FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 18, 2022

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2022-0267
Petitioner,	:	A.C. No. 48-00152-550854
	:	
v.	:	Docket No. WEST 2022-0268
	:	A.C. No. 48-00152-550854
GENESIS ALKALI, LLC,	:	
Respondent.	:	Mine: Genesis Alkali @ Westvaco

ORDER DENYING SETTLEMENT

These cases are 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 petition originally contained 38 citations and orders, until the Commission's docket office reallocated the citations into three dockets: WEST 2022-0197[1], WEST 2022-0267, and WEST 2022-0268. The latter two dockets are currently pending before this Court. In the interest of judicial economy, these matters will be considered jointly since they both involve citations issued to the same operator during the same time frame.

The parties have settled both dockets, and the Secretary of Labor has submitted a Motion to Approve Settlement in each case. The proposed settlements include dramatic penalty reductions and must be denied for the reasons set forth below.

The terms of the proposed settlement are as follows:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEST 2022-0267			
9655800	$ 1,869.00	$ 169.00	Modify gravity from "Fatal" to "Lost Workdays or Restricted Duty" and modify negligence from "High" to "Moderate."
9655900	$ 2,790.00	$ 2,790.00	No change.

[1] A settlement for Docket No. WEST 2022-0197 was approved by this Court on August 16, 2022. The original assessment was $41,855.00, and the settlement amount was $9,338.00.

9655940	$ 183.00	$ 183.00	No change.
9655941	$ 144.00	$ 144.00	No change.
9655943	$ 183.00	$ 183.00	No change.
9655944	$ 144.00	$ 144.00	No change.
9655946	$ 4,884.00	$ 4,884.00	No change.
9656004	$ 3,022.00	$ 0.00	Vacate.
9656006	$ 2,376.00	$ 0.00	Vacate.
9656007	$ 7,890.00	$ 0.00	Vacate.
9656008	$ 10,034.00	$ 0.00	Vacate.
9656010	$ 10,034.00	$ 1,254.00	Modify Part/Section from 30 C.F.R. § 57.11001 to 57.20003(a), modify gravity from "Reasonably Likely" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate" and modify Significant and Substantial from "Yes" to "No."
9656011	$ 987.00	$ 987.00	No change.
TOTAL	**$ 44,540.00**	**$ 10,738.00**	
Docket No. WEST 2022-0268			
9656012	$ 16,213.00	$ 1,472.00	Modify gravity from "Fatal" to "Lost Workdays or Restricted Duty" and modify negligence from "High" to "Moderate."
9656013	$ 4,507.00	$ 1,358.00	Modify negligence from "High" to "Moderate."
9656014	$ 481.00	$ 145.00	Modify negligence from "High" to "Moderate."

9656015	$ 4,507.00	$ 841.00	Modify Part/Section from 30 C.F.R. § 57.11001 to 57.20003(a), modify gravity from "Permanently Disabling" to "Lost Workdays or Restricted Duty," and modify negligence from "High" to "Moderate."
9656016	$ 4,161.00	$ 0.00	Vacate.
9656017	$ 4,161.00	$ 0.00	Vacate.
9656018	$ 7,890.00	$ 145.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate," and modify Significant and Substantial from "Yes" to "No."
9656019	$ 16,213.00	$ 296.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," modify negligence from "High" to "Moderate," and modify Significant and Substantial from "Yes" to "No."
9656020	$ 10,034.00	$ 0.00	Vacate.
9656024	$ 3,022.00	$ 0.00	Vacate.
9656025	$ 4,884.00	$ 296.00	Modify gravity from "Reasonably Likely" and "Fatal" to "Unlikely" and "Lost Workdays or Restricted Duty," and modify Significant and Substantial from "Yes" to "No."
9656026	$ 296.00	$ 133.00	Modify gravity from "Unlikely" to "No Likelihood."
TOTAL	**$ 76,369.00**	**$ 4,686.00**	

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 protect 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. In January 2022, MSHA issued a number of citations and orders to the Respondent for alleged violations of mandatory safety standards. The Respondent contested 38 of those citations. Some of the contested citations form the basis of the two dockets at issue here. On May 17, 2022, the Secretary of Labor filed his petition proposing a total penalty of $120,909.00 for the 25 citations contained within these two dockets. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On August 19, 2022, the Secretary submitted proposed settlement agreements corresponding to these two dockets. In the filings, the Secretary proposed a settlement that would reduce the penalty to $15,424.00, representing **a savings for the mine operator of $105,485.00** and **a penalty reduction of 87 percent.** The proposal sought to modify or vacate sixteen citations, but the filings only provided modest factual justification for **one** proposed modification. 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 information in support.

The Secretary filed an amended settlement motion for Docket No. WEST 2022-0267 on September 13, 2022. An amended motion for Docket No. WEST 2022-0268 followed two days later. The Secretary's amended filings provide some additional context for a few of the modifications proposed. Notably, the Secretary has declined to present any facts in support of his decision to vacate citations as part of this 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 motions 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.

Although I find most of the proposed modifications unacceptable, in the interest of time and length, I only discuss a few here as examples of the Secretary's unsupported reasoning and faulty explanation. I also note that, in these cases, some proposed modifications were made by an MSHA supervisor after the penalties were contested, and others made by an MSHA conference and litigation representative. This Court has jurisdiction to review any changes proposed by the Secretary after the Respondent contests the original penalties. *See* 30 U.S.C. § 820(k); *Black Beauty*, 34 FMSHRC at 1860-61.

A. The Proposed Vacatur of Citations Nos. 9656006, 9656007, and 9656008

Citation No. 9656006 alleges a violation of 30 C.F.R. § 57.14206(b) as follows:

> The Caterpillar retractable boom fork lift is not being maintained in a safe manner. The Caterpillar machine was left unattended and running while the operator of the equipment was conducting work activities alongside the #17 Mono conveyor belt line, overhead on the catwalk. The forks of the machine had been elevated with materials loaded on the forks and the forks protruding over top of the handrailing and not secured from motion rather vertically or forward, further into the belt line area. This condition will result in fatal crushing injuries.

Pet. at 55. The inspector determined that it was reasonably likely that the violation would result in a miner's injury, and that the injury could reasonably be expected to be fatal. He marked the citation as S&S and as moderate negligence. The Secretary assessed a civil penalty of $2,376.00 for this citation.

Citation No. 9656007 alleges a violation of 30 C.F.R. § 57.14211(c) as follows:

> A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component. The Caterpillar retractable boom fork lift and forks are not secured from accidental motion where a miner was working in the immediate area of the machine. This condition will result in serious and fatal injuries to workers who are exposed to unsecured machine parts.

Pet. at 56. Here again, the inspector determined that injury was reasonably likely, and that the injury could reasonably be expected to be fatal. He found that the operator was highly negligent for this citation and designated it as S&S. The Secretary assessed a $7,890.00 penalty associated with this citation.

Citation No. 9656008 alleges a violation of 30 C.F.R. § 57.11001 as follows:

> The mine operator has failed to ensure and maintain the safe access alongside the Mono #17 conveyor belt. A miner was conducting work activities around an unsecured machine component while having to exit the conveyor walkway by passing the unsecured machine component. This condition will result in fatal

> injuries as a result of hazardous access locations. Standard 57.11001 was cited 27 times in two years at mine 4800152 (23 to the operator, 4 to a contractor).

Pet. at 58. The inspector found that it was reasonably likely that this condition would cause an injury that could reasonably be expected to be fatal. He found the mine operator highly negligent for allowing this condition to persist, and he marked the conduct as S&S. For this citation, the Secretary assessed a penalty of $10,034.00.

The Secretary now seeks to vacate all three citations. For Citations Nos. 9656007 and 9656008, the Secretary explains that each citation is being vacated because "[t]he violation was cited and corrected with Citation No. 9656006."[2] Pet. at 57. According to the Secretary, the factual basis underlying all three citations is so similar that the dangerous conditions can be addressed and corrected by a single citation: Citation No. 9656006. However, in the next breath, the Secretary vacates Citation No. 9656006 without explanation.

Consequently, these three citations—originally marked as S&S and assessed for a total of $20,300.00—would disappear under the proposed settlement agreement, resulting in a huge reduction in the overall penalty. The parties have not offered any facts to justify these changes. Presumably facts are omitted because the Secretary believes that he has unfettered discretion to vacate a citation, as discussed more fully below. While I agree that he has discretion, it is not unlimited, and may be reviewed if it appears that he has abused that discretion. The parties fail to demonstrate how it would be fair, reasonable, or appropriate to vacate three citations when the inspector witnessed a forklift left running, unattended, and unsecured with a suspended load. Moreover, the parties make no effort to show how vacatur of these citations protects the public interest. Based on the record before me, I can only conclude that this settlement offends the public interest by eviscerating the deterrent effect of the original penalties. *See Black Beauty*, 34 FMSHRC at 1866 (recognizing deterrence as an important public interest to consider when reviewing settlements).

The Secretary argues that he has prosecutorial discretion to vacate citations, citing *RBK Construction, Inc.,* 15 FMSHRC 2099 (Oct. 1993). Given that he has submitted no facts in support of the proposed vacatur, the Secretary likely believes that his discretion is plenary. He is mistaken for three reasons.

First, even if *RBK Construction* were applicable, it would not preclude review of the Secretary's proposed vacatur. In that case, the Commission held only that the Secretary "has the authority to vacate citations," not that his authority is unreviewable. *Id*. at 2101. Any passing mention in other cases to the Secretary's "unreviewable" discretion to vacate citations is mere dictum and does not bind this Court.

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[2] This is the language used in association with Citation No. 9656007. The language employed in association with Citation No. 9656008 is slightly different but used to the same effect. The only other language offered in support for vacating Citation No. 9656008 is that the citation was "duplicative" of Citation No. 9656006. Am. Mot. to Approve Settlement (WEST 2022-0267) 4.

Second, *RBK Construction* is easily distinguishable from this case. The holding in *RBK Construction* is limited to the narrow circumstance where the Secretary vacates all of a docket's citations and moves for final dismissal of the proceedings. The Secretary in that case conceded that section 110(k) allows judges to scrutinize "the settlements of penalties." *Id*. at 2101. This case involves the settlement of penalties, and the analogy to *RBK Construction* therefore falters.

Finally, there is reason to doubt the wisdom of the decision in *RBK Construction*. The decision rests upon a false equivalence drawn between the Mine Act and the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq ("OSH Act"). The Supreme Court found in *Cuyahoga Valley Railway Company v. United Transportation Union* that the Secretary of Labor has "unreviewable discretion to withdraw a citation charging an employer with violating the [OSH Act]." 474 U.S. 3, 7-8 (1985). The Commission took notice of this Supreme Court case. In *RBK Construction*, the Commission held, "[b]ased on that decision," that the Secretary should similarly have discretion to vacate citations issued under the Mine Act. 15 FMSHRC at 2101 (citing *Cuyahoga Valley*, 474 U.S. at 7-8). The Commission failed to note, however, that the Mine Act and the OSH Act differ in one key aspect. The Mine Act requires that judges review settlements and compromised penalties proposed by the Secretary. *See* 30 U.S.C. § 820(k). The OSH Act contains no such requirement. Rather, judges presiding over OSH Act cases merely sign off on settlements without questioning their contents. The Commission's decision in *RBK Construction* fails to account for this nuanced yet crucial difference between the two laws that would make it reasonable to review vacaturs as part of settlement under the Mine Act when it is not reasonable to do so under the OSH Act.

My statutory duty to review settlement terms cannot be neglected. The Commission has never suggested that a judge's duty to scrutinize a settlement is diminished if the settlement happens to include vacated citations. On the contrary: the Commission has affirmed that the Secretary must submit facts to support any proposed settlement. *Black Beauty*, 34 FMSHRC at 1863 n.5; *Am. Coal Co.*, 38 FMSHRC at 1984-85. This requirement persists even if the settlement involves vacated citations. *Greenbrier Minerals, LLC*, 43 FMSHRC 509 (Nov. 2021) (ALJ).

Certainly, the Secretary should be afforded some latitude in enforcement decisions. He has access to more information about the underlying facts in this case, and he has unique expertise that helps him set agency priorities and predict the likelihood of success at trial. Agency resources are scarce, and the Secretary deserves deference in determining how to allocate those resources.

To whatever extent the Secretary has discretion in such matters, he has abused it here. He premised the vacatur of two citations on the existence of a third, and then he vacated the third citation without explanation. This procedure is arbitrary, self-contradictory, and contrary to law. Even when specifically asked to provide more information justifying the vacatur, the Secretary refused to submit *any* facts that support the proposed modifications. This Court is charged with the "duty to consider the sufficiency of facts submitted in support of a settlement," and the complete lack of factual basis for these proposed modifications cannot be ignored. *Solar Sources Mining*, 41 FMSHRC 594, 601 (Sept. 2019).

A settlement agreement cannot be appropriate under the facts if no facts are put forth. A modification cannot be found reasonable if the parties offer no reason for the change. And the Secretary's effort to avoid scrutiny is a breach of the public policy underlying section 110(k) of the Mine Act: to shine light upon settlements formerly shrouded in darkness. I therefore cannot approve of these proposed changes.

B. The Proposed Modifications to Citation No. 9656018

Citation No. 9656018 alleges a violation of 30 C.F.R. § 57.9300(b) as follows:

> The mine operator has failed to provide berms or guardrails where roll over hazardous conditions exist. The ground area between R5 and the Bi-Carb building shows evidence of vehicular and equipment travel with an area that is not protected and provides a roll over hazardous condition. This condition will expose miners to serious injuries resulting in fatalities. Standard 57.9300(b) was cited 2 times in two years at mine 4800152 (1 to the operator, 1 to a contractor).

Pet. at 83. The regulation requires the creation and maintenance of roadway berms of "at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 57.9300(b). The inspector found that the alleged failure to install berms was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. He marked the citation as high negligence and as S&S, and the Secretary assessed a penalty of $7,890.00.

The Secretary now moves to whittle this citation down to nearly nothing. He seeks to modify the likelihood of injury from "Reasonably Likely" to "Unlikely," to reduce the gravity from "Fatal" to "Lost Workdays or Restricted Duty," and to cut the negligence from "High" to "Moderate." The Secretary also proposes the removal of the S&S designation. Altogether, the proposed changes would reduce the assessed penalty from $7,890.00 to $145.00.

The Secretary offers four statements in support of the proposed changes. The Secretary notes that "most of the vehicle travel is in pick-ups or light duty vehicles."[3] Pet. at 85. He adds that a "vehicle traveling off the road in this area would most likely cause a vehicle to become stuck in the mud" rather than roll over. Pet. at 85. Further, the Secretary asserts that the "operator requires the use of seat belts in all vehicles." Pet. at 85. Finally, the Secretary avers that the missing berm "was not an obvious condition" and that "workplace examinations should have caught this." Pet. at 85.

The proposed modifications are deficient for three reasons. First, the Secretary submits no facts that support reducing the negligence level. A berm is required on this road by law, and the absence of a berm is a clear indication of noncompliance for the operator. The inspector indicates that there is travel on the road, and therefore a missing berm would be obvious to anyone at the mine. It seems, based on the facts in the record, that the operator should have known about

[3] In his motion, the Secretary frames it slightly differently: "Traffic in the affected area was limited to light duty vehicles." Am. Mot. to Approve Settlement (WEST 2022-0268) at 5.

the violative condition. The inspector found that the operator was highly negligent for this reason. The Secretary has not presented any reason to reduce that negligence finding. His assertion that the lack of a berm "was not an obvious condition" is a legal conclusion unsupported by facts in the record, and his claim that "workplace examinations should have caught this" does nothing to mitigate the negligence finding. If anything, it supports the inspector's view of negligence because the person responsible to conduct workplace examination was either not doing his job or simply decided not to mention the issue. There is not a single, concrete fact in the record that would support a reduction in negligence. The proposed modification is therefore not reasonable or appropriate under the facts.

Second, the penalty reduction is drastic and unwarranted. The alleged violation—as described in the citation and the facts submitted in support of settlement—is serious, and a serious violation cannot be deterred by a trivial penalty of $145.00. Even if the negligence and S&S modifications were proper, the penalty reduction would not be. This Court is not bound by the Secretary's Part 100 regulations for penalty determination, and the Part 100 penalty does not address the seriousness of this violation. Accordingly, it cannot be approved. For further discussion of the penalty, see *infra*, Section II.D.

Third, the Secretary proposes the removal of the S&S designation. However, the violation alleged here is serious. The failure to install berms can lead to potentially fatal vehicle rollover. Unfortunately, miners continue to die in such fatal accidents year after year.[4] Nevertheless, the Secretary elects to strip this citation of its S&S status. This is not an isolated event: there has been an alarming uptick in the number of settlement proposals seeking removal of S&S designations from serious violations. This troubling trend chips away at the meaningful standards that protect miner safety, contravening the cornerstone public interest embedded in the Mine Act. *See* 30 U.S.C. § 801(a). In proposal after proposal, the Secretary completely ignores the meaning of S&S as set forth in *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016), as well as its forebears and its progeny. Instead, the Secretary misstates the law and therefore attempts to settle a citation in violation of the binding precedent.

Here, the facts offered in support of the S&S removal are unconvincing. Even if taken as true, the facts submitted little to mitigate the severity of harm. The road still lacks a berm, and miners traveling down the road in trucks face the risk of driving off the edge and causing a rollover. Although the negligence and penalty reductions alone would form sufficient basis for denial of this proposed modification, I also find that removal of the S&S designation is improper.

C. The Proposed Modifications to Citation No. 9656019

Citation No. 9656019 alleges a violation of 30 C.F.R. § 57.20003(a) as follows:

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[4] *See, e.g.*, MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (SAND AND GRAVEL) FATAL MACHINERY ACCIDENT – MARCH 5, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/march-5-2021-fatality/final-report; MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (CRUSHED AND BROKEN LIMESTONE) FATAL POWERED HAULAGE ACCIDENT – SEPT. 16, 2013, https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Metal/2013/ftl13m11.pdf.

> The passageway leading from the top stairwell landing at the north side of the Sesqui cooling tower is not being kept in a clean and orderly fashion. The top landing has various materials piled up behind the opening direction of the door, restricting travel leading up and down into a steep stairwell location. This condition will expose miners to slips, trips, and falls resulting in fatal occurrences from elevated heights. Standard 57.20003(a) was cited 72 times in two years at mine 4800152 (68 to the operator, 4 to a contractor).

Pet. at 86. The cited housekeeping regulation requires passageways to be kept clean and orderly. 30 C.F.R. § 57.20003(a). The inspector found that the alleged violation was reasonably likely to cause injury, and that the injury could reasonably be expected to be fatal. He marked the citation as high negligence and as S&S, and the Secretary assessed a penalty of $16,213.00.

Here too, the Secretary proposes major changes. He seeks to reduce the likelihood of injury from "Reasonably Likely" to "Unlikely," to cut the gravity from "Fatal" to "Lost Workdays or Restricted Duty," and to modify the negligence from "High" to "Moderate." Finally, he seeks to remove the S&S designation. The proposed changes would reduce the penalty assessed from $16,213.00 to $245.00. In other words, the operator would pay **one cent on the dollar** for this citation after settlement.

The Secretary has submitted some information in order to justify this change. He submits that the "materials that were a housekeeping issue were not in the direct route of travel" so that "[t]ripping and falling down the stairway would be unlikely." Pet. at 88. He adds that "if a fall were to happen, the stairway was provided with hand rails to prevent serious injury." Pet. at 88. Finally, the Secretary avers that "the materials addressed in the housekeeping were placed to the side, [but] a workplace examination should have addressed this condition. The mine operator should be on notice, the standard has been cited 70+ times at this mining operation." Pet. at 88.

I am aware that some current case law from the Commission would like Judges to accept, wholesale, everything the Secretary states in a settlement motion. However, Congress has required Judges to use some experience and judgement in determining if a settlement motion is sufficient. I simply cannot turn my back on something that is obviously contrary to the Act and its purpose.

Based on my judgment and experience, I take issue with three modifications proposed in the settlement motion: the negligence, the penalty, and the S&S designation. First, the Secretary fails to present facts justifying a reduction in the negligence finding. In truth, the submitted facts may even aggravate the negligence finding, since the Secretary agrees that the mine operator should be on notice after more than **seventy** citations for similar housekeeping issues in the previous two years alone. The fact that "workplace examination should have addressed this condition" does little, if anything, to mitigate the negligence since the operator is also responsible for training its miners to conduct proper workplace examinations—and that clearly has not happened given the frequency of citations related to fall hazards at this mine.

Second, the penalty reduction is dramatic and unsupported by facts. Allowing the operator to pay one cent on the dollar for this violation undermines the important public interest of encouraging operator compliance with mine safety regulations. That is especially true here, where the operator has a history of noncompliance with this regulation. For further discussion of the penalty, see *infra*, Section II.D.

Third, the Secretary again removes the S&S designation with only limited factual basis. The submitted facts do little to negate the notion that permitting "various materials" to be "piled up behind the opening direction of the door, restricting travel leading up and down into a steep stairwell location" would be S&S. Pet. at 86. Importantly, one of the key facts presented by the Secretary is that the stairs had handrails that could prevent falls, but the S&S analysis precludes consideration of redundant safety measures. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013). The sole relevant fact remaining—that the material was not in the direct route of travel—does not address the fact that material was piled up behind the door in the opening direction. There is therefore very little information indicating why the alleged violation would not be S&S.

As support for the S&S changes, the Secretary insists that he has "discretion to modify the significant and substantial designation" based on two Commission cases: *American Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020), and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996). Am. Mot. to Approve Settlement (WEST 2022-0268) at 6. 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 merely 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 remove the S&S designation here ignores decades of history and precedent. While I would deny the proposal based on negligence and penalty alone, I also note the deficiency of the proposed S&S changes.

D. The Proposed Penalty Reduction

The parties propose a dramatic penalty reduction. If the settlement were approved, the total penalty for the two dockets would be slashed from $120,909.00 to just $15,424.00. 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.

The Commission and its judges "assess all civil penalties provided in [the Mine] Act." 30 U.S.C. § 820(i). It is therefore *my* duty, not the Secretary's, to assess the penalty in this case. Even if there are some legitimate facts in the motion, that does not automatically suggest that I must reduce the penalty amount to the degree suggested by the Secretary. While Part 100 is useful in assessing penalties and sometimes is useful in reducing penalties in settlement, that is not always the case. Even with modifications, violations may be serious and may require a higher penalty to deter the mine operator from further violations, and to protect the interest of the public—not to mention the miners who constantly risk their health and safety only to see the

agency protecting them sending a message that safety is not important. Instead of relying on the Secretary's part 100 regulations, I look closely at the six penalty criteria.

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. *See supra*, sections II.A-C. Accordingly, I find that this settlement is neither fair nor in the public interest.

E. 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 (WEST 2022-0267) at 3. 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 (WEST 2022-0267) at 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 is fair, reasonable, appropriate under the facts, or protective of the public interest. Many of the present citations are vacated and therefore are not preserved for future enforcement actions. Many others have been stripped of their S&S designations, which would also affect future enforcement. The Secretary offers no explanation of how these changes would provide non-monetary benefits for him or for the public.

Furthermore, "[t]he Commission recognized that significant non-monetary value flows from accepting the citations as written." *Solar Sources*, 41 FMSHRC at 601 (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.

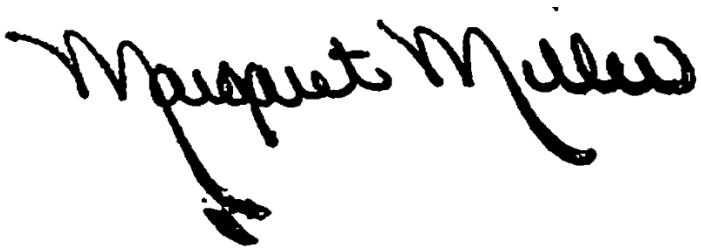
In sum, there are some non-monetary benefits to this settlement, but the Secretary's generalized statements do not convince me that the particular changes proposed here meet the *AmCoal* standard.

III. CONCLUSION

These citations allege serious safety issues: raised loads left unsecured and unattended, roads unprotected by berms, and passageways with significant obstacles. Many of these citations are repeat violations, and the mine operator has been cited dozens of times for similar issues in the past. And yet the Secretary proposes a settlement that would allow the operator to pay a compromised penalty of just thirteen cents on the dollar, would reduce the negligence findings, and would scrub away the S&S designations from many of the citations. The support offered for the proposed modifications is paltry and often has nothing to do with the relevant penalty criteria.

The Secretary's proposal would transform the civil penalty into a trivial fee accepted by the operator at the cost of doing business. This contradicts the purpose behind the Mine Act—to meaningfully deter dangerous conduct. The proposed settlement will not keep miners safe and, if the words in section 110(k) of the Mine Act are to bear any meaning at all, it must be denied.

WHEREFORE, the Amended Motions to Approve Settlement are hereby **DENIED**.



Margaret A. Miller
Administrative Law Judge

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