FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933/ Fax 202-434-9949

August 17, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. COVOL FUELS NO.3 LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. KENT 2022-0040 A.C. No. 15-19702-549694 Mine: Straight Creek Mine

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement of the citation involved in this matter. The parties move to modify the citation, as stated below. The penalty would be reduced by **78%**, from the original assessed amount of **$3,546.00** to **$796.00**. As the Motion does not meet the Commission's requirements for approval of settlements, per its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), the Motion is **DENIED**.

Citation Number	Proposed Penalty	Settlement Amount	Modification
9233080	$3,546.00	$796.00	Reduction in the likelihood of occurrence from "Occurred" to "Reasonably Likely"
Totals	**$3,546.00**	**$796.00**	**Seventy-Eight (78%) Percent Penalty Reduction**

Citation No. 9233080 was issued on December 16, 2021 for a violation of 30 C.F.R. §75.202(a). Titled "Protection from falls of roof, face and ribs," the standard specifies that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. §75.202(a).

The citation read:

> The mine operator is not fully controlling the mine roof to protect person from falls of the roof. When checked the mine roof has collapsed between the crosscuts 20 and 21 along the# 6 entry of the primary escapeway. This roof fall is approximately 20 feet in width and 35 feet in length and 9 feet in thickness. This citation is being issued in conjunction with 103k order# 9233079.
>
> Standard 75.202(a) was cited 4 times in two years at mine 1519702 (4 to the operator, 0 to a contractor).
>
> Pet. for a Civil Penalty at 16.

For the gravity of the violation, the likelihood of injury or illness was marked by the inspector in his evaluation to have "occurred," with the injury or illness reasonably expected to be "fatal," affecting one person. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be moderate. *Id*. A 103(k) Order, No. 9233079**,** was not included in the record, nor was the abatement document for the violation. The latter action to terminate was due four days after the issuance of the citation, on December 20, 2021. *Id*. Both these documents are essential for the Court to make an informed review of the Motion, per section 110(k) of the Act.

The Secretary moves to modify the citation, changing the likelihood from "occurred" to "reasonably likely," supplying the following in support:

> Basis of compromise: A reduction in the likelihood of an injury or illness to occur.
>
> There are factual disputes regarding the likelihood of an injury producing event.
>
> The Respondent asserts it was unlikely for an accident to occur that would result in any illness or injuries. The Respondent argues that no injury or illness occurred as a result of the cited condition. The Respondent further argues that the unplanned roof fall was in an area where miners do not normally work or travel, that no one was working at the time the unplanned fall occurred and that page 2-3, of PH20-I-3, MSHA Citation and Order Writing Handbook, clearly states that occurred can only be checked when an injury or illness has actually occurred. Therefore, the Respondent concludes it was unlikely for an accident to occur that would result in any illness or injury given the aforementioned facts. For the purpose of settlement,

the Petitioner proposes, and the Respondent accepts a reduction in the likelihood of occurrence from "Occurred" to "Reasonably Likely". The parties have discussed the citation and propose a revised penalty of $796.00, which is consistent with the penalty table found in Part 100, 30CFR.

Mot. to Approve Settlement at 3.

Analysis

This case presents a most unusual assertion. To begin, one must first comprehend the enormity of the roof fall – a roof collapse in the primary escapeway which was approximately 20 feet in width, 35 feet in length, and 9 feet in thickness. These figures evince the enormously large roof fall. A fraction of that fall of roof would've killed anyone who happened to be at that location when it occurred.

The Motion seeks to reduce the inspector's gravity evaluation down from "Occurred," bypassing "Highly Likely," and arriving at "Reasonably Likely," as the designation. The Respondent presents two arguments in support of reducing the penalty by 78% from $3,546.00 to what the Court views as a non-incentivizing penalty amount at $796.00. One argument is that it was unlikely for an accident to occur that would result in any illness or injuries. This contention rests upon the fact that that the fall occurred in an area where miners do not normally work or travel, and that no one was working at the time the unplanned fall. The second argument is that MSHA can't designate a violation as "Occurred" unless an injury or illness "actually occurred." The Motion claims there are "factual disputes regarding the likelihood of an injury producing event," even though Respondent's arguments are not factual disputes but rather disagreement as to the legal interpretation of the facts. Neither argument supports the "Reasonably Likely" gravity designation.

The first contention – that the fall was in an area where miners do not normally work or travel, and that no one was working at the time the unplanned fall, runs afoul of well-established case law that a violation must be considered in the context of continued normal mining operations. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). "[T]he gravity determination requires a predictive inquiry into whether the violation is reasonably likely to result in a reasonably serious injury, *see Secretary of Labor v. Mathies Coal Co*., 6 FMSHRC 1, 3–4 (Jan. 1984), a prediction which may assume 'continued normal mining operations,' *U.S. Steel Mining Co*., 6 FMSHRC at 1574." *Rex Coal Co*., *v. Sec'y of Lab., Mine Safety & Health Admin.,* 630 F. App'x, 359, 363 (6th Cir. 2015). "An S&S determination must be made at the time the citation is issued 'without any assumptions as to abatement' and in the context of 'continued normal mining operations.' *Paramont Coal Co*., 37 FMSRHC 981, 985 (May 2015)." *Mach Mining,* 40 FMSHRC 1, 6 (Jan. 2018).

As to the second argument, that the Secretary may not designate a violation as "occurred," under these circumstances, the Respondent looks to MSHA's Citation and Order Writing Handbook. U.S. Dep't of Lab., Mine Safety and Health Admin., *Citation and Order Writing Handbook*, *PH20-I-3* (Dec. 2020). (Handbook). It is true that the Handbook states that "occurred" can only be checked when an injury or illness has actually occurred. Handbook PH20-I-3 at page 2-3. Since no injury or illness actually occurred as a result of the cited condition, Respondent asserts that gravity box designation may not be checked. Instead, the Secretary and Respondent agree to reclassify the gravity as "reasonably likely" to occur.

However, this rationale doesn't square with the requirement of the cited standard, 30 C.F.R. §75.202(a), which specifies that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." Clearly, and with a staggeringly large failure, the roof in this instance was not supported or otherwise controlled, and in that safety-enforcing sense, the gravity *occurred*. The gravity of the violation should not turn on whether the mine operator had the sheer luck of no miner being at that location at that moment of inundation. If that were the test, the agreement of the parties to designate the gravity as 'reasonably likely' would not make sense either – no one was injured when the collapse occurred, so following the line of reasoning regarding 'occurred,' it was not 'reasonably likely' either and by that thinking 'no likelihood' should have been the designation.

The Respondent's unusual line of reasoning has been rejected. *See, e.g*., *Clintwood Elkhorn Mining Co.*, 38 FMSHRC 458, 466 (Mar. 2016) (ALJ), upholding the inspector's determination an injury reasonably expected to be "fatal" and "occurred" when a miner received abrasions and bruising in a runaway truck accident. The inspector "designated the injury as reasonably expected to result in a fatality because this type of accident -- a runaway truck -- could have resulted, and had resulted, in fatalities in the past." *Id*.

"As a general proposition, rules of statutory construction can be employed in the interpretation of administrative regulations. *See C. D. Sands, 1A Sutherland Statutory Construction*, § 31.06, p. 362 (1972). According to 2 Am. Jur. 2d, Administrative Law, § 307 (1962), 'rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.'" *Golden R Coal Co.,* 2 FMSHRC 446, 448-49 (Feb. 1980) (ALJ)
"It is also an established canon of statutory construction that a legislature's words should never be given a meaning that produces a stunningly counterintuitive result—at least if those words, read without undue straining, will bear another, less jarring meaning."
United States v. O'Neil, 11 F.3d 292, 297 (1st Cir. 1993). The principle is that statutes should not be read to produce illogical results which are at odds with the statute's underlying purposes. *Consolidation Coal Co*., 14 FMSHRC 956, 963 (June 1992). In the Court's view, the construction urged by the Respondent produces such illogical results.

Further, the MSHA Handbook on Citation and Order Writing represents internal agency guidance and policy directives that are not binding on the Secretary in his enforcement actions. *See, e.g., Mingo Logan Coal Co*., 19 FMSHRC 246, 250 (1997), *aff'd Mingo Logan Coal Co. v. Sec'y of Labor*, 133 F.3d 916, *3 (4th Cir. 1988). The standard takes precedence over the Handbook, so in determining likelihood, the relevant event is not the injury itself but the potentially injurious event that the standard exists to prevent, here, a massive roof collapse.

In addition, the Handbook is in tension with the wording of 30 C.F.R. §100.3(e), which specifies that "Gravity is determined by the likelihood of the *occurrence of the event against which a standard is directed*." (emphasis added). The event against which 30 C.F.R. §75.202(a) is directed – "falls of the roof, face or ribs and coal or rock bursts," – *did occur*, even though no miner was injured by the fall. The standard takes precedence over the Handbook, so in determining likelihood, the relevant event is not the injury itself but the potentially injurious event that the standard exists to prevent, a roof collapse which in this instance would clearly be fatal.

That the mine operator should be able to have a 78% reduction in the penalty assessed resting entirely that no one died is repugnant to the overarching principles of the Mine Act and the Secretary's duty to take care of the safety and health of our Nation's miners. Permitting Respondent to avoid the higher penalty amount for the roof fall because no miners were actually injured also frustrates the deterrent aims of the civil penalty system. One of Congress' central goals for the Mine Act's civil penalty scheme was to ensure "effective and meaningful compliance" by imposing penalties "of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."[1] In the Court's view, the $796.00 hand slap does not accomplish Congress' goal.

Beyond the remarks above, the Motion does not meet the Commission's test for review of settlements because, even under its nonintuitive definition of 'facts,' the motion is deficient. This is because, at bottom, the Respondent is making a legal, not a factual, argument, about the proper evaluation of the gravity of the violation. The first two elements of the Commission's test for review of settlements are always present, because without them no motion could be presented. Those are: the amount of the penalty proposed by the Secretary, and the amount of the penalty agreed to in settlement. Because no agreed-upon 'facts' have been offered, but rather only the legal argument that one cannot designate the injury as 'occurred' unless there has been an injury, the Motion is deficient.

There are other issues with the settlement motion. The citation was issued in conjunction with a 103k order, Number 9233079. In carrying out its responsibilities under Section 110(k) the Court should be able to view this relevant document. In addition, the official record does not include the termination document associated with the citation. Both documents constitute part of

[1] S. Rep. 95-181, 41 (1977).

the official record for this matter, and even under the Court's limited purview, it should be able to view these essential parts of the record. They are to be part of the public record, not hidden from view.

Respondent's claims about miners' absence in the area – no miners were working in the area at the time of the roof fall, and miners do not typically work or travel in the area where the roof fall occurred – amount to an ersatz "redundant safety measures" argument, rejected by federal courts.[2] Miners avoiding the area do not absolve Respondent of its obligation to follow all safety standards.

[2] Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it does not meet that decision's standard of review. Accordingly, the motion to approve settlement is **DENIED.**

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Gary W. Oliver, Conference & Litigation Representative, U.S. Department of Labor, MSHA 3837 S. US Hwy 25E, Barbourville, KY 40906 oliver.gary@dol.gov

Eric S. Lewis, Covol Fuels No. 3 LLC, Box 853, Pineville, KY 40977
eric@covolfuel.com