# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 24, 2019

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION, (MSHA),<br>Petitioner, | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. LAKE 2019-0149<br>A.C. No. 33-00968-481020 |
| v. | |
| HOPEDALE MINING LLC,<br>Respondent. | Mine: Hopedale Mine |

## DECISION AND ORDER

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves four citations issued pursuant to Section 104(a) of the Act detailing alleged violations of mandatory health and safety standards with respect to Respondent's coal mine ventilation plan. The parties appeared at a hearing on April 24, 2019 in Pittsburgh, Pennsylvania. The parties called no witnesses but submitted stipulations regarding the citations at issue. Based upon the parties' stipulations, my review of the entire record, and consideration of the parties' legal arguments, I make the following findings and order.

## I. BACKGROUND

The Hopedale Mine is an underground coal mine located in Harrison County, Ohio. The parties have stipulated that Hopedale Mining LLC is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips., Ex. J-2. ¶¶ 1-3.

The Secretary filed a petition for assessment of civil penalty regarding the four citations in this docket and Respondent filed a timely answer. The originally assessed amount for the citations at issue totals $18,093.00. The Secretary submitted two motions for settlement on behalf of the parties. In those motions, the parties represented that they had agreed to a significant reduction in penalty of almost 81.5% based upon information purporting to support reductions to the gravity and negligence for each citation.

The Secretary filed his initial settlement motion on March 25, 2019. The docket contains four ventilation violations in which the CLR proposed to modify the negligence on all four, and to change the highly likely to reasonably likely for two citations, thereby reducing the total penalty from $18,093.00 to $3,339.00 based upon the Secretary's schedule of penalties found at 30 C.F.R. § 100.3. After the parties were notified that same day via email that the court would not approve the proposed settlement, the Secretary filed an amended settlement motion on April 5, 2019. The amended motion included the same terms proposed in the initial motion along with some additional information concerning each citation. In their amended motion, the parties assert that they included a description of the "issue[s] on which the parties have agreed to disagree" and that the motion demonstrated "the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest," as required by *Am. Coal Co.*, 40 FMSHRC 983, 991 (Aug. 2018) [hereinafter "*Am. Coal II*"]. The Secretary did make an effort to provide some relevant information in the second motion, which was filed by the Solicitor's office, but the second motion was also deficient. That additional information is discussed in more detail below.

On March 29, 2019, the court issued a Notice of Hearing directing the parties to appear for hearing on April 24, 2019 in Steubenville, Ohio. Due to a lack of courtroom availability, the court issued a Notice of Hearing Site on April 9, 2019 and changed the location of the April 24, 2019 hearing to a courtroom at the Commission's Pittsburgh office. Each party filed its prehearing submission on April 15, 2019; both submissions indicated that no witnesses would be called at hearing and that the only exhibit offered would be a copy of the parties' joint stipulations. Following a conference call with the parties on April 16, 2019, the Secretary submitted a copy of the parties' initial joint stipulations to the court.

On April 17, 2019, the court issued an order denying the parties' amended motion for settlement. The order also addressed the stipulations, which in fact, contained the identical information found in the amended motion to approve settlement. The joint stipulations were considered to be an attempt to have a settlement motion approved and are addressed here as another effort to further the original settlement. A little over 36 hours prior to hearing, the Secretary filed a 94-page submission to request that the court reconsider the parties' settlement agreement, or alternatively, revoke the subpoena issued to the inspector, or alternatively, certify the order denying settlement for interlocutory appeal. The hearing was held as originally scheduled, and the parties introduced an updated copy of the joint stipulations as Exhibit J-2. On May 1, 2019, Respondent joined the Secretary's arguments requesting reconsideration of the settlement agreements and certification of certain issues for interlocutory review.

## II. SETTLEMENT ISSUES

Prior to hearing, the parties' settlement proposals were rejected because they were not fair, reasonable, appropriate under the facts, or in furtherance of the public interest. The four citations at issue here involve violations of 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow a ventilation plan that is designed to control methane and respirable dust. Each citation was marked significant and substantial ("S&S"), and the parties' four settlement proposals retained those designations. However, in both of the motions and in the two stipulations, the parties suggested reducing the negligence of three of the four citations from

moderate to low, reducing the negligence of one of the four citations from high to moderate, and reducing the likelihood of injury of two of the four citations from highly likely to reasonably likely. This decision incorporates the order denying the Secretary's amended motion for settlement, which was issued on April 17, 2019 and addressed the motion for settlement and amended motion, as well as the parties' first joint stipulations. In addition to those three submissions, I address the second joint stipulation here.

The first motion for settlement was denied on March 25, 2019 in an email sent to the CLR and the mine operator. The email explained that the four ventilation citations were serious, as was the potential for exposure to dust, and that such a drastic reduction in the overall penalty was not supported. The first motion addressed each of the four violations in a limited manner. A proposal for Citation 8055975, which was issued for failure to maintain adequate air flow, included a modification to negligence from moderate to low and sought a reduction in penalty from $1,031.00 to $462.00. The parties justified the modification to low negligence by arguing that the "foreman stated" to the inspector that he had taken an air reading prior to the roof bolters entering the area and that reading was within the required parameters. The citation includes a statement that the mine was cited 10 times in the past two years for ventilation violations. In the amended motion that followed, the attorney for the Secretary added information explaining that the inspector's air reading was 93% of what was required by the plan and that the difference in the ventilation was not easily detectable by the roof bolter. The Secretary also added that the supervisor took the air reading "just prior to the inspector's arrival." No other changes were suggested and the proposed reductions to negligence and the penalty remained the same. In the next settlement attempt, the joint stipulations, one other item was added: the parties agreed that the foreman said he measured over 3,000 cfm of air prior to roof bolting. Finally in the fourth attempt, the second joint stipulations, the parties agreed that as the continuous miner advances, it is farther from the ventilation source. I credit the Secretary for making an effort to supply additional information, but a significant amount of the information contained conclusions rather than facts, and it was not sufficient to support the drastic reductions that were proposed. It is clear that the parties did not consult the Commission's case law on what constitutes the various levels of negligence. The Secretary may have more facts he relied upon, but if he does not, the parties should consider renegotiating the agreement.

Citation 8055976 was issued 35 minutes later on the same MMU-005 for a failure to remove a tail curtain. The CLR suggested a change from high negligence to moderate and a reduction to likelihood of injury or illness from highly likely to reasonably likely, reducing the penalty from $12,321.00 to $1,666.00 based on Part 100. The proposed reduction was based upon information the mine operator presented that included sampling results for the shuttle car operators taken at or near the time of the violation and demonstrating no overexposure to dust. In addition, the justification for modification included a statement that management was not aware of the violation and that the exposure was for a short duration. The amended motion added that the "Secretary agrees that the section foreman was at the continuous miner" but was not aware the curtain had not been adjusted. The next submission, the first joint stipulations, stated that the section foreman was present at the continuous miner for the cut from E to F, but unaware of the violation. The parties agreed that the violation was for a short period of time. Finally, in the second stipulation, the parties added that the exposure lasted for 45 minutes, but still agreed that it was for a short period of time. They also agreed that there was no evidence of

overexposure. For each violation in the second joint stipulation, the parties added that the violation as set forth was a true and accurate description of the condition observed by the inspector with the exceptions set out. Given all of the information provided, the Secretary has failed to justify the changes to moderate negligence and a reasonable likelihood of injury, as well as the drastic penalty reduction.

Citation 8055977, issued on MMU-005 just 45 minutes after Citation No. 8055976, cites the mine for having plugged water sprays on the continuous miner. The first motion suggested a reduction from moderate negligence to low and a reduction in likelihood of injury or illness from highly likely to reasonably likely. The proposed penalty was reduced from $3,710.00 to $749.00. The CLR justified the changes by stating that the personal samples taken by the shuttle car operators showed the dust levels in compliance and management was not aware that the sprays were plugged. The second motion added more to the parties' justifications and included a statement that the location of the plugged sprays made it difficult for the operator of the continuous miner to see the non-functioning sprays. The motion also included a statement that the respirable dust parameters were in compliance at the start of the shift and the sprays had been checked after the third cut. The motion added finally that there was no dust "rolling over" the continuous miner at the time. In the third attempt at settlement, contained in the first set of joint stipulations, the parties stated that "rolling dust" is a reliable sign of plugged sprays and there was no rolling dust. The parties also asserted that the sprays were checked after the cut from E to F. Finally, the last stipulation added that the inspector did not know about the samples from the shuttle car operators when he issued the citations and there was no reliable evidence as to the duration of the exposure. Given all of the information provided, the Secretary has not made a case for low negligence as it is defined by the Commission.

Inspector Dye issued the fourth citation, No. 8055978, about one and a half hours later on MMU-005 for failing to maintain the roof bolter vacuum as required by the ventilation plan. The CLR justified the change from moderate to low negligence by indicating that the bolter was in compliance at the beginning of the shift. The amended motion added that the 2 inch difference from 12 Hg. to 10 Hg. was not easily detectable by the roof bolter. The first stipulation added little to the parties' justification and the second stipulation stated further that there was no evidence an agent was aware of the violation. The second stipulation also included a statement that the parties agreed that two factors were material in assessing negligence: the fact that the agent was not aware of the condition and that the difference between 10 Hg. and 12 Hg. was not easily detected. Given the information provided for this particular violation, I would not agree that the Secretary has met the definition of low negligence. The fact that the agent was not aware does not support a reduction to low negligence. A reading that was taken at the beginning of the shift may justify such a modification if more information was provided to explain the reading. There are clearly more facts the Secretary could have added to make the settlement of this citation and the corresponding reduction in penalty from $1,031.00 to $462.00 acceptable.

The order denying the amended motion for settlement set forth the court's reasons for finding that the proposed penalty reduction was not fair, reasonable, appropriate under the facts, or protective of the public interest. First, the information available did not support the proposed reductions to gravity and negligence. For each citation at issue, the parties presented insufficient information or information that had little to no bearing on the designation for which they sought

modification. Second, the exercise of setting forth facts on which the parties have agreed to disagree may partially fulfill the Commission's directive from *Am. Coal II*, but it is not the sole criteria for the approval of settlement. Third, the parties' initial joint stipulations, filed just prior to the issuance of the order denying settlement, added little to the proposed settlement. The document was nearly identical in content to the previously filed settlement motions, but with a different heading. It was therefore considered in denying the motion for settlement. Ultimately, it was determined that the information the parties set forth in support of settlement combined with the information available in the case file[1] did not support the proposed modifications.

Following the court's order denying settlement, the Secretary filed a 94-page submission just 36 hours prior to the scheduled hearing. The Secretary's motion sought reconsideration of the settlement denial, or revocation of the subpoena to the inspector, or certification of certain issues for interlocutory appeal. In the interests of judicial economy, I convened the previously scheduled hearing and allowed counsel for both parties to address the outstanding motions. For the reasons set forth below, I deny the Secretary's motion and each of his requests in the alternative.

In the motion filed just prior to hearing, the Secretary first argues that the court abused its discretion by denying the parties' initial proposed settlement, which was filed on March 25, 2019. To support his argument, the Secretary asserts that the court failed to cite to the proper settlement standard and failed to provide guidance on what constitutes an appropriate settlement. As the Commission has observed repeatedly, a judge's "front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (citations omitted). In the court's initial email to the parties, they were advised that the settlement was not adequate, and that the four ventilation violations, as well as over exposure to dust, were serious issues. The email gave the parties an informal opportunity to go back and look at the settlement to decide if they wanted to present additional information or renegotiate the terms. The email was sent with the standards for reviewing penalty reductions in settlement in mind and was meant to give notice to the parties that they should revisit their settlement. As a result of that email, the parties submitted an amended motion that was then addressed, along with the first joint stipulations in a formal order denying the settlement.

The Secretary argues next in his Motion for Reconsideration that with respect to the denial of the parties' amended settlement motion, the court made four errors amounting to an abuse of discretion. First, the Secretary contends that the court relied on Section 110(i) as the legal standard for reviewing the proposed settlement. This assertion has no merit. *See* Order Denying Settlement at 2 (applying the standard the Commission has articulated for evaluating penalty reductions in settlements, which directs judges to determine whether a proposed penalty

1. The Secretary, joined later by Respondent, expressed some concern as to the contents of the court's "file" in this case. Sec'y Mot. for Recons. at 3; Resp. Joinder. As clarified at hearing, the file referenced in the order denying settlement consists of the Secretary's petition, Respondent's answer, and any other documents that have been filed by or with the court since the penalty case commenced as well as information learned on a conference call and through emails. Tr. at 19-20.

reduction is fair, reasonable, appropriate under the facts, and protects the public interest; and referencing the requirement of the Mine Act to consider Sections 110(i) and (k) when evaluating proposed settlements). The Secretary then suggests that the Court's reliance on the standard set forth in *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) [hereinafter "*Am. Coal I*"], is troubling. The Secretary bases this assertion on his belief that the *Am. Coal. II* decision "fully articulates the Commission's legal standard for evaluating proposed penalty reductions." Sec'y Mot. for Recons. at 4. I disagree. The Commission's 2018 decision does not add additional elements to the standard articulated in 2016—the standard remains the same. *Compare Am. Coal II*, 40 FMSHRC at 984, 988, 991, 993, *with Am. Coal I*, 38 FMSHRC at 1976. Nor does the 2018 decision supersede the standard set forth in the 2016 decision. Rather, *Am. Coal II* clarifies that mutually acceptable facts are sufficient *to meet* the standard for evaluating proposed penalty reductions in settlement.

The Secretary then argues that the court was wrong to disregard the purported "enforcement value" of the parties' proposed settlement. In support of this claim, the Secretary states that "the Commission *validated* the Secretary's interest in the enforcement value of *any given settlement*" in *Am. Coal II*, 40 FMSHRC at 989. Sec'y Mot. for Recons. at 4 (emphasis added).[2] The Secretary's position mischaracterizes the Commission's statement. Far from validating the Secretary's interest in the enforcement value of *any* given settlement, the Commission has observed that "[t]he Secretary makes a valid point that *the fact that the proposed settlement preserves all of the citations as written* could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Am. Coal II*, 40 FMSHRC at 989 (emphasis added). In the settlement at issue here, the operator agreed to accept the citations in a modified form, and not as originally issued. The Secretary's motion fails to address the reason why accepting modified citations would be valuable in future enforcement actions.[3] As Congress has noted, the overall purpose of the penalty system is to encourage operator compliance with the Mine Act's requirements. *See* S. Rep. No. 95-181, at 41 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629 (1978). While "enforcement value" could be a factor outside of the section 110(i) factors that *might* be relevant when evaluating a proposed settlement, the Secretary's statements on enforcement value in this case, both in the motion for reconsideration and in his previous settlement motions, have not demonstrated the appropriateness of the settlement at issue here.

The Secretary's final two arguments allege that the court abused its discretion by inappropriately assigning probative value to the operator's general history of ventilation violations, and by using hyperbole to misrepresent the terms of settlement. As the Commission

2. The Secretary made a similar argument in another case before this court, *Northshore Mining Co.*, Docket No. LAKE 2018-0177.

3. As Commissioner Cohen noted in *Am. Coal II*, "[t]he Secretary's boilerplate recitations of having evaluated the value of compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing." 40 FMSHRC at 989 n.10.

has acknowledged, when reviewing information set forth in support of a reduced penalty in settlement, a judge should consider whether such information supports a finding that the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest. *Am. Coal I*, 38 FMSHRC at 1982. The exercise of highlighting certain facts that tend to support a judge's decision regarding the appropriateness of settlement does not necessarily mean that the judge has given probative value to those facts over others. Rather, it is a window into how the court is evaluating the information before it, and it alerts the Secretary and the mine operator as to which portions of the settlement may need further review or explanation by the parties. This, in turn, helps to achieve Congress' stated intent in the penalty settlement process to provide transparency to all interested parties. *See Am. Coal II*, 40 FMSHRC at 987-88.

The Commission's procedural rules require the parties to "provide factual support in the settlement proposal and for the Judge's decision approving settlement to be supported by the record." *Am. Coal I*, 38 FMSHRC at 1981; *see also* 29 C.F.R. §§ 2700.31(b), (c), and (g). In addition to looking to the modification to each citation, the settlement was reviewed and considered in its entirety. A full evaluation of the facts set forth in each citation reveals that all of the citations were issued within a relatively short period of time and in the same area of the mine. Each citation was issued for a violation of the ventilation plan and the mine foreman was in the area when the citations were issued. While the Secretary asserts that the negligence of three of the violations should be reduced from moderate to low largely because the foreman or an "agent of the operator" was not aware of the violations, the facts paint a different view. As explained below, the mine foreman is held to a higher standard and the negligence inquiry centers around whether he "knew or should have known." For all of these reasons, I deny the Secretary's request to reconsider my denials of settlement.

In the alternative to reconsidering the parties' proposed settlement, the Secretary argues next for revocation of the subpoena duces tecum the court issued to John William Dye, the MSHA inspector who issued the citations in this case. The Secretary claims that the subpoena is unreasonable and unnecessary, therefore constituting an abuse of discretion.[4] While Inspector

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4. In support of this argument, the Secretary once again references *Northshore Mining Co.*, LAKE 2018-0177, and the court's "unreasonable" statements at a hearing held on October 16, 2018 regarding several other Northshore cases. The Secretary includes only a part of that history. In his motion for reconsideration, the Secretary argues that just as in Northshore, the court here has engaged in a "judicial fishing expedition" by seeking more information, this time from the inspector, to support the parties' settlement proposal. Sec'y Mot. for Recons. at 9. The Secretary attempts to bolster this claim by alleging that the court previously made "inappropriate inquiries into the details of the parties' settlement discussions" in Northshore. *Id.* at 9 n.9.

From the time the parties submitted their initial motion to approve settlement in Northshore, LAKE 2018-0177, the court repeatedly requested additional information that would support the proposed modifications because the information made available was insufficient. As the Commission noted in *Am. Coal Co. II*, Commission judges who properly determine that "a settlement motion lacks sufficient information may permissibly request further facts from the parties." 40 FMSHRC at 988 (citing *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1863 (Aug. 2012)). The initial motion, filed on July 24, 2018, did not contain facts sufficient to justify the

Dye appeared at the April 24 hearing as directed, I did not ask him substantive questions, nor did I require him to turn over any documents. Although the Secretary's motions and stipulations make reference to the inspector's notes, they were not provided to the court here and thus not considered unless specifically set forth in a pleading. The Secretary's argument regarding what a Commission Judge may ask to review in furtherance of a settlement has not been addressed by the Commission, and I do not address it here.

Finally, in another alternative to his prior arguments, the Secretary requests the court certify for interlocutory review its two denials of settlement and issuance of the subpoena. Since the case has been heard, the matter is moot, but addressed briefly. The Secretary states that those decisions involve controlling questions of law and immediate review may materially advance the final disposition of these proceedings. Specifically, the Secretary argues that three controlling questions of law have been raised in this case:

1) Whether the judge's March 25, 2019 denial of settlement constitutes an abuse of discretion;
2) Whether the judge's April 17, 2019 denial of settlement constitutes an abuse of discretion; and
3) Whether the judge's April 17, 2019 subpoena to the MSHA inspector constitutes an abuse of discretion, or is otherwise unreasonable.

Sec'y Mot. for Recons., at 11.

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Secretary's total proposed penalty reduction of 80%. Following an email to the parties requesting additional facts, the Secretary submitted an amended motion, which also lacked sufficient information to demonstrate the appropriateness of the large penalty reductions. As a result, a conference call was held on August 13, and, in an email immediately following that call, the parties were directed yet again to provide more facts that would support the proposed penalty reductions. The Secretary then submitted a second amended settlement motion on August 23, 2018, which included no additional facts from the Secretary but did contain more information provided by the operator's counsel about the circumstances surrounding three of the violations.

Both the Secretary and operator's counsel were given the opportunity to discuss outstanding settlement issues related to Docket Nos. LAKE 2018-0177 and LAKE 2018-0147 at a hearing held on October 16, 2018. The Secretary attached the relevant excerpt of that hearing as Exhibit C to his motion for reconsideration here. The Secretary states in the motion filed in this case that the court's statement at the Northshore hearing that it had not yet heard from the Secretary following the operator's submission of additional information in LAKE 2018-0177 constituted an inappropriate inquiry into the details of settlement. Sec'y Mot. for Recons. at 9 n.9. With respect to the settlement reached in LAKE 2018-0147, it was the mine operator's counsel again who volunteered additional information, this time verbally at hearing, to help the court "fulfill the duty of articulating reasons for the [settlement] approval so that the process of compromising penalty amounts is transparent, as Congress intended." *Am. Coal II*, 40 FMSHRC at 988-89. In light of the additional information offered by the mine operator in both Northshore cases, I ultimately approved those settlement agreements.

Commission Rule 76 provides that a judge should certify a ruling for interlocutory review if it involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1). I find that interlocutory review of the court's March 25, 2019 and April 17, 2019 denials of settlement is not merited under the facts of this case. Neither of these questions involves controlling questions of law; these two questions are not novel nor do they involve an unresolved question of law relevant to the case. The Commission has repeatedly addressed settlement requirements as they relate to contested civil penalties. *See, e.g.*, *Am. Coal II*, 40 FMSHRC 983; *Am. Coal I*, 38 FMSHRC 1972; *Black Beauty*, 34 FMSHRC 1856. The Secretary may take issue with the Commission's decisions, but the case law is clear: when evaluating penalty reductions in settlement, a judge must determine whether the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest. *Am. Coal I*, 38 FMSHRC at 1976. Here, I considered the facts based on the standard the Commission has articulated for evaluating penalty reductions in settlement and determined the parties' proposed settlement was not fair, reasonable, appropriate under the facts, or protective of the public interest.

I find further that interlocutory review of the court's April 17, 2019 subpoena to the inspector is not merited based on the facts of this case. Although the Secretary's argument may have merit, the issue in this case involves a judge's authority to compel the inspector to appear *at hearing*, while the issue currently on review before the Commission deals with such authority during the settlement process and *before* a hearing on the merits. As the Secretary has recognized, the Commission and its judges have the authority to "compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects . . . at any stage of the proceedings before them." 30 U.S.C. § 823(e). However, given the Secretary's objection, the inspector was not questioned and no documents were produced. Accordingly, for the reasons set forth above, the Secretary's motion is denied in its entirety.

## III. MATTERS FOR HEARING

At the hearing on April 24, the Secretary and the mine operator refused to present witnesses or exhibits in support of their case. Instead, the parties presented the court with amended joint stipulations. The stipulations contained provisions almost identical to the terms that comprised the previously rejected settlement motions, but with a few additional facts related to jurisdiction. The amended stipulations also included information related to the mine's history of violations, since that history had been raised in the order denying settlement, as well as a statement that the parties agreed that the information contained in each of the citations was accurate, with some exceptions. Finally, the amended stipulations contained statements that the parties agreed to the level of negligence, the modifications, and the modified penalty amount. Following a discussion regarding the appropriateness of reducing the parties' settlement agreement to stipulations, the Secretary's representative read the additional information into the record and the amended joint stipulations were admitted as Exhibit J-2. Tr. at 29-32. However, the stipulations were not accepted in lieu of evidence. The stipulations are more accurately characterized as a modified settlement motion at best, and the parties offered no evidence outside of those stipulations. Without an acceptable settlement agreement, the parties to a case are

expected to renegotiate a settlement that is acceptable to the Commission, or present evidence at hearing.[5] The parties did neither.

While ostensibly offered for the purpose of streamlining the hearing, the stipulations at issue here were inappropriate because they served as an indirect means of effectuating the same settlement that the court denied twice prior to hearing. In Exhibit J-2, the parties simply took their reasons and conclusions supporting settlement from the previously denied motions and reduced those reasons and conclusions to "stipulations of fact." Thus, for the most part, they were not stipulations of fact but legal conclusions. Stipulations of fact should not contain restated conclusions or arguments; stipulations of fact should contain facts only. For example, stipulation 7(i) states that "the parties agree the appropriate negligence level is '[l]ow.'" The parties make similar statements with respect to each remaining citation at issue. However, the degree of negligence is not a fact; rather, the degree of negligence is a legal conclusion to be determined by the court based on the facts available for review. I find it troubling and frustrating that instead of seeking to renegotiate a settlement, the parties have instead attempted to back door a settlement by reducing previously rejected arguments and conclusions to "stipulations of fact."

Stipulations of fact may be appropriate in two instances: when there are no facts in dispute and the parties are seeking summary judgment, and when the parties want to aid in the process of hearing. Tr. at 27. When viewed in the context of summary decision, stipulations may be appropriate with proper supporting evidence, such as affidavits. Stipulations may also be appropriate at hearing as a means to narrow certain issues, as the Secretary argues. However, stipulations are no substitute for and do not take the place of witnesses and exhibits at hearing. The information set forth in Exhibit J-2 was considered in the analysis above as part of an amended motion to approve settlement. Otherwise, the joint stipulations are simply a subterfuge to have a settlement approved that was unacceptable in its original form. Nonetheless, I address each citation below based upon the factual information provided in Exhibit J-2. In doing so, I accept the agreed upon facts contained in the stipulations but, as I would in any decision, come to conclusions that are supported by those facts contained in the record. The conclusions I have reached based upon the stipulated facts are not the same as those reached by the parties.

### A. Citation No. 8055975

Citation No. 8055975 was issued by Inspector Dye on December 4, 2018 pursuant to Section 104(a) of the Act for a violation of 30 C.F.R. § 75.370(a)(1). The citation alleges that the operator did not follow its currently approved ventilation plan by failing to ensure that 3,000 cfm of air was provided behind the line curtain in the active section where the roof bolter was operating. The inspector determined that the cited condition was reasonably likely to cause a

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5. The Secretary routinely refuses to renegotiate settlements that have been denied, thereby rendering meaningless the requirement that a settlement be approved by the Judge.

permanently disabling injury to two people, was S&S,[6] and that it resulted from moderate negligence. The Secretary proposed a penalty of $1,031.00.

As part of the parties' proposed settlement, the Secretary has agreed to reduce negligence from moderate to low, thereby reducing the penalty to $462.00 based on the Part 100 point system. In their settlement motions and Exhibit J-2, the parties state that they agree to a reduction to low negligence because of mitigating circumstances. The parties explain that the section supervisor took an air reading behind the line curtain "just prior to the inspection," and that reading showed 3,200 cfm of air. However, when the inspector took an air reading, the anemometer showed 2,792 cfm, which is 93% of what is required by the plan. In addition, the parties agree that the inspector's notes confirm that the foreman stated he had taken an air reading that reflected over 3,000 cfm just prior to the roof bolters installing roof bolts. Based on the information presented, I cannot tell if the supervisor took one reading prior to the roof bolters entrance to the area or if the reading was taken again just prior to the inspector's arrival. I do accept the fact that the supervisor was present at the time of the violation and he did take an air reading at some point during the shift. In Exhibit J-2, the parties add that "[a]s the continuous miner advances through the section, it moves further away from the source of ventilation, potentially resulting in an air volume reading lower than what is required by the ventilation plan, but at a variation in volume not readily discernable to a miner. This fact was not considered by the inspector." It may be a fact that air does not reach equipment as it moves farther from the source, but there is no evidence that was the case in this instance. Furthermore, there is no evidence to show that the miner could not discern that the volume of air was less than originally measured. Instead, the parties use the term "potentially" to describe this alleged fact. The facts agreed to by the parties do not establish that negligence should more correctly have been marked as low.

In evaluating negligence, the Commission has explained that each mandatory standard carries with it an accompanying duty of care to avoid violations of that standard and "an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of

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6. A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that the overexposure to respirable dust resulting from a violation of the respirable dust standards, *i.e.*, 30 C.F.R. §§ 70.100 and 70.101, is presumed to be S&S. *U.S. Steel Mining Co.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consol. Coal Co.*, 8 FMSHRC 890, 899 (June 1986). This conclusion was based on "the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses to miners." *U.S. Steel Co.*, 8 FMSHRC at 1281. While there is no such presumption in this case because a respirable dust standard is not involved, the same principles apply.

the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The Secretary defines negligence as "conduct either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). According to the Secretary's regulations, moderate negligence occurs when the operator knew or should have known of the violative condition, but there are mitigating circumstances that exist. *Id.* Low negligence occurs when the operator knew or should have known of the violative condition, but there are considerable mitigating circumstances. *Id.* Under the Secretary's own guidelines, the modification to low negligence is not warranted.

While the Secretary's Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody Mining*, 37 FMSHRC at 1702-03; *see also Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101-02 (Dec. 2014). Rather, Commission judges consider "the totality of the circumstances holistically" and may find high negligence in spite of mitigating circumstances or moderate negligence without identifying mitigating circumstances. *Brody Mining*, 37 FMSHRC at 1702-03. The Commission has recognized that "the gravamen of high negligence is that it 'suggests an aggravated lack of care that is more than ordinary negligence.'" *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Here, the information the parties presented, both in their settlement proposals and stipulations, does not support a legal finding of low negligence. It is not clear when the air reading was taken by the supervisor or if further air readings were taken as the roof bolters or continuous miner started to advance. A section supervisor, whose actions may be attributable to an operator, should be diligent in checking the air supply throughout the cut. This is particularly true when he understands that as the continuous miner advances, it is farther from the ventilation source and less effective. The Commission has explained in *Ohio County Coal*, 40 FMSHRC 1096, 1099 (Aug. 2018), that an operator's actual or constructive knowledge is a key component of a negligence evaluation. As part of the settlement on review in that case, the Secretary had agreed to reduce negligence on one citation from moderate to low specifically because the foreman was not present. *Id.* at 1098. Based on that reasoning, the Secretary would not accept a modification to low negligence for the citation at issue here, where the foreman was present. The proposed reduction to low negligence essentially takes the responsibility off of the foreman and the mine to live up to the standard of care that is required under the Mine Act.

The order denying the amended settlement explained that the history of the mine operator may be important to an evaluation of negligence in this case. In response, the Secretary included a statement in Exhibit J-2 that the operator had only violated the ventilation plan once in the past two years *in a manner similar to that cited here*. However, the plan is considered as a whole, and the supervisors, as well as the miners, are trained on the requirements of the plan.

Ventilation is important to help prevent exposure to coal dust and silica every day, and by reducing the negligence on all four citations, along with a large reduction in penalty, the Secretary is removing the deterrent effect contemplated by the Act. If the supervisor or the miners do not understand how to best effectuate the ventilation plan, then retraining may be necessary. Additionally, a supervisor must set a good example by continuing to monitor the air as the equipment moves and dust is generated. If indeed it is a fact that the ventilation effectiveness changes as the continuous miner moves, then the supervisor and the continuous miner operator should be aware of that fact and adjust accordingly. For all of these reasons, I do not agree that the record as a whole suggests that the negligence should be reduced to low for this violation. I find further that the Secretary has not met his burden of proving the violation, as issued or as he proposes to modify, through the stipulations presented here.

**B. Citation No. 8055976**

Inspector Dye issued this citation for another violation of 30 C.F.R. § 75.370(a)(1) only 12 minutes after Citation No. 8055975 was terminated. Citation No. 8055976 alleges that the operator did not follow the ventilation plan in the crosscut of an active section. Specifically, the operator failed to remove the tail curtain in the entry intake, which allowed dust generated by the continuous miner to be carried over the mining crew and exposed the miners to respirable coal dust and silica. According to the citation, page 3-9 of the ventilation plan requires the tail curtain to be dropped in the intake entry when cutting into the intake air. The inspector marked the citation as highly likely to cause a permanently disabling injury to five people, S&S, and resulting from high negligence. The citation was terminated 10 minutes after it was issued, and the Secretary subsequently proposed a civil penalty in the amount of $12,321.00.

The parties proposed to reduce negligence from high to moderate and to reduce the likelihood of injury from highly likely to reasonably likely. These modifications resulted in a drastic reduction in penalty to $1,666.00 based on Part 100. In support of the proposed reduction to likelihood of injury, the parties asserted that results of Continuous Personal Dust Monitoring ("CPDM") samples taken on shuttle car operators at the time the violation was issued were below the 1.5 mg standard. They also argued that a reduction in likelihood of injury was warranted because of the short duration of exposure to the condition. In support of reducing negligence from high to moderate, the parties stated that while the section foreman was at the continuous miner during the cut, he was unaware that the curtain had not been adjusted prior to the cut as required by the plan.

The Commission evaluates negligence from the starting point of a traditional negligence analysis and examines whether the operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining*, 37 FMSHRC at 1702). The Commission has explained that the standard of care is that of a reasonably prudent person familiar with the mining industry. *Brody Mining*, 37 FMSHRC at 1702. The Mine Act places primary responsibility on operators to maintain safe and healthful working conditions in mines, and they are thus expected to set an example for miners working under their direction. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). "Such responsibility not only affirms management's commitment to safety but also, because of the

authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot*, 9 FMSHRC at 688.

A reduction in negligence is simply not supported by the facts surrounding the violation and the information the parties have submitted in support of settlement. Section managers and foremen have a great responsibility to maintain safe and healthful working conditions at each mine. They must be proactive in their duties and take steps to ensure that they are in compliance with the very plans that are in place to protect the health and safety of miners. The argument that the foreman was unaware that the line curtain had not been advanced is wholly unpersuasive and does not comport with the reasonably prudent miner standard of care. As stated above, a foreman or manager must be familiar with the ventilation plan. The suggestion that the foreman was unaware of the cited condition indicates that the foreman was extremely careless or not properly trained. In any event, the foreman failed to live up to the standard of care required under the Mine Act and a downward adjustment to negligence is not appropriate in this circumstance. Just as with the other violations at issue here, certain factors such as supervisor familiarity with the plan, ventilation violations issued in a very short period of time with at least one supervisor in the working area, and the serious nature of exposure to coal dust support the findings initially made by the inspector. These factors therefore make it difficult to agree that the proposed modification to this citation and the accompanying severe reduction in penalty is fair, reasonable, or in the public interest.

Similarly, the information the parties have presented does not support a modification to the likelihood of injury. As the citation states, the failure to properly position the tail curtain caused dust from the continuous miner to be carried over the mining crew and exposed miners to respirable dust and silica. The fact that CPDM samples from shuttle car operators were below the standard has little impact on the evaluation of the likelihood of injury or illness for this citation. As I noted in the order denying settlement, shuttle car operators do not receive the same or similar respirable dust exposure as the continuous miner operators. Shuttle car operators drive in and out of the area being cut, whereas the continuous miner operators remain with the equipment in the area being mined. In addition, a short duration of exposure to respirable dust would not alone reduce the likelihood of injury or illness. While a single exposure to respirable dust or silica may not cause serious respiratory disease, there is little dispute that repeated exposure of short durations ultimately contributes to the development of such disease. *See Consol. Coal Co.*, 8 FMSHRC at 898-99. Pneumoconiosis, or black lung, is extremely serious and it is not always known how much exposure ultimately results in the disease. Accordingly, a reduction in likelihood of injury or illness would not be appropriate here and I cannot approve such adjustment. Even if I accept all of the facts presented in the parties' stipulations, I cannot reach the conclusions set forth by the parties. I find that the Secretary has not met his burden of proof with regard to this violation, as originally issued or in its proposed modified form.

**C. Citation No. 8055977**

Citation No. 8055977 was issued 35 minutes after Citation No. 8055976 was terminated, and alleges a third violation of 30 C.F.R. § 75.370(a)(1). The inspector observed that the operator was not maintaining the minimum number of operating water sprays on the continuous miner while it was operating on the active section. When the inspector checked the sprays, only

19 of 30 were operating. According to page 4-2 of the ventilation plan, a minimum of 27 of 30 sprays are required to be operating while the continuous miner is in use. The inspector marked the citation as highly likely to cause a permanently disabling injury to five people, S&S, and resulting from moderate negligence. The citation was terminated 55 minutes after it was issued. The Secretary proposed a civil penalty in the amount of $3,710.00 for this alleged violation.

As part of their settlement proposal, the parties agreed to reduce the likelihood of injury from highly likely to reasonably likely, and to reduce negligence from moderate to low. The modifications resulted in a reduced penalty of $749.00 per Part 100. The parties again pointed to the CPDM samples taken from the shuttle car operators and the short duration of exposure to the condition to support the modification to likelihood of injury. With respect to negligence, the parties stated that a reduction was justified because the location of the plugged sprays made it difficult for the operator of the continuous miner to recognize that the sprays were plugged. In Exhibit J-2, the parties assert that "the rolling of dust is a reliable visual sign that water sprays may be ineffectively controlling dust, and dust was not observed 'rolling' over the miner operator or shuttle car operators." According to the parties, this information was not known or considered by the inspector. The parties also agreed that the inspector's notes reflected that he was told that the respirable dust parameters were in compliance at the beginning of the shift and the sprays were checked after the third cut was completed. Finally, the Secretary submits that he has "no reliable evidence of the length of time the condition existed or that the concentration of respirable dust exceeded the standard."

The parties describe the same arguments regarding likelihood of injury as they did to support the reduction in gravity to Citation No. 8055976. Those arguments are equally unavailing with respect to this citation and I incorporate my reasoning set forth above in rejecting the modification here. Citation No. 8055977 indicates that it took almost an hour for the water sprays to be repaired and cleaned. The condition of the sprays suggests extensive build-up and clogging which would have taken a considerable amount of time to develop. In addition, the information the parties provided that dust was not observed "rolling" over the continuous miner operator or shuttle car operators is not enough to reduce the likelihood of injury. If dust were "rolling" over the continuous miner, it would indicate a serious problem that could be attributed to a number of issues. The absence of the rolling dust is not proof of anything.

The information that the parties submitted purporting to support a modification from moderate to low negligence is also unpersuasive. As described in the citation, the mine's ventilation plan requires that 27 of the continuous miner's 30 water sprays operate while the equipment is in use; the inspector found that only 19 of 30 were operational. This undoubtedly results in increased dust in the air as the continuous miner cuts into the active section. While I understand that the location of the non-operational water sprays may have made it more difficult to see exactly which sprays were plugged, it is hard to accept that a reasonably prudent miner would not recognize that only 63% of the sprays were operating as expected. As stated above, the assertion in the stipulation that there was no visible dust "rolling" over the miners or that there is no reliable evidence as to the length of time the condition existed are *not* facts that necessarily support a finding of low negligence. There is, in fact, evidence to suggest the plugged sprays were extensive, and there is information in the file to support the fact that

supervisors were present. Finally, there is no requirement that the Secretary found, through dust samples, that the miners were exposed to dust when looking at violations of the ventilation plan and when assessing negligence of a ventilation plan violation.

As the citation describes, the foreman was in the area of the MMU-005 during the course of the inspection. The Commission has long recognized that mine management is held to a heightened standard of care. *Newtown*, 38 FMSHRC at 2047. When a violation is committed by a non-supervisory employee, the conduct of the rank-and-file miner is typically not imputable to the operator for negligence purposes. *Ky. Fuel Corp.*, 40 FMSHRC 28, 31 (Feb. 2018). In such circumstances, Commission judges must analyze "whether the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.*; *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016). Relevant considerations include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue." *A.H. Smith Stone Co.*, 5 FMSHRC at 15-16. The amount of non-operational water sprays leads me to conclude that there was general lack of initiative from miners and management to make sure that the continuous miner's water sprays were being properly cleaned throughout each shift. Given the overall circumstances related to the four ventilation violations, including the seriousness of exposure to coal dust and the reasonable expectation as to the supervisor's knowledge of a ventilation plan, the proposed modifications to this citation are not supported by the information available for review. In addition, there are insufficient facts in the file to support a conclusion that the Secretary has met his burden to prove the violation as issued.

**D. Citation No. 8055978**

Finally, Citation No. 8055978 was issued for a fourth violation of 30 C.F.R. § 75.370(a)(1) just 55 minutes after Citation No. 8055977 was terminated. The citation alleges that the roof bolter operating on the active section was not in compliance with ventilation plan requirements. When the inspector checked the vacuum on the return side of the roof bolter, only 10 in. Hg of pressure was provided. According to the citation, page 2-1 of the ventilation plan requires a minimum of 12 in. Hg to be maintained while the roof bolter is operating on the active section. Inspector Dye determined that the condition was reasonably likely to cause a permanently disabling injury to two people, was S&S, and resulted from moderate negligence. The citation was terminated 20 minutes after it was issued. The Secretary proposed a civil penalty of $1,031.00 for the alleged violation.

In their settlement proposals, the parties agreed to reduce negligence from moderate to low. To support this change, the parties explained that the vacuum's parameters were compliant at the beginning of the shift, which was reflected in the inspector's contemporaneous notes. The Secretary does not indicate who provided the inspector with that information or how much time had elapsed. The parties also asserted that the difference between 10 and 12 in. Hg is not easily detected by the roof bolter operator, but did not submit facts to support that supposition in general or as it relates to this violation. In Exhibit J-2, the parties added that there was no evidence to suggest an agent of the operator was aware of the pressure issue. They could not determine the length of time the condition existed, and there was no evidence that the concentration of respirable dust exceeded the standard.

While the parties have submitted information that relates to the evaluation of negligence, the information on its own does not justify a modification from moderate to low. The parties' statement that no evidence exists to suggest an agent of the operator was aware of the pressure discrepancy does not validate a reduction from moderate negligence to low. The standard of care here revolves around whether a reasonably prudent miner knew or should have known of the violative condition. Simply stating that an agent of the operator did not know of the condition, when it has been admitted that the foreman was at the location when the inspector arrived, is not enough. Also, there is no indication why a 2 in. Hg difference in pressure is not easily detected by the roof bolt operator. Without that information, it is difficult to fully assess whether the miner or operator should have known about the pressure differential. Just as with the citations addressed previously, the entire settlement for the four ventilation violations was considered in reaching the conclusion that the settlement is not supported by the record, and is not fair or in the public interest. I therefore cannot accept the parties' request to modify the negligence for this citation. In addition, the Secretary has not met his burden to demonstrate the violation as alleged in the citation, or the violation as modified.

## IV. CONCLUSION

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989). Once a ventilation plan has been approved and adopted, its provisions are enforceable at the mine as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006). The Commission has recognized that a ventilation plan is violated when an operator does not follow its specific terms. *See Peabody Coal Co.*, 16 FMSHRC 2199, 2201-02 (Nov. 1994).

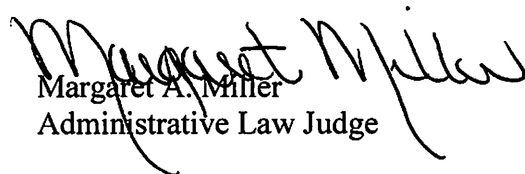
The parties submitted two motions and then joint stipulations in an effort to provide evidence sufficient to approve the proposed settlement. When those attempts failed, the parties submitted Exhibit J-2, the amended joint stipulation, as evidence for the violations at hearing. The Commission decisions regarding settlement explain that it is the Commission Judge who must review and approve a settlement. Further, the Judge is not required to blindly accept assertions and conclusions that are not supported in law. If the Secretary cannot provide an acceptable settlement and refuses to renegotiate the terms, the only other avenue is a hearing on the merits. Here the hearing held on April 24 addressed the proposed settlement, the motions filed by the Secretary, and the facts submitted in support of the Secretary's position. Given that an appropriate settlement was not submitted, the parties were expected to participate in the hearing and provide evidence to support their positions.

At the hearing, the parties called no witnesses and entered no evidence into the record except for Exhibit J-2, the Amended Joint Stipulation. The Secretary rested on the information

contained in the settlement motions and Exhibit J-2. Accordingly, the record in this case demonstrates that the Secretary did not meet his burden to establish the violations alleged in the citations and therefore the citations are vacated and the case dismissed.

## V. ORDER

Based on the above findings, there is no acceptable settlement agreement and the Secretary has not met his burden of proof at hearing on the merits. Accordingly, the case is hereby **DISMISSED**.



Margaret A. Miller
Administrative Law Judge

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Edward V. Hartman, Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Michael T. Cimino, Jackson Kelly, PLLC, 500 Lee Street East, Suite 1600, Charleston, WV 25301

Alan S. VanCuren, Hopedale Mining LLC, P.O. Box 415, Hopedale, OH 43976