FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 2, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2022-0249 A.C. No. 42-02078-554812
v.	:	
RULON HARPER CONSTRUCTION, INC, Respondent.	: :	 Mine: Pit 12

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, 30 U.S.C. § 801 et seq. The parties have notified the Court that they have reached a settlement agreement in this case. Based on the proposed modifications and significant penalty reduction, 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 2022-0249			
9727214	$ 10,868.00	$ 662.00	- Modify Type of Action from 104(d)(1) citation to 104(a) citation; - Modify gravity from "Reasonably Likely" to "Unlikely"; - Modify negligence from "High" to "Moderate"; and - Modify Significant and Substantial from "Yes" to "No."
9727216	$ 12,076.00	$ 3,274.00	- Modify Type of Action from 104(d)(1) order to 104(a) citation; and - Modify negligence from "High" to "Moderate."
TOTAL	**$ 22,944.00**	**$ 3,936.00**	

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 (Aug. 2012).

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 owns and operates a sand-and-gravel operation at Pit 12 near Salt Lake City, Utah. This docket includes two citations issued to the Respondent on March 29, 2022. The Respondent contested the citations, and the Secretary filed a petition proposing a penalty of $22,944.00 on July 20, 2022. *See* Pet. for Assess. of Civil Pen. (hereinafter "Pet.").

On September 23, 2022, the Secretary filed his original Motion to Approve Settlement for this docket. In that filing, the Secretary proposed a compromised penalty of $3,936.00, representing a **savings for the mine operator of $19,008.00** and a **penalty reduction of 82.8 percent**. The motion also proposed numerous substantive modifications to the text of the citations. But the facts offered in support of the proposed modifications were lacking.

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 October 3, 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 not fair, reasonable, appropriate under the facts, or protective 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. 9727214

Citation No. 9727214 alleges a violation of 30 C.F.R. § 56.14207 as follows:

> The Dodge Ram 1500 truck was parked on a roughly 5% grade without being provided with wheel chocks or any other required means to prevent uncontrolled, unintended movement. Miners walked up the grade directly behind the vehicle. Should a miner be struck by the truck, fatal blunt force trauma would be the expected result. Management engaged in conduct constituting more than ordinary negligence in that the mine operator was aware of the truck and took no action to correct or mitigate the hazard. Standard 56.14207 was cited 2 times in two years at mine 4202078 (2 to the operator, 0 to a contractor). . . . This violation is an unwarrantable failure to comply with a mandatory standard.

Pet. at 6. The cited standard requires that, "[w]hen parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207. The inspector found that the alleged violation was reasonably likely to result in an injury, and that the injury could be reasonably expected to be fatal. Pet. at 6. He marked the citation as high negligence and S&S. Pet. at 6. After determining that the violation was an unwarrantable failure to comply with a mandatory standard, the inspector issued the citation under section 104(d)(1) of the Mine Act. The Secretary assessed a penalty of $10,868.00.

Now, the Secretary seeks to radically alter this citation. First, he proposes reclassification of this action from a section 104(d)(1) citation to a 104(a) citation. That proposed change requires deletion of the unwarrantable failure designation. *See* 30 U.S.C. § 814(d)(1). Second, he seeks to change the likelihood of injury from "Reasonably Likely" to "Unlikely." Third, he proposes a reduction in the negligence finding from "High" to "Moderate." And finally, he seeks to remove the S&S designation. Altogether, these changes would reduce the penalty from $10,868.00 to $662.00.

The Secretary offers very few facts in support of these major changes. He states in his motion that the pickup truck in question was "outfitted with an automatic transmission which was observed in the 'park' position" and that the "parking brake was set." Am. Mot. to App. Settlement at 3. He also notes that his "review of the information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck."[1] Am. Mot. to App. Settlement at 3.

[1] Any other information adduced by the Secretary regarding this citation was either redundant or mere conclusion. Often, when a motion to approve settlement is filed by an MSHA conference and litigation representative (CLR), the motion relies heavily on legal conclusions that are either improperly applied or inadequately supported. The standard boilerplate language used by every CLR contains legal information that they are not sufficiently trained to understand or qualified to use in a legal document. Moreover, the Commission requires the Secretary to provide "facts," not conclusions, in support of settlement. 30 C.F.R. § 2700.31(b).

The violation alleged here is serious, despite the Secretary's attempts to downplay it. Just one month before the Secretary filed his original motion in this case, a miner was killed by parked mobile equipment that had not been secured against accidental movement.[2] Another miner was killed earlier this year when a dump truck—unsecured against accidental motion—crushed a miner attempting to troubleshoot a brake issue.[3] Last year, at least three such fatal accidents occurred. One miner was pinned by his parked truck while helping a second miner repair a truck parked immediately in front of his own.[4] Another miner died when his haul truck, parked on a grade without wheel chocks, rolled downhill and crushed him.[5] A third miner with ten years of experience died while performing a pre-operational examination on a truck with unchocked wheels.[6] MSHA's root-cause analysis found that the death was caused by the contractor's failure to ensure that all truck wheels were properly blocked when parked on a grade. In 2020, a truck ran over a miner who had attempted to adjust its brakes without blocking it against motion.[7] In 2018, a miner with eight years of experience was killed by mobile equipment that was not properly secured against movement while parked.[8] In 2017, a parked pickup truck pinned a miner against a wall and killed him, in part because the wheels were not chocked.[9]

Miners are killed year after year in these accidents—accidents that are completely avoidable if operators were to follow the regulations with diligence and care. That is why the

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[2] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: AUGUST 4, 2022 FATALITY, https://www.msha.gov/data-reports/fatality-reports/2022/august-4-2022-fatality/fatality-alert.

[3] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: JANUARY 26, 2022 FATALITY, https://www.msha.gov/data-reports/fatality-reports/2022/january-26-2022-fatality/fatality-alert.

[4] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, DECEMBER 13, 2021 FATALITY – PRELIMINARY REPORT, https://www.msha.gov/data-reports/fatality-reports/2021/december-13-2021-fatality/preliminary-report-0.

[5] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE (CONSTRUCTION SAND AND GRAVEL) FATAL POWER HAULAGE ACCIDENT – APRIL 19, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/april-19-2021-fatality/final-report.

[6] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: FACILITY (COAL) FATAL POWER HAULAGE ACCIDENT – AUGUST 11, 2021, https://www.msha.gov/data-reports/fatality-reports/2021/august-11-2021-fatality/final-report.

[7] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE MINE (SAND) FATAL POWER HAULAGE ACCIDENT – SEPTEMBER 16, 2020, https://www.msha.gov/data-reports/fatality-reports/2020/september-16-2020-fatality/final-report.

[8] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: UNDERGROUND METAL MINE (GOLD ORE) FATAL POWER HAULAGE ACCIDENT – NOVEMBER 11, 2018, https://www.msha.gov/data-reports/fatality-reports/2018/fatality-16-november-11-2018/final-report.

[9] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: SURFACE NONMETAL MINE (CRUSHED STONE) FATAL POWER HAULAGE ACCIDENT – MARCH 24, 2017, https://www.msha.gov/data-reports/fatality-reports/2017/fatality-3-march-24-2017/final-report.

inspector's original finding of S&S is well founded: the violation alleged here is serious, and mine operators need to take them seriously or else miners will continue to die.

The Secretary now seeks to remove the S&S designation. I cannot accept this proposed modification based on the two sentences that he offers in support of the change. The Secretary points to other required safety features, like the parking brake, to show that the alleged violation is not significant or substantial. However, I am precluded from considering redundant safety measures as part of S&S analysis. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013). The relevant inquiry here is the magnitude of risk presented by the operator's failure to chock the wheels of a truck parked on a grade. Given the number of serious accidents caused by this condition, I find that the inspector has set forth no basis for S&S and that the Secretary's facts cannot support deletion of the S&S designation. Accepting the facts, even if true, stand in opposition to the current case law regarding S&S. I cannot accept a settlement that is contrary to law.

As additional 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 App. Settlement at 4. 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 of the CLR are irrelevant here. It appears they were drafted by an attorney and are used in every settlement agreement by a CLR who is not qualified to cite to legal authority. I find that the Secretary's claim of discretion regarding S&S is erroneous, and that his decision to remove the S&S designation wrongfully dispenses with decades of history and precedent.

I further find that the submitted facts cannot support the negligence changes. The Secretary attests that a "review of the information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck." Am. Mot. to App. Settlement at 3. This statement raises several concerns. It does not specify the basis of the "information provided by the operator" or whether it is credible. *Id*. It does not mesh with the inspector's account, which noted that management "was aware" of the violative condition. Pet. at 6. And it does not even say explicitly that management lacked knowledge of the unchocked wheels—only that management was unaware of any conditions that it deemed a "hazard." Am. Mot. to App. Settlement at 3.

Moreover, even if management lacked actual knowledge of the unchocked wheels, this fact would still not negate negligence. The Secretary defines negligence as when "[t]he operator knew *or should have known* of the violative condition." 30 C.F.R. § 100.3 (emphasis added). The Commission looks to "the operator's actual *or constructive knowledge* of the violative condition or practice" to determine its negligence. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016) (emphasis added). The record indicates that management should have known of the condition since miners routinely "walked up the grade directly behind the vehicle." Pet. at 6. The Commission also looks to the operator's "supervision, training, and disciplining of its

employees to determine if [it] has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *Knight Hawk*, 38 FMSHRC at 2369. Here, the Secretary has submitted no facts regarding the operator's supervision or training practices. Accordingly, the facts do not mitigate the operator's negligence as alleged in the petition.

Finally, and most importantly, I must deny the proposed penalty reduction associated with this citation. The threadbare information submitted cannot support such a drastically compromised penalty. For further discussion of the penalty, see *infra*, Section II.C.

B. The Proposed Modifications to Order No. 9727216

Order No. 9727216 alleges a violation of 30 C.F.R. § 56.18002(a) as follows:

> The mine operator failed to ensure that an adequate examination of working places was being conducted prior to miners working around the crusher and wash plant areas. During this inspection 20 violative conditions were noted and cited. The workplace examination record noted 0 safety concerns. Some of the conditions cited were extensive and obvious and had been in existence for days or weeks. The failure to identify and correct hazards is known to contribute to fatal accidents across the mining industry. Mine management engaged in conduct constituting more than ordinary negligence in that they did not complete the required examinations and allowed hazards to exist with no mitigation. . . . This violation is an unwarrantable failure to comply with a mandatory standard.

Pet. at 7. The inspector found that the operator's failure to conduct an adequate exam was reasonably likely to result in an injury that could reasonably be expected to be fatal. He marked the order as S&S and high negligence. After determining that the violation was an unwarrantable failure to comply with a mandatory safety standard, the inspector issued the order under section 104(d)(1) of the Mine Act. He withdrew the crusher and the wash plant from operation until the mine operator terminated the order by training a designee to conduct a thorough workplace examination.

Section 56.18002(a) requires that "a competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." 30 C.F.R. § 56.18002(a). Merely performing an examination is not enough to satisfy the standard—the operator must perform an *adequate* examination. Under Commission case law, a workplace examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016).

The first fact put forward by the Secretary—that a "workplace examination had been conducted and documented"—is therefore hollow. *See* Am. Mot. to App. Settlement at 3. This fact does not negate the fact of violation, the negligence finding, or the unwarrantable failure designation. The workplace examination has to be meaningful to satisfy the safety standard; haphazard inspections do not protect miners. For instance, in *Sunbelt Rentals*, the operator

performed and recorded a workplace examination. The exam failed to identify the loose material that would later strike a miner and knock him unconscious. 38 FMSHRC at 1627; *Sunbelt Rentals, Inc.*, 40 FMSHRC 573, 583-90 (Apr. 2018) (ALJ). The operator did not protect the miner with its inadequate examination and could not avoid liability under section 56.18002(a).

Here, the record supports a finding that the examination was inadequate. The inspector noted twenty violative conditions. Some of the violations were "extensive and obvious," and some had been in existence for "days or weeks." Pet. at 7. Meanwhile, the operator's workplace exam noted none of these issues.

The inspector's report tends to contradict the second and final fact offered by the Secretary in support of settlement: that "there was no evidence that the examination was inadequate." [10] Failure to identify and address safety violations can be evidence of an inadequate examination. *LRock Industries*, 39 FMSHRC 1429 (July 2017) (ALJ); *APAC-Kansas, Inc.*, 38 FMSHRC 2560 (Oct. 2016) (ALJ). The inspector documented the operator's failure to identify twenty violations despite the extensiveness and duration of the violative conditions. Accordingly, there *is* evidence that the examination was inadequate.

I cannot say how the Secretary has now concluded that "no evidence" exists in the face of the inspector's report. He provides no further context or explanation for his conclusion, even when asked to supplement his original filing on this precise issue. Instead, he wants me to ignore the evidence of an inadequate examination and to accept his current version of events without further facts or scrutiny. To accept the Secretary's facts uncritically would be a derogation of my statutory duty under section 110(k) of the Mine Act.

By attempting to make such a drastic change with such weak and inconsistent facts, the Secretary again conveys that he does not take this violation seriously. But this is a serious offense. Miners continue to suffer injuries, fatal and otherwise, due to inadequate workplace examinations. Just days before the Secretary filed his motion in this case, he released a fatality alert indicating that a miner died due in part to the failure to conduct an adequate workplace examination.[11] Accordingly, I take the allegations in this case seriously and would require concrete and specific facts to justify the dramatic changes proposed. The Secretary's motion is devoid of such facts. I therefore must deny the proposed changes as unreasonable and inappropriate under the facts.

C. 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 $22,944.00 to the compromised value of $3,936.00. Based on the reasoning below, I find that the proposed penalty reduction is unfair and contrary to the public interest.

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[10] Any other information adduced in support of the proposed modifications was nonfactual and conclusory in nature.

[11] MINE SAFETY & HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FATALITY ALERT: SEPTEMBER 9, 2022 FATALITY https://www.msha.gov/data-reports/fatality-reports/2022/september-9-2022-fatality/fatality-alert.

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. Instead, by allowing the operator to pay just seventeen cents on the dollar for these two serious alleged violations, the Secretary encourages the operator to embrace the status quo and accept the minor settlement amounts as the cost of doing business. The Secretary has not submitted any

information to dissuade me of this thinking, or to show that a reduced penalty furthers the public interest. Accordingly, I find that the large penalty reduction undermines operator compliance, fails to deter dangerous behavior, and therefore contravenes the public interest.

D. 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 and unwarrantable failure designations also impacts future enforcement actions, but the Secretary provides no explanation of these specific changes and how they maximize prosecutorial impact.

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 both of the citations in this docket and forfeit the non-monetary value that would flow from preserving them as written.

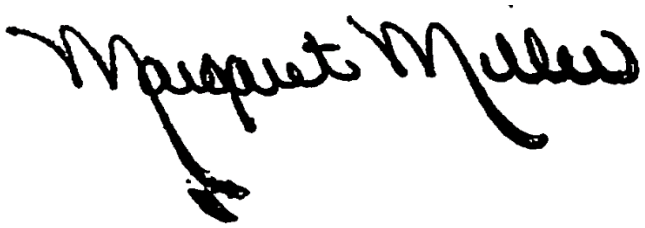
Altogether, although there are some non-monetary benefits to this settlement, none of the Secretary's generalized statements convince me that the particular changes proposed here are "fair, reasonable, appropriate under the facts, and protect[] the public interest." *Am. Coal Co.*, 38 FMSHRC at 1976.

III. Conclusion

This case boils down to facts. The Secretary must submit facts in support of the proposed settlement, and I must scrutinize those facts. Here, the Secretary has submitted a grand total of three relevant sentences to support the 82.8 percent penalty reduction proposed. Most of the information submitted is conclusory and redundant. Few of the facts are concrete or specific. He does nothing to explain why the submitted facts differ from the inspector's report. He fails to tailor the facts to the penalty criteria or the modified portions of the citations. He ignores the seriousness of the alleged violations. And, when asked for more information, he rebuffs the Court and merely rearranges the information already encapsulated in the original motion.

It is my statutory duty to review the sufficiency of the Secretary's facts. If I were to approve this proposed settlement based on the submitted facts, the judicial review provision in section 110(k) of the Mine Act would be rendered meaningless. I cannot close my eyes to the deficiencies of the facts submitted here, nor to the risk presented to miners by the violations alleged in this case. I must deny this motion.

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



Margaret A. Miller
Administrative Law Judge

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