, it has decided to approve the settlement in this instance because the Commission examines all settlement determinations made by its judges, and has the authority, per 29 C.F.R. §2700.71, to review a judge's decision on its own motion.[2]

[2] 29 C.F.R. § 2700.71, titled, "Review by the Commission on its own motion," provides "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented.

The Court has considered the Secretary's Motion and approves it solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. As noted, under those decisions, reasonable inquiry by the Court is not permitted.

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.

WHEREFORE, the motion for approval of settlement is GRANTED. Citation No. 9205312 is modified to moderate negligence, Citation No. 9204928 is modified to unlikely and non-S&S, Citation No. 9205356 is modified to unlikely and non-S&S.

It is ORDERED that the Respondent pay the agreed-upon civil penalty of $1,897.00 within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Attorney Kyle D. Stelmack, U.S. Department of Labor, Office of the Regional Solicitor
1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19104
Stelmack.kyle.d@dol.gov

Craig S. Aaron, CONSOL Energy, Inc., 275 Technology Drive, Suite 101
Canonsburg, PA 15317 craigaaron@consolenergy.com

The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

[3] Penalties may 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 vital to include Docket and A.C. Numbers when remitting payments.