FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 19, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-0013
Petitioner,	:	A.C. No. 11-02752-232235
v.	:	
	:	
THE AMERICAN COAL COMPANY,	:	Mine: New Era Mine
	:	

ORDER DENYING SECRETARY'S MOTION TO CERTIFY MAY 2, 2017 ORDER FOR INTERLOCUTORY REVIEW

Before: Judge Moran

Though hard to believe, the Secretary of Labor and his present counsel, whether motivated through deafness or defiance, is back, filing another motion for interlocutory review, but asking, essentially, the same questions.[1] The Commission has already answered those questions. For the reader who may be confused, this is not a new case. It is the *same case*, now more than four years old, with the Secretary presently making another run, through the same vehicle as before — interlocutory review — at not complying with this Court's decision and the Commission's affirmance of that decision, all with the purpose of emasculating the Commission's Congressionally-delegated statutory responsibility under section 110(k) of the Mine Act. The United Mine Workers of America, Intervenors in this case, have also weighed in on the Secretary's Motion, voicing strong opposition to it ("UMWA Response in Opposition"). For the reasons which follow, the Secretary's Amended Motion to Certify May 2, 2017 Order for Interlocutory Review ("Motion") is **DENIED**. **The hearing in this matter remains as scheduled, to commence on Monday, June 19, 2017**.

When this Court rejected the Secretary's latest gambit, in its May 2, 2017 Order Denying Settlement Motion ("Order"), as set forth below in Appendix I, it went to some lengths to expose the emptiness of the Secretary's present settlement. In this Motion the Secretary now, yet again, seeks the Commission's repeated review and by that step to unnecessarily draw upon the Commission's resources regarding a subject about which the Commission has already, patiently and definitively, expressed its view.

[1] The Secretary filed his motion on May 8, 2017. Two days later, on May 10, 2017, he filed a "Supplemental Motion" for interlocutory review, recasting its questions. The Supplemental Motion changes nothing, both forms of the motion are rejected.

Following the Court's Order, a conference call was held for the purpose of setting this matter for a hearing.[2] A few observations about that conference call are revealing. It was the *Respondent's* counsel who inquired whether *it* could provide the facts to support the motion, and asked for guidance from the Court as to the type of facts that would pass muster. The Court advised the parties that both the Court and the Commission have already made plain the information required for settlement motions. Curiously, the Secretary was entirely silent on that issue, with not a word offered that he too would like to supply facts in support of the motion. The Secretary's silence during the call clearly displayed that he has no intention of providing facts to the Commission. Both the Court's May 2, 2017 Order, and its many other prior Orders where settlements have been accepted, and on occasion denied, provide clear guidance to anyone who is genuinely interested in compliance.

There were other problems revealed with the one-sided interest in offering an adequate basis in support of a settlement. Counsel for the Respondent did not seem to appreciate that a one-size-fits-all 30% reduction is not likely to be satisfactory, because each violation is fact-specific.[3] That is why the Commission repeatedly told the Secretary in its August 25, 2016 Decision that *facts* must be provided. Therefore, even if plausible facts were presented and the Secretary admitted that those facts presented genuine disputes, it would be highly questionable if, through some magic, each citation ended up with an odds-defying 30% reduction. Compounding that problem, if the percentage reduction would be the same for each of the 32 citations, is the fact that at least 5 (five) of the citations were specially assessed.

While the Court appreciates the cooperative spirit advanced by the Respondent, there is a second problem that the Court has encountered in some settlements and needs to be mentioned. These have occurred on occasion where a cooperative *Respondent* has provided asserted facts in support of a given reduction but the Secretary made *no comment whatsoever*. As with the proverb "one hand won't clap," a settlement must express from the Secretary that the Respondent's assertions present *legitimate* questions of fact which can only be resolved through the hearing process. Under such circumstances, *legitimate* disputes of fact are usually sufficient to support a given proposed reduction.[4]

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[2] As announced during the call, that conference call was recorded by the Court.

[3] Nor is this matter a "global settlement," where different considerations may come into play.

[4] In those instances when the Court has rejected settlements because only one side, the mine operator, has offered facts in dispute and the Secretary has remained mute, in addition to requiring the Secretary's voice on the facts advanced by the operator, the Court has suggested, in the spirit of seeking legitimate settlements, that the Secretary at least announce to the Court that it has apprised the issuing inspector of the facts asserted by the Respondent, as the inspector is the only government eyewitness to the issued citation or order. Note that this requires no disclosure of privileged *information*, nor the substance of such communications between the Secretary's attorney and the issuing inspector, but only confirms that, acting in good faith, the Secretary has disclosed the operator's version of the attendant facts to the inspector. Though this would seem obvious as part of due diligence, the Secretary has rarely cooperated with the

A review of the Secretary's Motion

Having set the stage, so to speak, of the background for this matter, here is the Court's annotated version of the Secretary's latest motion. The quoted portions in the following annotated version all are from the Secretary's March 30, 2017 Motion at 2-4. A non-annotated version appears in Appendix II of this Order. Language taken from the Motion is in quotations, with bold text and italics added, as deemed appropriate, by the Court. The Court's annotations follow each quoted portion from the Secretary's Motion and they are in *italics*.

> **Counsel for the Secretary reviewed the entire case**, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case.

The Court would note that most of this would be standard protocol in any case — reviewing each citation and the inspector's notes and the position of the Respondent would seem to be minimalist activity. It is unclear what role "the views of officials in the district office" would have and the Court is told neither who those individuals were, the nature of their views, nor any basis for concluding that a 30% reduction would be appropriate for each of the 32 citations. The Secretary then announces that information, identified as "privileged," about the evidence developed in the case would be improper or imprudent to disclose.

"**Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations.**"

Based upon "information," about which the Commission is completely kept in the dark, the Secretary then announces that he concludes that there is "substantial risk" that the court "could" reduce the degree of negligence or gravity with respect to 14 of the 32 citations. How that speculation evolves into a 30% across the board reduction is left for the Commission to somehow divine.

"**One** additional **citation runs *the risk* of vacatur** because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute."

The Secretary, while not identifying which citation runs the claimed risk of vacatur, apparently feels that, like each of the other 32 citations, such a risk qualifies this citation for a 30% reduction. That the Secretary suggests this citation may not be the best case to test the citation's applicability is odd, because in more than a few cases before this Court, the Secretary has routinely exercised his option to vacate a given citation. As with all of the foregoing, no facts are presented by the Secretary.

> "*If,* **after trial**, the Secretary *were* to receive adverse decisions **with respect to each of the citations that counsel believes to entail such risks**- a worst-case

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Court's request for such assurance.

> outcome *the Secretary does not believe would occur* but is obligated to consider- the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise."

Here, the Secretary truly brings out his crystal ball, advising that, while he does not believe that his fears would occur, if they did occur, he predicts that he would suffer a 50% reduction in the penalties. On the basis of the fears he does not himself believe in, he then asserts that a 30% reduction makes sense. As with all of the foregoing, no facts are presented by the Secretary.

> In deciding that such a compromise is appropriate, **the Secretary has** not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, **considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate.**

This part of the Motion is the Secretary's most overt return to its stance of four years ago; translated it plainly means that the determination of a settled penalty amount is completely within its sole discretion. How that fits within section 110(k) is, as before, ignored by the Secretary.

"**The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose**."

As with the justification presented, next above, this is an encore assertion of the Secretary's claim that he has the sole power over settlement terms; the role of the Commission is to genuflect to the Secretary. The Secretary's interpretation effectively revokes Congress' inclusion of section 110(k) in the Mine Act.

> **The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise.** This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects **the Secretary's views regarding the gravity and negligence of the operator's conduct**.

*If this basis were to be accepted, the Commission would be required to accept any settlement with such terms. The Secretary's position would also negate the express language of section 110(k), which addresses "Compromise, mitigation, and settlement of penalty," and provides, in relevant part, that "[no] proposed **penalty** which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k) (emphasis added). The further remark that the Secretary will somehow be assisted "in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity*

and negligence of the operator's conduct," can only be described as pure blather.[5] *The Secretary's "views regarding the gravity and negligence of the operator's conduct" do not go beyond these particular citations – they are not translatable to future citations as the nature of those criteria are determined vis-à-vis those matters. In short, there is no carry over.*

> As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act.

There is no representation that, among the 32 citations, a section 104(d) chain has been triggered, nor is there any assertion that a pattern of violations is in the offing. Further, such speculations do not excuse the Secretary from complying with section 110(k) as those provisions are not entwined, but operate independently of one another.

> Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, **it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted** and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act… Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty.

As noted before, if the Secretary's expression was deemed sufficient here, then in future cases, the Commission could not logically assert any section 110(k) considerations where all violations were admitted. Such a result would effectively neuter the Commission's review authority under section 110(k). Beyond ignoring the plain language of that section, the Commission could not reasonably object to a higher percentage reduction. Accordingly, if the Secretary's position were adopted, a 40 or 50 percent reduction, or more, would also fit within the Secretary's authority.

"Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified.… **Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable**."

By this reasoning, all dockets for which all violations are admitted, could form the justification for a 30% reduction. But that is not all. As just mentioned, applying the same

[5] "Blather" is defined as talking long-windedly without making very much sense. As expressed by Merriam-Webster it is "voluble nonsensical or inconsequential talk or writing." "Blather," Merriam-Webster Online Dictionary (May 11, 2017), http://www.merriam-webster.com/dictionary/blather.

reasoning, if the principle were to be accepted, it could be applied to justify any other across-the-board percentage figure that the Secretary tossed out.

> The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. **There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.**

This statement simply underscores the transparent nature of the Secretary position — it is for the Secretary alone to reach settlements and facts in support of such matters need not be disclosed to the Commission. Clearly, under the Secretary's interpretation, section 110(k) would be an empty provision.

In summary, under the Secretary's, now tedious, view, it is entirely within his prerogative to decide terms of settlement. It is not an understatement to say that the Commission would have *no role* under this approach *except to submissively accept the terms presented by the Secretary.*

For its part, the United Mine Workers of America, in its Response in Opposition, has asserted that, as the question has already been considered and decided, the matter should not be certified for interlocutory review since a redundant review cannot materially advance the final disposition of the proceeding. UMWA Response in Opposition at 1. Noting that in its August 25, 2016 decision "the Commission held . . . in this case that 'Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include ***for each violation*** the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties,'" the UMWA maintains that the law of the case applies. *Id*. at 2 (citing *The American Coal Company et al.*, 38 FMSHRC 1972, 1981 (2016) (applying 29 C.F.R. § 2700.31(b)(1)) (emphasis in original). The Court agrees.

Thus, we have the quite peculiar situation where the Respondent mine operator and the United Mine Workers of America want to support the Commission's clear decisions regarding the required information for settlements, while the Secretary of Labor, whom one would expect to be in the vanguard on this issue, instead seeks to avoid the plain words of section 110(k) yet again.

Analysis of the Secretary's Motion to Certify this Court's May 2, 2017 Order for Interlocutory Review

The Secretary's Motion for Interlocutory Review[6] seeks certification of the following questions:

> 1. Whether the Commission erred in rejecting the Secretary's interpretation of the term "approval" in Section 110(k) of the Mine Act (30 U.S.C. § 820(k)), and instead adopting a standard of review that fails to recognize that the Secretary is exercising his statutory enforcement discretion when he proposes a settlement agreement?
>
> 2. Whether the Commission erred in adopting a standard of review that presumptively disfavors across-the-board settlements of multiple penalties.

Motion at 1.

These questions may be addressed summarily. The Commission has already definitively answered the first question in its August 25, 2016 decision. The Commission did not adopt a standard of review that *presumptively* disfavored across-the-board settlements. Instead, it held that *in this case* no facts supported the across-the-board 30 % reduction. As mentioned in footnote 6, the Secretary's Supplemental Motion does not change the Court's reaction.

The Secretary's Motion, after asserting that the matter involves a controlling question of law, defines a "controlling" question as one which if reversed on interlocutory appeal "might save time for the [trial] court, and time and expense for the litigants." Motion at 2 (internal citation omitted). Given the more than four year history challenging the same issue — the authority of the Commission in approving settlements and the Commission's decision on that issue — the save time and expense argument is hollow. The Secretary also asserts that "there can be no doubt that immediate review of the questions presented could 'materially advance the final disposition of the proceeding' because a decision in the Secretary's favor would avoid litigation and adjudication on the merits by resolving the matter with an approved settlement." Motion at 3. The opposite of that assertion is true — the matter has already been litigated and decided before the Commission and the hearing date is imminent, commencing on June 19th.

[6] As mentioned at the outset, two days after filing its Motion for Interlocutory Review, the Secretary filed a second "Supplemental Motion." The essence of the Supplemental Motion was to reframe the questions, but the result is the same — the Secretary simply does not want to comply with the Commission's decisions on settlements and section 110(k). The Secretary's additional questions are, "Whether the ALJ failed to adequately consider whether the additional facts provided by the Secretary on remand in support of the settlement motion satisfy the legal standard established by the Commission for evaluating proposed settlement agreements under Section 110(k) and whether the additional facts provided by the Secretary on remand in support of the settlement motion satisfy the legal standard established by the Commission for evaluating proposed settlement agreements under Section 110(k)." Supplemental Motion at 1.

Conclusion

The Commission has spoken clearly about settlements and section 110(k). When the Commission stated that settlements require "facts," as was evident to nearly everyone, they meant facts *about the alleged violations.* In contrast, the Secretary's notion of *facts* encompasses his assertions expressing why he doesn't want or need to provide facts about the violations. In the Court's view, by taking that tactic, the Secretary has basically fabricated issues for interlocutory review in its unceasing effort to circumvent the Commission's responsibilities under section 110(k). Accordingly, pursuant to 29 C.F.R. § 2700.76(a)(1)(i), titled "Interlocutory review," the Court **DENIES** the Secretary's Motion for Interlocutory Review because the questions of law raised in the Motion have been decided by the Commission and further immediate review will not materially advance the final disposition of the proceeding.

William B. Moran
Administrative Law Judge

Appendix I

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ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-0013
Petitioner,	:	A.C. No. 11-02752-232235
v.	:	
	:	
THE AMERICAN COAL COMPANY,	:	Mine: New Era Mine
	:	

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary has filed a "new" motion to approve settlement, but it is new only in the sense of its filing date. The Secretary continues to resist complying with the Commission's requirements for settlements. Accordingly, for the reasons which follow, the Secretary's motion is **DENIED** and the parties are **ORDERED** to participate in a conference call with the Court on **Friday May 5, 2017 at 12:00 p.m. EDT** for the purpose of setting a hearing date for this docket, which shall be held promptly.[7]

This matter now has a very long history. Over four years ago the Secretary embarked on its goal of emasculating section 110(k) of the Mine Act. The Court in its Decision Denying Settlement Motion, issued February 11, 2013, noted that:

> [t]he Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

The American Coal Co., 35 FMSHRC 515, 515 (Feb. 2013) (ALJ) (emphasis omitted).

[7] The call-in number will be provided in a separate email to the parties.

In denying the motion, the Court observed that:

> [t]he *entirety* of the justification provided: 'After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties' interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.' If this were a satisfactory justification, then every case would warrant a 30% reduction to avoid the 'uncertainties of litigation.'

35 FMSHRC at 515-16.

So began the Secretary's effort to overlook the plain meaning of Section 110(k). As will be set forth below, the Secretary's latest motion, too clever by half, is nothing more than its latest gambit, displaying the same, tired, recalcitrant behavior, all with the obvious purpose of continuing to avoid complying with section 110(k) of the Mine Act.

Before examining the Secretary's latest ploy, it is worth revisiting that there is nothing particularly difficult, or onerous, required for the Secretary to comply with the Commission's long-standing requirements for section 110(k) and the *Secretary has himself* repeatedly demonstrated that to be the case. In numerous other cases, examples of which were provided to the Secretary by the Court *from his own submissions* to the Commission, the Court reminded the Secretary how this is done in the appendix to its May 13, 2014 Order Denying Motion for Approval of Settlement Upon Secretary's Motion for Reconsideration. *The American Coal Co.*, 36 FMSHRC 1489, 1503-1522 (May 2014) (ALJ). Because the Secretary seems to have forgotten how this is done, two examples from the appendix to the Court's May 13, 2014 Order are repeated here. These examples are from the *Secretary's submission* for approval of a settlement in another case, *Sec. v. Brooks Run Mining*, Docket No. WEVA 2010-468:

> Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the

> Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," to modify the negligence from "moderate" to "low," and to reduce the penalty to $275.00.
>
> Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of "pizza pans" and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $475.00.

Unpublished Order dated Nov. 4, 2013; *see* 36 FMSHRC at 1519-20.

The reader should take note that the justification for the penalty reductions in those two citations provided a factual basis to support them.

More recent settlement motions before this Court demonstrate that, when the Secretary drops his mulish stance, he is quite able to provide the kind of facts the Commission needs in order to meet its statutory obligations under section 110(k).

For example, in *Sec. v. Triad Underground Mining LLC*, LAKE 2017-0007, ("*Triad*"), the Secretary filed his Motion to Approve Settlement before the Court on January 26, 2017. That case involved a single citation, No. 9036792, for which a penalty reduction of 24 percent, from $3,300 to $2,500, was sought.

In support of his Motion, despite some grammatical errors, the Secretary presented facts in dispute, stating:

> The Respondent has communicated plausible arguments as to why the gravity and/or negligence findings for this violation should be reduced. The Respondent would present evidence at hearing that, among other things, the examiner did not observe any hazards during his previous examination [sic] therefore no hazards were recorded in the Record Book. The accumulations referenced in the citation had occurred after the previous examination due to a coal spill. The hazard referenced in the inspection notes, accumulations of coal at the take up, had just occurred due to a spill and had not existed for two shifts [sic] therefore

> management could not have known. The Respondent contends that the negligence should be evaluated at "Moderate or Low" based on the mitigating circumstances provided. The Respondent contends that it is not reasonably likely that the accumulations of coal would [ ] result in a Lost Workdays injury. Also the Respondent provided evidence that this mine is in "Non-Producing Status", has no production crew and none of the belts are currently in operation, and when verified through reviewing the Uniform Mine File of record at MSHA, this mine was placed in "Non-Producing Status" on 09/06/2016. The Respondent further argues that management was not aware of the condition and would have promptly corrected the condition as soon as management was made aware of the condition. The Respondent asserts that there was not a "Confluence of Factors", no ignition source identified, along this belt that would cause and/or contribute to a belt fire. Also, the Respondent would argue that there was normally only one miner working and/or traveling within the cited area and would request the number of persons affected be modified from "2" to "1'. However, the respondent agrees to pay a reduced penalty and there will be no change to the violation as issued. The Secretary acknowledges that any or all of respondent's arguments regarding gravity or negligence may be persuasive at a hearing on the merits and has agreed, based on evidence presented, to reduce the proposed penalty *in consideration of the six statutory criteria in Section 110(i)* of the Federal Mine Safety and Health Act of 1977 as amended by the MINER Act of 2006 (the Act).

Motion at 4-5 (emphasis added).

The Court calls attention to four observations from the Secretary's Motion in *Triad*. First, the Motion demonstrates that the Secretary is not confused; he knows full well what needs to be provided to the Commission when inclined to respect the command of section 110(k). Second, the Secretary recognizes that *facts* which are in dispute need to be identified. Third, it is neither difficult nor burdensome to gather such facts to explain the basis for the reduced penalty. Fourth, the Secretary recognizes that such disputed facts must be tied to the six statutory criteria in Section 110(i), a requirement the Commission has made plain.[8] As the Commission stated less than a year ago:

> The requirements to provide *factual support in the settlement proposal* and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979… The Commission has recognized that standards for such factual support may be found in section 110(i).

[8] While the Secretary asserted in *American Coal* that it is inappropriate for a judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement, the Commission directly stated, "We disagree." *The American Coal Company*, 38 FMSHRC 1972, 1981 (Aug. 2016). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1864 (Aug. 2012).

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016) ("*American Coal*") (emphasis added).

Now, with a zombie-like persistence, the Secretary refuses yet again to comply with the Commission's explicit direction, a direction the Secretary implicitly accepted by its recent decision to file, on March 16, 2017, his *Motion to Withdraw* its Petition with the Court of Appeals for the District of Columbia. Motion at 1 (emphasis added).

As with the Secretary's original, insufficient, justification in February 2013 for its 30% across-the-board reduction, its new offering, while dressed-up, is just as empty as its original formulation because it again provides *no facts* to support the reduction sought. In the Court's original rejection of the Secretary's Motion, issued in February 2013, it noted the "impossibly small odds," that each of the 32 citations warranted a 30% penalty reduction. 35 FMSHRC at 515. As set forth below, the Secretary now offers a host of non-factual excuses, untethered to any specific citation. Further, there is no information associating any of the citations to the statutorily identified penalty factors. While wordier, the Secretary sets forth its new justification and again, against all odds, miraculously arrives at the same conclusion it served up four years ago — a 30% across-the-board reduction. The translation of all this is, effectively, "*we were right all along*."

Here then, is the Secretary's latest offering:

> Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute… If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. … The

> Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act. … Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. … Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. … Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

The Secretary confuses logorrhea with providing factual support. They are not the same. The long-winded statement is easily translatable — the Secretary's position has not changed; he continues to assert that settlements are within the Secretary's unreviewable discretion. The essential problem with the Secretary's latest motion is that it does not provide a penalty-factor related explanation to support the uniform 30%, reduction for each citation.

Importantly, in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again*

before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion, if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Nor can the non-factually based language be viewed as a one-off event. That the Secretary would now take this dressed-up formulation of non-compliance for future cases is not speculation. In other recent settlements the Secretary has been providing similar, uninformative, language, to wit:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

See, e.g., the settlement motions filed by the Secretary in *Omega Highwall*, VA 2016-0008 (April 26, 2017), *Edgar Minerals*, SE 2017-0029 (April 27, 2017), and *Greenbrier*, WEVA 2017-0091 (April 26, 2017), each of which contain this verbiage.

Meeting the requirement of Section 110(k) requires that civil penalties are to be assessed upon the Commission considering:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.[9]

[9] Included here for the sake of completeness, the remainder of section 110(i) then speaks to the distinct subject of the Secretary's *proposing* civil penalties by providing: "In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

30 U.S.C. 820(i); *American Coal* at 1977.

The Commission, in its August 25, 2016 decision in this case, left no room for the apparent confusion or obstinate stance that the Secretary has renewed here.

As the Commission stated:

> [t]he legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the 'compromising of the amounts of penalties actually paid' had reduced 'the effectiveness of the civil penalty as an enforcement tool.' S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("Legis. Hist."). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned 'that to a great extent the compromising of assessed penalties [did] not come under public scrutiny,' and that '[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are not on the record.' *Id.* It noted that even after a petition for civil penalty had been filed, 'settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge.' *Id.*
>
> In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that 'the purpose of civil penalties, [that is,] convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public,' where miners, Congress, and other interested parties 'can fully observe the process.' *Id*. at 633. 'To remedy this situation,' section 110(k) 'provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission' and that a 'penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court.' *Id.*
>
> 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 off-the-record negotiations are avoided*." *Id*. (emphasis added). Congress expressed its 'inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties.' *Id*.

American Coal at 1975-76.

Anticipating the type of empty settlement the Secretary has presented yet again in this case, the Commission set forth its standard for reviewing proposed settlements of contested penalties. The Commission's standard, based upon the language of section 110(k) and the

legislative history for that section, is designed "'in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.' . . . The Commission's consideration of proffered settlements has worked well for more than 35 years. *Id.* at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862).

Thus, the Commission summarized that it:

> must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit *facts* supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and *facts* in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that "[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). The requirements to provide *factual support* in the settlement proposal and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979. See 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).

Id. at 1981 (emphasis added).

Conclusion

Now, more than four years later, the Secretary continues to refuse to provide any facts to support the proposed settlement of 32 reduced penalties. The game is over. Given that Counsel for the Secretary has represented in its current motion that it has, "reviewed the *entire* case, including *all* 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case,"[10] there can be no need for the delay resulting from depositions, nor is there any other impediment to proceeding immediately to hearing in this matter.

William B. Moran
Administrative Law Judge

[10] *See*, Sec's Motion at 2 (emphasis added).

Appendix II

Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute… If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. … The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act. … Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. … Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. … Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not

depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

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