FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2021-0160 A.C. No. 11-03147-536309
v.	
KNIGHT HAWK COAL, LLC, Respondent	Mine: Prairie Eagle-Underground

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

Before: Judge Young

This matter is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary filed a Motion to Approve Settlement setting forth the factual bases for the proposed modifications. When I disapproved the settlement, the Secretary filed amended motions, which I disapproved based on my concerns with the removal of a "Significant and Substantial" ("S&S") designation.

The Secretary now seeks interlocutory review of this proceeding, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. I agree with the Secretary that this interlocutory ruling involves a controlling question of law, and that immediate review will materially advance the final disposition of this proceeding. I certify for review this question: whether the Secretary has unreviewable discretion to remove a "Significant and Substantial" ("S&S") designation from a contested citation without the Commission's approval.

This case was assigned to me on August 18, 2021. This docket includes three citations issued pursuant to Section 104(a) of the Mine Act. The Secretary submitted a motion to approve settlement on August 24, 2021, in which the Secretary proposed removing S&S designations from two citations: Citation Nos. 9198165 and 9198038. The third citation remained unaltered. Additionally, the motion requested a penalty reduction from $7,960.00 to $4,590.00. After review and careful consideration, I denied approval of this settlement via email—specifying that for Citation Nos. 9198165 and 9198038, I needed clarification of the operator's arguments in support of why the facts and circumstances surrounding the conditions were not reasonably likely to contribute to an event with the potential to cause significant injuries. The email provided possible resolution—a detailed explanation—rather than Commission review.

The Secretary chose to submit subsequent motions to approve settlement on September 3, September 13, and September 14, 2021. Although I determined that the amended explanation for the removal of the S&S designation from Citation No. 9198165 was satisfactory, I was not

provided with sufficient factual support to approve such removal from Citation No. 9198038.[1] As such, my approval of the settlement would unfairly compromise the public interest by conceding an important issue without reasonable justification for doing so. Therefore, I issued an order on September 30, 2021, denying the motion to approve settlement ("Denial Order").[2] In order to resolve the question of law before us, the Secretary submitted a motion for certification on November 24, 2021.

I. The Standard for Approval of Proposed Settlements

The Secretary relies on the Commission's decisions in *Mechanicsville Concrete, Inc.* and *American Aggregates of Michigan, Inc.* as support for his contention that he need only depend on his discretion when vacating S&S designations. S. Mot. ¶ 6(C)(2); *Am. Aggregates of Mich., Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–89 (June 1996)). However, *Mechanicsville* and *American Aggregates* do not confer sole discretion upon the Secretary or limit the evaluation of the Commission under section 110(k) of the Mine Act. The Secretary made a S&S designation and now intends to modify it. He cannot rely solely on discretion, but must provide sufficient factual support. *See* 29 C.F.R. § 2700.31(b)(1) (requiring "facts in support of the penalty agreed to by the parties"); *see also Am. Coal Co.*, 38 FMSHRC 1972, 1981 (Aug. 2016) ("*AmCoal I*"); *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1856 (Aug. 2012).

The unreviewable discretion asserted by the Secretary is contrary to the Mine Act's requirement that the Commission approve all settlements. *See* 29 C.F.R. § 2700.31(g) ("Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record."). While the Secretary retains prosecutorial discretion at the citation and petition stage, Commission Judges have the authority to review proposed compromises. 30 C.F.R. § 2700.31(b) ("A motion to approve a penalty settlement shall include *for each violation* . . . facts in support of the penalty agreed to by the parties.") (emphasis added). Rule 31 enables Judges to review proposed penalties under section 110(k) of the Mine Act, which provides, "No 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).

The Secretary argued in *AmCoal I* that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions, and that section 110(k) does not provide meaningful or substantive standards sufficient to limit the Secretary's prosecutorial discretion as applied to settlement agreements. 38 FMSHRC at 1974–75 (citing as support the "Heckler Test" established in *Heckler v. Chaney*, 470 U.S. 821, 834 (1985)). The Commission has expressly rejected, and the text and structure of the Mine Act refutes, this argument. *Id.* at 1979–81. As the Commission held in *AmCoal I*, Congress charged the Commission with the administration of section 110(k), which explicitly grants the Commission the authority to

[1] This is a controlling question of law because there is no other defect with the settlement. If I am found to be in error, I will approve on remand the motion as submitted to me. Otherwise, the case will still be before me subject to further action by the Secretary and Respondent.

[2] I incorporate that order here by reference.

approve settlements and limits the Secretary's authority to reduce contested penalties. As the Commission noted, the assessment of civil penalties under the Mine Act has not been committed to the Secretary by law, but was instead expressly and clearly delegated to the Commission. *Id.* The Commission has employed a meaningful abuse of discretion standard—discussed in detail below—under which the Secretary is required to provide facts in support of settlement. This requirement may only be deemed inappropriate if it is unreasonable or inconsistent with the Mine Act—and it is not.

A. The Secretary's cited authority does not confer the discretion asserted.

The Secretary's reliance on *Mechanicsville* is misplaced. *Mechanicsville* is irrelevant to this proceeding because it relies upon the Commission's decision in *RBK Construction, Inc.,* 15 FMSHRC 2099, 2101 (Oct. 1993), which in turn relied upon the U.S. Supreme Court's decision in *Cuyahoga Valley Railway Co. v. United Transportation Union*, 474 U.S. 3, 6–7 (1985). In contrast to the case at hand, *RBK Construction* did not involve a settlement, and the Court in *Cuyahoga Valley* grounded its decision on the statutory scheme of the Occupational Safety and Health Act, which—unlike section 110(k) of the Mine Act—does not require the Occupational Safety and Health Review Commission to approve settlements.

Even if the cited authority was relevant to a case which has been contested before the Commission under section 105(a), an important distinction between this proceeding and *Mechanicsville* renders it inapplicable. The present case involves a proposal to *eliminate* an S&S designation, while the Commission in *Mechanicsville* held that an ALJ may not *add* an S&S designation on his or her own initiative. *Mechanicsville Concrete, Inc.*, 18 FMSHRC at 880, 882. These important distinctions between this case and *Mechanicsville* render this authority irrelevant to this case.

The Secretary's reliance on *American Aggregates* is also misplaced. In this case, the Commission vacated a Judge's decision to deny a settlement motion because the Judge ignored information that was relevant to the reasonableness of the settlement under the *AmCoal* criteria. 42 FMSHRC at 577, 581. This information included several facts that were relevant to, and plausibly supported, a decrease in gravity and negligence, and the removal of the S&S designation. The Commission only reversed the Judge's denial of the settlement, and the included removal of the S&S designation, because of the Judge's failure to consider the significant factual support provided.

B. The Secretary must provide substantive, relevant facts in support of modifying violations in a motion to approve settlement.

The Commission has consistently required its judges to consider facts that are both substantive and relevant to proposed modifications before a motion to approve settlement may be granted. The facts provided must enable a plausible inference that the violation at issue can be justly compromised. In the case at hand, the facts provided must permit an inference that facts

might be established at hearing that could result in the violation in question not being affirmed as S&S.[3]

1. *The Commission has consistently required Judges to consider substantive, relevant facts in support of settlement.*

No definition of the term "relevant" has been provided by the Commission to date. However, Black's Law Dictionary defines the term "relevant" as "[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value — that is, rationally tending to persuade people of the probability or possibility of some alleged fact." *See Relevant*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Federal Rules of Evidence defines "relevant" as a contention that "has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Fed. R. Evid. § 401.

In *Solar Sources Mining, LLC*, the Commission approved a denied settlement based on a Judge's failure to consider the facts submitted in support of settlement. 41 FMSHRC 594, 605, 606 (Sept. 2019). The Commission held that the Judge erred in concluding that the parties presented no facts to support settlement, when the parties "actually presented relevant facts," including the non-applicability of the standard. *See* 41 FMSHRC at 601.[4]

In addition to relevant facts, the Commission has consistently recognized that Judges must consider substantive evidence, defined as "[e]vidence offered to help establish a fact at issue," in order to approve or deny settlement motions. *Substantive Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014). In *AmCoal I,* the Commission rejected the Secretary's "boilerplate referencing" of "professional judgment" and enforcement value "in lieu of the substantive factual support traditionally provided to justify a penalty reduction." *AmCoal I*, 38 FMSHRC at 1973–74. Another *Am. Coal Co.* case was denied settlement by a split Commission because of a lack of facts, and was approved by the disapproving Commissioners only upon submission of additional facts. *See* 40 FMSHRC 765, 766 n.1 (June 2018); Am. Joint Mot. Approve Settlement Agreement, Docket No. LAKE 2009-0035, at 8–10 (May 18, 2018).

The Commission discussed the proper substantive evidence requirement for modifying individual citations in *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020). In *Hopedale*, the Commission held that a Judge's denial of a settlement constitutes an abuse of discretion when the agreed-upon facts supplied by the parties satisfy the standard for approval established in *AmCoal I*. Although judges need not engage in fact-finding, weighing conflicting evidence, or making credibility determinations, the majority stressed that this holding does not restrict judges by limiting their ability to "probe gaps or inconsistencies in the explanation offered in support of

[3] I note that I have not found, and do not find, that the violation must be affirmed as S&S. Nor have I required the Secretary to establish that it is not. I merely note that the limited facts the parties have chosen to provide would preclude a non-S&S finding for this violation.

[4] Commissioners Jordan and Traynor dissented, arguing that the parties failed to meet the *AmCoal* standards because the motion contained insufficient factual support. *See Id.* at 607 (Jordan, Traynor, dissenting).

a settlement motion." *Id.* at 595; *see also Solar Sources Mining LLC*, 41 FMSHRC at 602 (stating that Judges are "expected to . . . determine whether the facts support the penalty agreed to by the parties").

The Commission determined that the provided facts in *Hopedale* supported the penalty reduction agreed to in the settlement, and that "[t]he rejection in this case was contrary to stipulated facts, mischaracterized the operator's compliance history, and failed to give weight to the considerable non-monetary value preserved by the settlement." *Id.* at 602. For citations where the Secretary proposed a reduction in negligence, he provided respondent contentions demonstrating that the "violative conditions were not obvious or readily known to the operator." *Id.* at 598. For other violations challenging gravity, the Secretary provided contentions showing possible compliance (i.e., no violation) or the reduced likelihood of hazard because the equipment was found to be functioning better than noted. *Id.* at 597–98. These facts were all *substantive* because they were offered to dispute a fact at issue. These substantive facts, as described, were also *relevant* to the individual modifications proposed, a principle that should also apply to the removal of S&S designations. This case thus differs from *Hopedale Mining*, in that it does not involve the rejection of substantive, relevant facts. Rather, the parties have not provided me with sufficient facts to serve as the basis for an evaluation under *AmCoal I*.[5]

2. *The Secretary misreads the cited authorities.*

    a. Although the Secretary cites *Am. Coal Co.*, this case requires the submission of relevant facts.

The Secretary states in the Motion to Approve Settlement that he "has considered the deterrent value of the penalty and obtaining a final resolution to this matter." As support for this statement, the Secretary cites the following excerpt:

> The Amended [motion] provides substantive explanations supporting the Secretary's decision to compromise the issues of one violation at issue . . . . In

[5] Though the Commission found that the facts provided in *Hopedale Mining* were substantive and relevant to either gravity or negligence modifications, two Commissioners thought even these facts were insufficient to support the modifications. *See* 42 FMSHRC at 608–09 (Commissioners Jordan and Traynor, arguing in dissent that settlements must provide substantive explanations). The dissenting Commissioners asserted that "[t]he Congressional transparency mandate has always meant that the Judge's decision must include a substantive explanation as to how the penalty reduction submitted for approval is (or is not) warranted by the facts and legal contentions the parties claim as support for their motion." *Id.* (citing *Co-Op Mining Co.*, 2 FMSHRC 3475, 3475, 3476 (Dec. 1980) (vacating a settlement with finding of violation where the stipulations demonstrate that a violation did not actually occur)). My decision is consistent with both the majority and the dissent in *Hopedale* and the decision in *Co-Op Mining*. All of the opinions rely on the same legal principles requiring settlement decisions to be consistent with the facts provided, but the dissent in *Hopedale* disagreed that the required quantum of substantive evidence had been met.

> addition, the Secretary has set forth reasons why it would not be in the public interest to litigate certain legal issues in the context of this case. Moreover, the amended motion explains that the operator's mines have closed since the citations issued, reducing the deterrent value of the penalty. Commissioners Jordan and Cohen note that *these justifications were absent in the initial settlement motion*. Upon review of the *amended motion*, Commissioners Jordan and Cohen agree to grant the motion and approve the settlement.

Am. Coal Co., 40 FMSHRC at 766 n.1 (emphasis added).

The Secretary asserts that it is sufficient for him to "consider the deterrent value" of the penalty. This assertion is based on only a partial understanding of the cited authority. In citing this footnote as support, the Secretary ignores the facts of the case. Importantly, the settlement at issue was only granted following the submission of additional facts. *Id.* at 766. After AmCoal appealed a remanded decision, the parties submitted a motion to approve settlement that was denied by the Commission in a 2-2 split.

As support for their denial, Commissioners Jordan and Cohen set forth reasons why approval would not be in the public interest, including their concerns that (1) it was unclear what AmCoal had agreed to give in exchange for settlement, (2) the Commission did not remand for a gravity reduction where the trier of fact already made a gravity determination, and (3) the settlement was one-sided and did not help with enforcement of the Mine Act. *Am. Coal Co.*, 40 FMSHRC 330, 337–39 (Mar. 2018).

Commissioners Jordan and Cohen joined in approving settlement after the parties submitted an amended motion that included additional factual support. Amended Joint Motion to Approve Settlement Agreement, Docket No. LAKE 2009-0035, at 8 (May 18, 2018).

The amended motion included at least three additional substantive facts that were directly relevant to the proposed modification, including acknowledgement that the operator's mines had since closed. *Am. Coal Co.*, 40 FMSHRC at 766 n.1. This decision, and the footnote cited by the Secretary, do not support the contention that the Secretary need only consider the deterrent value of a penalty in obtaining a final resolution. The outcome of this case clearly depended on the submission of substantive, relevant facts. This is the standard I have followed in rejecting the settlement.

b. *AmCoal II* also requires the submission of substantive facts.

The Secretary states that he has evaluated enforcement values and maximized his prosecutorial impact, citing page 989 of *AmCoal II*. The cited authority requires that the facts provided "reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Am. Coal Co.*, 40 FMSHRC 983, 991 (Aug. 2018) ("*AmCoal II*"). The Secretary uses this language to make the overbroad assertion that he need only state that the parties are in agreement without submitting adequate support. However, the Commission has consistently required that the Secretary provide substantive facts, relevant to the proposed modifications.

The standard for Commission evaluation is whether the proposed settlement is "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal II*, 40 FMSHRC at 987.[6] The Commission found that in order to effectively apply this standard, Commission Judges must be provided with "sufficient information" upon which to base their evaluation. *Id.* (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). Specifically, the Commission found that the Judge required substantive facts to support proposed penalty reductions. *Id.* at 989 ("[T]he *Judge appropriately determined that the submission of additional substantive facts to support the proposed penalty reductions was necessary . . . .*") (emphasis added).

Similar to the *AmCoal* case noted above, *see supra* Section I.B.2.a., the settlement motion approved by the Commission depended on the submission of new facts that were substantial and relevant to the modifications—primarily that the mine ceased production two years prior, and that the respondent's other mine also ceased production, facts that proved a reduced enforcement value. *Am. Coal Co.*, 40 FMSHRC 1380, 1388 (Sept. 2018) (ALJ); Joint Mot. Approve Settlement & Dismiss Proc., Docket No. LAKE 2011-0013, at 2 (Sept. 7, 2018).

In this case, the Secretary denies that he must provide substantive, relevant facts in support of settlement. *AmCoal II* does not support this claim. The Commission requires sufficient facts—*including* nonmonetary assessments regarding enforcement value—upon which Judges can make an appropriate finding. *AmCoal II*, 40 FMSHRC at 991 ("[F]acts required by Rule 31 may include a description of an issue on which the parties have agreed to disagree."). In the present case, the Secretary has failed to provide any detailed explanation of how the enforcement value of the violation will be maintained.

II. The facts provided by the Secretary do not justify removal of the S&S designation.

A. The Commission utilizes an abuse of discretion standard to evaluate the Secretary's enforcement decisions.

Rule 31 requires that a settlement motion include facts in support of the penalty agreed to for "each violation," and that a Judge's order set forth reasons for approval and be supported by the record. 29 C.F.R. § 2700.31(b), (g). The abuse of discretion standard requires the Secretary to provide relevant facts from which a Commission Judge may understand the reasonable conclusions drawn in support of his decision. *See Prairie State Generating Co.*, 792 F.3d 82, 92 (D.C. Cir. 2015); *Knight Hawk Coal, LLC*, 42 FMSHRC 435, 445–46 (July 2020).

The Commission has established that denial or reversal is justified in cases where there is no evidence to support the Secretary's decision. *See Solar Sources Mining, LLC*, 41 FMSHRC at 599 (citing *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) ("An

[6] While this is a "four factor" analysis, as a practical matter, there is often considerable overlap between the factors. Thus, a proposed settlement may not be "fair" because it is insufficiently protective of the public interest, or it may not be "reasonable" because it is inappropriate to the facts provided in support of the settlement.

abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law")); *see also Twentymile Coal Co.*, 27 FMSHRC 260, 278 (Mar. 2005) (Jordan, dissenting) (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249–50 n.5 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998)).

On review, the D.C. Circuit Court of Appeals has noted that the Commission's ALJs determine, in the first instance, whether the Secretary has been arbitrary and capricious, abusing his discretion in his decision, and that the Commission's standard of review is whether substantial evidence supports the Judge's determination. *See Sec'y of Lab. v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1308 (D.C. Cir. 2021) (citing 30 U.S.C. § 823(d)(2)). Under the arbitrary and capricious standard, the Secretary must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 1307 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

This standard is deferential to the Secretary, but its grace is not unlimited. In particular, the law—statutory law, Court and Commission precedents, and the Commission's procedural rules—clearly establishes a requirement that the Secretary's decisions be consistent with the reasoning and assumed facts provided with a motion to approve settlement.

Congressional intent, as well as Commission and court precedent, compels a meaningful review of all settlements submitted for approval. Section 110(k) of the Mine Act serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing his authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1976 (citing S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632–33 (1978)) ("Congress explained that '[b]y imposing [the] requirements' of section 110(k), it 'intend[ed] to assure that the *abuses* involved in the unwarranted lowering of penalties as a result of the off-the-record negotiations *are avoided*.").

The Commission has acknowledged the importance of section 110(k) in preventing abuse, and it possesses the authority to deny the Secretary's decisions when appropriate. This includes when the Secretary declines to provide an explanation for a settlement decision, or when the facts provided by the Secretary do not reasonably support a settlement decision. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012) (authorizing the Commission to approve the settlement of contested penalties in section 110(k) "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.")

Thus, under the governing law, I—as well as the Secretary—must make a rational decision governed by the operative facts and the law as it has been interpreted. I would abuse my discretion if I approved a settlement that is inconsistent with the facts provided. I have declined to do so.

B. Judges must have sufficient facts from which to plausibly infer that the violation would not meet S&S requirements.

The abuse of discretion standard requires judges to consider sufficient facts, taken as true, from which they may plausibly infer that proposed modifications are reasonable. Although the term "plausible" has not yet been defined by the Commission (and has in fact caused confusion amongst judges and scholars alike), the plausibility standard is evident in Commission precedent. The Commission has consistently required consideration of facts relevant to proposed modifications. *See Knight Hawk Coal, LLC*, 42 FMSHRC at 446 n.22 (requiring "some plausible—i.e., not speculative or preconceived—factual basis.").

In *Knight Hawk Coal, LLC*, the Commission affirmed a Judge's decision to vacate the Secretary's rejection of a ventilation plan because substantial evidence existed in support of the Judge's conclusion that the plan was acceptable. 42 FMSHRC at 452. The Commission applied a plausibility standard, agreeing that the Secretary had failed to articulate reasons, "rationally supported by the facts," that the ventilation approach did not protect miners. *Id.* The Commission could not condone rejection of a long-used plan based upon an "implausible belief" that harmful conditions might arise from the plan. *Id.* at 446 n.22 (describing such "implausible belief" as an "irrational belief not grounded on the record evidence").

The Commission articulated that the minimum standard requires "some plausible—i.e., not speculative or preconceived—factual basis for rejecting an operator's claim." *Id.* ("Requiring the Secretary to show his work in this regard is hardly a 'new' requirement. Rather, it reflects his fundamental duty under the Act to defend his choices as 'reasonable,' at a minimum."). This should be no different from requiring the Secretary to provide facts in support of a proposed settlement—i.e., "show[ing] his work"—to support a Judge's 110(k) review.

This standard is also supported by the Commission's requirement to be guided, when practicable, by the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("[T]he Commission and its Judges shall be guided so far as practicable by the [FRCP]."); *see also Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). Specifically, the Secretary's case can be likened to a pleading to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6).

Black's Law Dictionary equates the term "Plausibility Test" to the "Twombly Test," which requires the following in a pleading to survive a 12(b)(6) motion: "(1) state facts that, taken as true, make a plausible (rather than conceivable) claim, and (2) not rely solely on conclusions of law, which are not entitled to the same assumption of truth as factual allegations." *Twombly Test*, BLACK'S. The Court in *Bell Atlantic Corp v. Twombly* required a FRCP 8 pleading to "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" 550 U.S. 544, 557 (2007).

The Court noted that "[a]sking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. Requiring substantive, relevant facts in a settlement motion only requires sufficient facts to "raise a

reasonable expectation" that there was no violation, or that the violation did not meet the level of gravity or negligence cited.

In *Ashcroft v. Iqbal*, the Supreme Court provided a description of the plausibility requirement, stating that in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The Court described facial plausibility as "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). In relation to a settlement motion, the factual content provided should allow a Commission Judge to draw the reasonable inference that there is no violation, or that the violation does not meet the level of gravity or negligence cited.

The standard of plausibility exists in Commission review of decisions on the merits of a violation. Upon a *prima facie* showing of a violation by the Secretary, a respondent operator must demonstrate a "plausible theory based upon any facts in the record to support a reasonable inference" that the violation did not occur. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 988, 989–90 (Dec. 2006) (affirming the Judge's decision to uphold a S&S designation because there was substantial evidence to support the conclusion that the respondent did not show "any plausible theory" rebutting the Secretary's case).

The need to make a plausible demonstration refuting the existence of a violation could and should be applied to facts required in a settlement motion. Such a requirement is not contradictory to the Commission's directives in *AmCoal II*. *See* 40 FMSHRC at 991 (ruling that judges must not assign probative value to some facts). It merely requires that the submitted facts, if taken as true, plausibly demonstrate that there was no violation, or that the violation did not reach the level of gravity or negligence assigned.

C. <u>The facts provided by the Secretary cannot support the removal of the S&S designation.</u>

An S&S designation is appropriate if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard [danger to safety or health] contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). An S&S determination must be based on the continuation of normal mining operations. *See Consol PA Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.").

The four elements supporting an S&S designation provided in *Mathies* have been refined and expressed as follows: (1) an underlying violation of a mandatory safety standard; (2) a reasonable likelihood the violation will cause the occurrence of the discrete safety hazard against which the standard is directed; (3) a reasonable likelihood that the hazard would cause an injury; and (4) a reasonable likelihood that the injury would be of a reasonably serious nature. *Peabody*

Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*).

1. *The relevant facts provided demonstrate a prima facie showing of a S&S violation.*

The Mine Act and the Commission's precedents interpreting it compel me to determine whether the settlement tendered is appropriate to the facts provided to me. Citation No. 9198038 arises from an alleged violation of the operator's roof control plan, which appears to have been discovered after a roof fall occurred. *See* 30 C.F.R. § 75.220(a)(1) (requiring operators to develop and follow approved roof control plans); *see also* 30 C.F.R. § 75.202(a) (requiring roof support to protect miners from hazards related to roof falls). Under the terms of the plan, entry widths are limited to 19 feet. The operator asserts that a variance permits it to inadvertently mine widths up to 21½ feet wide. In that case, the variance requires the operator to use *additional* bolts that are one foot longer in between the rows to support the roof in the wider area.

Both the second and third amended motions state, "Because the area had never been deemed to be wider than the plan allowed, the additional bolts had not been installed." This explanation does not provide a sufficient evidentiary basis to support removal of an S&S designation. The explanation notes that the condition was not obvious, had not been noted on prior inspections, and did not present visible signs that a roof fall was imminent.

While these facts would support a reduction in negligence, they would not support a reduction of the likelihood of injury in an area where a roof fall occurred. Additionally, the operator's belief that a confluence of factors did not exist has no value to an assessment of the likelihood of injury from the hazard.

The limited facts provided in the motion included an acknowledgment that at least one miner, the examiner, would work or travel in the area where the fall occurred—an area where the Secretary has alleged the roof support was deficient—and a roof fall in fact occurred. During that time, the area was examined at least once every shift by an examiner. The motion provided no facts from which one might infer that this miner was not exposed to a possible hazard of serious injury from a roof fall.

A finding of S&S for a violation of an approved roof control plan is supported by Commission precedent. *See, e.g.*, *Consol Pa. Coal Co.*, 43 FMSHRC 145, 149 (Apr. 2021) (affirming Judge's determination that roof control plan violation was S&S); *Halfway, Inc.*, 8 FMSHRC 8, 12–13 (Jan. 1986) (affirming S&S for failing to comply with roof control plan when miners could have worked or traveled in areas with inadequately supported roof). Importantly, I do not find that the cited violation is or must be held to be S&S. I have been provided with limited facts, and neither party has waived its right to contest this issue by providing additional facts or legal authority at hearing. I am thus not substituting my enforcement judgment for that of the Secretary; I am merely noting that his conclusion that this violation might not be found to be S&S is entirely inconsistent with the evidence the Secretary himself has chosen to provide.

2. *The Secretary has provided no facts plausibly supporting the inference that the violation does not meet any one of the Mathies elements*.

Mathies Step 1 requires that the Secretary establish a violation of a mandatory safety standard. The Respondent's roof control plan is the functional equivalent of a mandatory safety standard and specifies the means of compliance with the ground support requirement for underground mines: "The 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). A failure to comply with the provisions of a roof control plan would satisfy Step 1 of the Commission's S&S analysis. The Secretary has provided no facts plausibly supporting an inference that Respondent was in compliance with the allowed variance.[7]

Mathies Step 2 requires a reasonable likelihood that the violation will cause the occurrence of a discrete safety hazard against which the standard is directed. The fact that a roof fall actually occurred here is dispositive as to the second S&S factor, because unintended roof falls in areas where miners work or travel is the focal point of Section 75.202(a) and the plan developed to ensure the protection of miners from such falls. *See Jim Walter Resources, Inc.,* 37 FMSHRC 493, 495–96 (2015) (noting that the Mine Act strictly requires protection of miners from roof falls in areas where miners work or travel). I find that an event that has occurred is perforce reasonably likely to have occurred.

Unlike the second factor, the remaining two S&S factors are not conclusively established. However, the settlement motion must provide at least a plausible basis for concluding that a hearing might result in a finding that there was no S&S violation, either because one of the remaining factors might not be proved or depends on questionable evidence, or because there may not have been a violation.

Mathies Step 3 requires a reasonable likelihood that the hazard would cause an injury. It is accepted that roof falls may cause injury as miners have died from roof falls. *See, e.g.*, *Doe Run Co.*, 42 FMSHRC 521, 521 (Aug. 2020); *Jim Walter Res., Inc.*, 37 FMSHRC at 493. To support removal of a S&S designation, the facts must allow the plausible inference that occurrence of the hazard would not cause an injury. The Secretary has provided that only the examiner travels the area and that exposure to the hazard would only last for a "split second of time," but these facts are insufficient for me to plausibly infer than an injury was unlikely.

Respondent acknowledged that an examiner traveled the area for the entire duration the violative condition existed. The fact that a roof fall did not occur while the examiner was traveling there does not negate the likelihood of an injury. Nor does the fact that the examiner was only exposed once per shift. *See Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it

[7] The facts provided would establish a violation of the plan. The motion does not provide even a contention by the operator that the entries did not exceed the plan's limits or that the additional longer bolts permitted by the variance had been employed in the areas cited by the inspector. As noted in the Denial Order, my decision does not prejudice Respondent's ability to argue or prove facts contrary to those provided in the settlement motions.

sufficient for Step 3 that the inspector determined that miners and an examiner would be exposed to the hazard twice per shift). Additionally, an unplanned roof fall is an "instantaneous event," so the Secretary's mention of only a split-second exposure fails to negate the likelihood of injury.

Mathies Step 4 requires a reasonable likelihood that the injury would be of a reasonably serious nature. An inspector's conclusion that a possible injury is of a reasonably serious nature has been held sufficient for Step 4. *Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient that the inspector characterized the potential injury as "serious"). Therefore, to support removal of a S&S designation, the facts provided to challenge Step 4 must allow the plausible inference that an injury would not be of a reasonably serious nature.

The inspector characterized the likely injury as "fatal" at the time of citation and petitioned for civil penalty on that finding. Roof and rib falls are subject to an extensive regulatory regime precisely because of the great danger of serious injury or death posed by unplanned ground movements in underground mines. No facts contended by the Secretary allow a plausible inference to the contrary—that the injury from a roof fall might not be of a reasonably serious nature.

D. Application of the abuse of discretion standard leaves me no choice but to deny the Secretary's motion to approve settlement.

Having made a S&S designation, the Secretary must provide substantial and relevant evidence as support for its removal. My denial of the Secretary's motion to approve settlement was specifically based on a lack of sufficient factual support available for me to properly consider the settlement under the *AmCoal* factors.

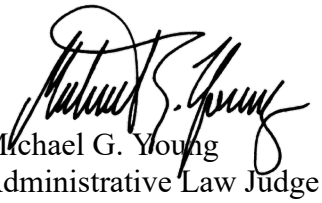
The Secretary must provide me with a plausible basis for the proposed modification of Citation No. 9198038. The Commission should not condone the removal of a cited and petitioned designation based on the implausible conclusion that the violation did not meet the requirements of an S&S designation. The conclusion to which the Secretary comes—that the proposed modification is justified by the respondent's contentions—must be rationally supported by the facts. It is not. The facts provided by the Secretary do not allow me to plausibly infer that the violation did not meet the *Mathies* requirements for a S&S designation. If anything, they support the existence of a S&S violation.

III. Certification

A settlement would finally resolve this matter without a hearing. I have invited the parties to submit additional facts that might permit approval, and they are apparently unable to agree on such facts. Following *Hopedale,* it would not be appropriate for me to proceed to a hearing with this legal question unresolved. Therefore, under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, I certify that this interlocutory ruling involves a controlling question of law—whether the Secretary has unreviewable discretion to remove an S&S designation from a

contested citation without the Commission's approval—and that immediate review will materially advance the final disposition of the proceeding.

This interlocutory ruling is hereby **CERTIFIED**.



Michael G. Young
Administrative Law Judge

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