FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th St., Suite 443

Denver, CO 80202-2500

Office: (303) 844-5266/Fax: (303) 844-5268

October 18, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0189 A.C. No. 48-00152-548001
v.	:	
GENESIS ALKALI, LLC, Respondent.	:	Mine: Genesis Alkali @ Westvaco

ORDER DENYING SETTLEMENT

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have notified the Court that they have reached a settlement agreement in this case. Based on the drastic penalty reduction and unjustified modifications proposed, I deny the settlement motion. The terms of the proposed settlement are as follows:

Citation/ Order No.	**Originally Proposed Assessment**	**Settlement Amount**	**Modification**
Docket No. WEST 2022-0189			
9479991	$ 12,007.00	$ 729.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9655723	$ 791.00	$ 0.00	Vacate.
9655731	$ 1,006.00	$ 125.00	Modify gravity from "Reasonably Likely" to "Unlikely," modify negligence from "Moderate" to "Low," and modify Significant and Substantial from "Yes" to "No."
9655754	$ 3,917.00	$ 3,917.00	No change.
9655756	$ 3,917.00	$ 530.00	Modify gravity from "Reasonably Likely" and "Permanently Disabling" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."

9655867	$ 1,385.00	$ 1,385.00	No changes.
9655868	$ 4,980.00	$ 1,500.00	Modify negligence from "High" to "Moderate."
9655907	$ 4,980.00	$ 1,006.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
9655908	$ 1,500.00	$ 302.00	Modify gravity from "Reasonably Likely" to "Unlikely" and modify Significant and Substantial from "Yes" to "No."
TOTAL	**$ 34,483.00**	**$ 9,494.00**	

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). This provision of the Act was designed to shed light and scrutiny upon the dealmaking that takes place between mine operators and government regulators, and to ensure that settlements further the public interest and the purposes of the Mine Act. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64.

Commission judges review settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). To enable judges to make this determination, Commission rules require that a motion to approve a penalty settlement must include "facts in support of the penalty agreed to by the parties." 30 C.F.R. § 2700.31(b). A judge reviews the submitted facts, the six penalty criteria set forth in section 110(i) of the Act, and all other relevant considerations when scrutinizing a settlement. *See Am. Coal Co.*, 38 FMSHRC at 1976, 1982.

I. The Assessed Penalty, Proposed Settlement, and Amendments

The Respondent operates a large trona mine near Green River, Wyoming. This docket includes nine citations issued to the Respondent between September and November of 2021 for various alleged violations of MSHA regulations. The Respondent subsequently contested these citations. On May 17, 2022, the Secretary of Labor filed his petition proposing a penalty of $34,483.00 for the citations contained in this docket. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On September 16, 2022, the Secretary filed his original Motion to Approve Settlement for this docket. In the filing, the Secretary proposed a settlement that would reduce the penalty to $9,494.00, representing a **savings for the mine operator of nearly $25,000.00** and a **penalty reduction of 72.5 percent**. The proposal seeks to modify or vacate seven of the nine citations, and to remove S&S designations from five of the citations. The facts submitted in support of the proposed modifications were minimal.

Accordingly, the Court notified the parties that their settlement could not be approved as submitted and gave the parties additional time to renegotiate the settlement or provide more supporting information. The Secretary filed an Amended Motion to Approve Settlement on September 30, 2022. The amended motion contains little, if any, additional information supporting the settlement.

II. The Proposed Settlement is not Fair, Reasonable, Appropriate Under the Facts, or Protective of the Public Interest

The Court now turns to the terms of the agreement. The terms are analyzed based on the facts submitted in the settlement motion as amended by the parties. Consideration is given to the monetary and nonmonetary terms of the settlement, and to the criteria established in section 110(i) of the Mine Act, such as negligence and gravity. On balance, I find that the modified penalty proposed by the Secretary is unfair, unreasonable, inappropriate under the facts, and unprotective of the public interest. I find also that the settlement motion does not adequately address the six penalty criteria. I therefore deny the Secretary's motion.

A. The Proposed Modifications to Citation No. 9479991

Citation No. 9479991 alleges a violation of 30 C.F.R. § 57.14100(b) as follows:

> In Sesqui Pumphouse, a fan (Co.# KF-24) for ventilation in the tunnels under the pumphouse, has not been running since 10/08/2021. During the inspection of the tunnels 0.5 to 0.9 H_2S gas was detected. There are no alarms/warning lights and the miners that work in the area do not carry meters with them while in the tunnels. During a "Work Place Exam" conducted on 10/08/2021, the fan was found "Not Running" and documented and was not resolved. With this condition, exposes miners to fatal injuries if H_2S gas was to build up in the tunnels. Standard 57.14100(b) was cited 27 times in two years at mine 4800152 (25 to the operator, 2 to a contractor).

Pet. at 8. The cited standard mandates that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 57.14100(b). The inspector issued this citation on November 3, 2021, indicating that the fan had been noted as nonfunctional nearly a month before this inspection. Pet. at 8. Hydrogen sulfide (H_2S) gas was observed in the tunnels. Pet. at 8. The inspector found that the alleged failure to fix the fan was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. Pet. at 8. The inspector marked the citation as high negligence and S&S. Pet. at 8. The Secretary assessed a penalty of $12,007.00.

Now, the Secretary seeks to drastically alter this citation. He proposes the reduction of the gravity from "Fatal" to "Lost Workdays or Restricted Duty." He seeks to reduce the likelihood of injury from "Reasonably Likely" to "Unlikely." He also proposes the removal of the S&S designation. Altogether, these changes would reduce the penalty from $12,007.00 to $729.00.

While the proposed changes are major, the facts offered in support are minimal. The Secretary has only submitted two statements to justify the changes proposed for this citation. The motion states that "[t]he amount of Hydrogen Sulfide detected by MSHA did not exceed MSHA's Threshold Limit Value or the General Industry Ceiling Limit for Hydrogen Sulfide," and that "there is no evidence that exposure to a level which could result in a fatality [sic] could result." Am. Mot. to App. Settlement at 3.

The position taken by the Secretary in this case is disconcerting. The Secretary bases the gravity reductions on the fact that hydrogen sulfide levels did not exceed the threshold limit value (TLV) at the time of inspection. But the TLV is the point above which miners are exposed to unsafe concentrations of gas. If hydrogen sulfide accumulations had exceeded the TLV, miners would have faced an active risk of major health issues and the operator would have unlawfully exposed miners to noxious gases. *See* 30 C.F.R. § 56.5001. In essence, the Secretary argues that gravity and S&S should be mitigated because conditions did not become so dangerous as to violate yet another regulation.

This rationale cannot support the proposed gravity modifications. And it is not aided by the second and final fact offered by the Secretary: that there is "no evidence" that the conditions could lead to fatal exposure. Am. Mot. to App. Settlement at 3. This statement is overbroad, conclusory, and at odds with the inspector's account. The inspector found that the ventilation fans in an underground tunnel had been defective for several weeks. He observed the presence of hydrogen sulfide gas, a substance that MSHA acknowledges as "one of the most poisonous gases known."[1] Hydrogen sulfide exposure can be deadly.[2] The inspector further determined that the extremely hazardous gas could continue to accumulate in the tunnel and present a risk of fatal injury or illness for miners. Moreover, miners may not know about the risk due to the lack of alarms, warning lights, or gas meters in the area. The inspector supplied a factual basis supporting his gravity findings. In my estimation, the Secretary has not presented any concrete fact that would mitigate the original gravity determination.

Nor do the Secretary's facts mitigate the S&S finding. Ventilation violations are serious in underground areas where toxic mine gases can accumulate. A persistent and consciously overlooked defect in a ventilation fan is reasonably likely to cause a hazard that could injure a miner. The presence of hydrogen sulfide gas indicates that an injury could be reasonably serious. This is especially true if considered in the continued course of normal mining operations, as is required by S&S case law. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)

---

[1] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, MINE RESCUE TEAM TRAINING | METAL AND NONMETAL MINES (2008) https://www.msha.gov/sites/default/files/Training_Education/MSHA3027%28Metal%20and%20Nonmetal%29.pdf

[2] One of the largest modern mass fatalities in a metal/nonmetal mine occurred when hydrogen sulfide gas was liberated at the Barnett Complex Mine, operated by the Ozark-Mahoning Company, and killed seven miners on April 12, 1971. A contributing factor to the mass fatality was the failure of an underground ventilation fan at the mine. *See* BUREAU OF MINES, U.S. DEP'T OF THE INTERIOR, REPORT ON MAJOR HYDROGEN SULFIDE DISASTER BARNETT COMPLEX MINE OZARK-MAHONING COMPANY ROSICLARE, POPE COUNTY, IL (1971).

("While it is true that methane measured in the section revealed a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made in terms of continued normal mining operations. The fact that the methane was low when the violation was cited is not fatal per se to the establishment of reasonable likelihood. If normal mining operations were to continue, a rapid buildup of methane could reasonably be expected.") (internal citations and quotations omitted).

It is important to note that I am not making formal findings regarding S&S. Neither party has presented evidence at hearing, and it would be inappropriate to make such findings. Rather, I am analyzing the basis for S&S as presented in the original citation and determining whether the Secretary has submitted facts that would make the removal of the S&S designation "reasonable" or "appropriate under the facts." *Am. Coal Co.*, 38 FMSHRC at 1976; *see id*. at 1982. I find that he has not.

The Secretary further supports the S&S removal by claiming "discretion to modify the significant and substantial designation." Am. Mot. to App. Settlement at 5. He finds substantive authority for this contention in *American Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996). But the Secretary's reliance on these cases is misplaced. The Commission in *Mechanicsville* held that an ALJ may not add an S&S designation on her own initiative, and the Commissioners reiterated this holding in *American Aggregates*. By contrast, the present case involves the Secretary's proposal to remove an S&S designation. The case citations are irrelevant here. The Secretary's claim of discretion regarding S&S is erroneous, and his decision to alter the S&S finding here is unsupported by fact and contradicted by decades of history and precedent.

In sum, the mine inspector presented a detailed account of the alleged violation and made his gravity and S&S findings accordingly. The Secretary now seeks to sweep these original findings under the rug based on two conclusory and irrelevant statements. When given an opportunity to submit additional information, the Secretary declined to put forward any specific or concrete facts to support the proposed changes. I know that recent Commission case law would have me accept the Secretary's changes wholesale, but the Mine Act requires me to use some experience and judgement in determining whether a settlement motion is sufficient. I simply cannot turn my back on something that is so obviously contrary to the Act and its purposes. I therefore find that the proposed changes for Citation No. 9479991 are unreasonable and inappropriate under the facts.

B. The Proposed Penalty Reduction

The other major defect in the present motion is the penalty reduction. The Secretary proposes a drastic penalty reduction from the assessed penalty of $34,483.00 to the compromised value of $9,494.00. Based on the reasoning below, I find that the proposed penalty reduction is unfair and contrary to the public interest.

Before passage of the Mine Act, mine operators were governed by the Coal Act and its regulations. Operators and regulators negotiated settlements that never saw public scrutiny, and

negotiations often led to large penalty reductions for operators. Senator Richard Schweiker (R-Pennsylvania) described the dysfunction:

> [Mine operators] get slapped [with] a fine of $100 or $200 or $300. They accumulate a whole lot of them and go back in court and ultimately settle them at 10 or 20 cents on the dollar… So what you actually assess them at and what they settle for are worlds apart and is part of the frustration of dealing with the act.

123 Cong. Rec. S10,277, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1072-73 (1978) ("*Legis. Hist.*"). This system failed to deter hazardous workplace conduct, and devastating mine accidents continued to occur. Members of Congress knew that paltry settlement amounts would not be sufficient incentive for mine operators to adopt safe and compliant practices. As Senator Wendell Ford (D-Kentucky) said:

> The settlement of penalty assessments in the past, often for as little as 30 cents on the dollar, has been a disgrace, as well as a serious obstacle to effective use of the civil penalty mechanism to encourage compliance.

123 Cong. Rec. S10,209, *reprinted in Legis. Hist.*, at 922. There was bipartisan consensus that compromised settlements had become an impediment to ensuring miner safety.

Congress decided to reshape the settlement regime with the Mine Act. Congress identified the compromise of assessed penalties in settlement as a problem with prior legislation, and it crafted section 110(k) of the Mine Act as a solution. By subjecting settlements to judicial review, Congress intended to avoid "the unwarranted lowering of penalties as a result of off-the-record negotiations" and to ensure that "the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.*, at 633.

It is therefore my duty to review compromised penalties. Motions proposing large penalty reductions—where the operator would pay only "10 or 20" or "30 cents on the dollar"—demand particular attention because they are the very settlements that Congress saw as an obstacle to regulatory compliance. 123 Cong. Rec. S10,277, S10,209, *reprinted in Legis. Hist.*, at 1072-73, 922. The parties must present concrete facts, review the six penalty criteria, and demonstrate how the proposed settlement will be fair and protective of the public interest.

Here, the public interest is not adequately protected. Encouraging compliance with safety regulations was a key public interest motivating Congress to pass the Mine Act, and it has been a key public interest considered by the Commission when scrutinizing settlements. *Black Beauty*, 34 FMSHRC at 1866. I fail to see how this settlement could promote compliance. The facts presented here simply cannot support such a finding. Rather, the proposed settlement would undermine compliance with the Act and its regulations, by taking a meaningful civil penalty assessment and gutting it on a threadbare factual basis.

I object, in particular, to the penalty reduction associated with Citation No. 9479991. The Secretary has lowered the original assessment of $12,007.00 to a mere $729.00. The mine

operator will therefore pay just six cents on the dollar for this alleged violation. As discussed above, the allegations are serious and the facts supporting the modification are sparse. The compromised penalty negates the deterrent effect of the original citation—a deterrent effect that is sorely needed in this case, where the mine operator allegedly allowed the violative condition to exist for weeks despite having knowledge of the defect.

Parties are not precluded from reaching settlements with large penalty reductions. Such settlements are approved routinely by the Commission and its judges. However, large penalty reductions are more likely to undercut the deterrent purposes of the Mine Act, and parties must present a substantial factual basis showing how the settlement preserves the public interest. The parties have not done so here. Accordingly, I find that this settlement is neither fair nor in the public interest.

C. Non-monetary aspects of the settlement

I have also considered the non-monetary aspects of this settlement motion. Just as in all other settlement motions, the Secretary includes the rote recitation that he "has evaluated the enforcement value of the compromise and is maximizing his prosecutorial impact in settling this case on appropriate terms." Am. Mot. to App. Settlement at 2. He says that resolution of this case through settlement is of "significant enforcement value to the Secretary" in part because the citations, as modified, are "preserved for future enforcement actions and are not subject to potential vacatur or further downward adjustment after a hearing." Am. Mot. to App. Settlement at 2-3.

I accord significant weight to the value of avoiding litigation and its attendant uncertainty. However, the Secretary's boilerplate statements do little more to help me understand how this particular settlement meets the *AmCoal* standard. Stripping citations of their S&S designations also impacts future enforcement actions, but this is not explained at all in the Secretary's motion.

Furthermore, "[t]he Commission recognized that significant non-monetary value flows from accepting the citations as written." *Solar Sources Mining*, 41 FMSHRC 594, 601 (Sept. 2019) (internal citations omitted). Here, the Secretary has elected to modify or vacate sixteen of the present citations and thus forfeit much of the non-monetary value that would flow from preserving them as written.

Altogether, although there are some non-monetary benefits to this settlement, none of the Secretary's generalized statements convince me that the particular changes proposed here are "fair, reasonable, appropriate under the facts, and protect the public interest." *Am. Coal Co.*, 38 FMSHRC 1972

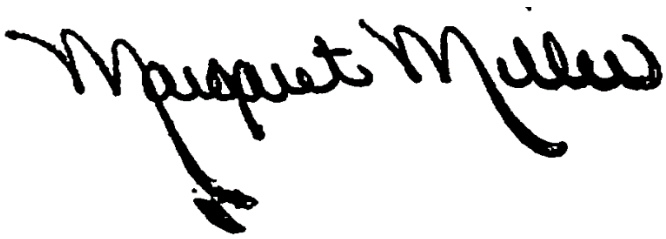
III. CONCLUSION

In the petition, the Secretary alleged that the mine operator knew of a defective ventilation fan in an underground portion of the mine but refused to fix the fan for at least 26 days. Hydrogen sulfide, a toxic gas, was documented in this underground area. There were no alarms, warning lights, or gas sensors in the area that could have alerted miners if the toxic gas accumulated to hazardous or deadly levels.

These facts would strike any neutral observer as serious. The original penalty for this citation also indicated the seriousness of the alleged violation. But in his amended motion, the Secretary has done an about-face. He downplays the gravity of the citation. He says there is no evidence of a fatal risk, despite the evidence summarized by his inspector in the original petition. He says the gas had not yet accumulated to dangerous levels, but fails to demonstrate why it would be unlikely to do so in the future. He dispenses with the S&S designation, and he slashes the assessed penalty by 94 percent.

I will not rubber-stamp such a drastic change. The Secretary is tasked with submitting facts to justify his proposed changes, and I am charged with the duty to weigh the sufficiency of those facts. The facts here are insufficient. Approving this settlement would force me to turn a blind eye to my statutory duty under section 110(k), to decades of case law regarding gravity and S&S, and to my own knowledge and experience. Accordingly, I must deny the Secretary's motion.

WHEREFORE, the Amended Motion to Approve Settlement is hereby **DENIED**.



Margaret A. Miller
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

Bruce H. Jakubauskas, CLR, U.S. Department of Labor, Mine Safety and Health Administration, Thornhill Industrial Park, 178 Thorn Hill Road, Suite 100, Warrendale, PA 15086, jakubauskas.bruce@dol.gov

Donna Pryor, Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202, Donna.Pryor@huschblackwell.com