FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 24 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0340 A.C. No. 20-02529-468328
v.	
AMERICAN AGGREGATES OF MICHIGAN, INC. Respondent	Mine: Ray Road Plant

ORDER ACCEPTING APPEARANCE, REJECTING SETTLEMENT, RECUSING UNDERSIGNED, REQUESTING REASSIGNMENT, AND CERTIFYING CASE FOR INTERLOCUTORY REVIEW

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary of Labor ("Secretary") submitted a motion to approve settlement of this matter. For the reasons that follow, the undersigned declines to approve the proposed settlement agreement and requests that this matter be reassigned to another judge for hearing on the merits. Furthermore, the undersigned certifies, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that this interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding.

I. STATEMENT OF THE CASE

This matter involves a single alleged violation, Order 8952500 ("Order"). The Order was issued on May 17, 2018 pursuant to Section 104(g)(1) of the Mine Act. The Order alleges that:

> [A miner] – Drill Operator, had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine. [The miner] had no previous mining experience. The mine operator was aware of the Part 46 training requirements. The mine operator must withdraw [the miner] from the mine until he receives the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Pet. for Civil Penalty at 11. The inspector marked the likelihood of injury as reasonably likely and the expected injury or illness as fatal. The inspector listed the violation as significant and substantial ("S&S"), with one person affected. The inspector recorded the level of negligence as high. The Order was terminated on May 21, 2018, after the miner received requisite safety training.

On February 14, 2019, the Secretary submitted a motion to approve settlement ("Motion"). The Secretary sought to reduce the proposed assessment from $2,007.00 to $132.00. The Secretary also sought to modify the likelihood of injury from reasonably likely to unlikely, the severity of injury from fatal to lost workdays or restricted duty, and the level of negligence from high to moderate, and to remove the S&S designation. Motion at 2. In support of these modifications, the Secretary offered the following:

> Respondent argued that the "reasonably likely," "fatal" and "high" negligence designations are not supported by the facts. Respondent asserts that [the miner] was not a driller but was a Driller's Helper. Respondent contends that [the miner] had received, at the time the order was issued, 19.5 hours of OSHA related classroom training, had received 4 hours of New Miner Training and had received on-the-job training working directly with its driller. Respondent concedes that on the day of the inspection [the miner] had not received training on all seven subject required by 30 C.F.R. 46.5 including 46.5(b)(4) 46.5(b)(5), 46.5(b)(6) and 46.5(b)(7), and the MSHA training that [the miner] had received had not been properly documented. Respondent stated that although [the miner] had no previous mining experience, he did have approximately one month of experience working with its driller as a Driller's Helper taking core samples at a non-mine property being considered for purchased [sic] for future mining. Respondent avows that [the miner]'s work off mine property was the exact same work conducted with the same drill rig the day the withdrawal order was issued. . . . Applying the penalty tables found at 30 C.F.R. § 100.3, these modifications result in a revised assessment of $132.00.

Id. at 3.

After reviewing the proffered basis for modifying the Order, the undersigned requested clarification on several portions of the motion that were unclear or unconvincing. Specifically, the undersigned stated:

1. The judge is also uncertain how the parties determined the violation was not significant and substantial given Respondent admits the miner did not have training on "[i]nstruction on the health and safety aspects of the tasks to be assigned" (30 C.F.R. § 46.5(b)(4)) and the "rules and procedures for reporting hazards" (30 C.F.R. § 46.5(b)(7)), such training is a mandatory safety standard under Section 115 of the Mine Act, Section 104(g)(1) expressly requires a declaration that the miner is "a hazard to himself and to others," and the Respondent acknowledges that the injury would still potentially result in lost workdays or restricted duty.

2. The judge is concerned about the Respondent's contention that it was "unaware that the training the miner received" was not sufficient to satisfy 30 C.F.R. § 46.5(b) given that the operator knew or should have known what training was required under 30 C.F.R. § 46.5 before the miner could begin work, acknowledged that it failed to properly document the training it asserts it gave him, and conceded that the miner had not been trained on 30 C.F.R § 46.5(b)(4)-(7) when the Order was issued.

3. The judge is concerned about the size of the reduction in penalty that accompanies the modifications to the Order, especially in light of the concerns outlined above. The reduction ends up being approximately 93-94% of the original proposed assessment amount of $2,007.00.

E-mail from Brendan Porter, Attorney Advisor to Administrative Law Judge Thomas P. McCarthy, to MSHA Conference and Litigation Representative George F. Schorr (Feb. 14, 2019, 16:23 PM EST). Mr. Schorr responded to the requests for further clarification, as follows:

> The Secretary respectfully relies upon the settlement motion as it was filed. The Secretary relies on the requirements of settlement language as set out in the recent decision from the FMSHRC in *American Coal Co.*, LAKE 2011-13, FMSHRC August 2, 2018. The Secretary asserts that the settlement motion includes a description of the "fact [sic] on which the parties have agreed to disagree." *American Coal*, page 9. Further, the settlement motion demonstrates "the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." Id.

E-mail from George F. Schorr, MSHA Conference and Litigation Representative, to Brendan Porter (Feb. 21, 2019, 17:17 PM EST) (italics added). On February 28, 2019, the undersigned offered the parties one last opportunity to address the substantive concerns outlined above. E-mail from Judge Thomas P. McCarthy to the parties (Feb. 28, 2019, 2:17 PM EST) (italics added). The Secretary's representative again demurred and stated that "[t]he Secretary respectfully requests the judge reduce to an Order any requests for additional information or objection to the settlement." E-mail from George F. Schorr, MSHA Conference and Litigation Representative, to Judge Thomas P. McCarthy (Mar. 1, 2019 9:12 AM EST).

II. LEGAL PRINCIPLES AND ANALYSIS

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. Sec. 820 (k). The legislative history describes the Congressional rationale in great detail. The Senate Report states that the "compromising of the amounts of penalties actually paid" has 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 its investigation of the penalty collection system under the Federal Coal Mine Safety and Health Act

of 1969 revealed "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.* To remedy this problem, 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.* This "legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so." *The American Coal Co.*, 38 FMSHRC 1972, 1976 n.5 (Aug. 2016) (*American Coal I*).

Based on the language of section 110(k) and its legislative history, the Commission reaffirmed in *Black Beauty* that Congress authorized 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." 34 FMSHRC at 1862 (citations omitted). To effectuate this Congressional mandate, the Commission in *American Coal I* held that the Commission and its Judges must "consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." 38 FMSHRC at 1976.

The Commission has repeatedly observed that a Judge's "front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (citations omitted). As the Commission also observed in *American Coal II:*

> Judges must have sufficient information to determine if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest. Moreover, such information permits a Judge to fulfill the duty of articulating reasons for the approval [or rejection] so that the process of compromising penalty amounts is transparent, as Congress intended. A Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. (footnote 6 omitted) *See Black Beauty*, 34 FMSHRC at 1863.

American Coal Co., 40 FMSHRC 983, 991 (Aug. 2018) (*American Coal II*).[1]

[1] The Commission ruled in footnote 6 that "some Commission Judges have a practice of seeking additional information from parties when evaluating a proposed settlement, and that this procedure works effectively. Oral Arg. Tr. 21-22, 31-32, 34-35, 50, 75-76. If a party believes that a Judge has overstepped his or her authority or otherwise committed an abuse of discretion in requesting such facts, a party may appeal that matter to the Commission on an interlocutory basis. *See Solar Sources, Inc.*, Unpublished Order dated May 16, 2018 (granting interlocutory review of 39 FMSHRC 2052 (Nov. 2017) (ALJ))." *American Coal II*, 40 FMSHRC at 991 n.6.

Applying these principles, I find that the proposed settlement is not reasonable, appropriate under the proffered facts, or in furtherance of the public interest. The Secretary seeks to reduce the proposed penalty assessment from $2,007.00 to $132.00. This amounts to an approximate 93.5% reduction in the penalty amount. While a significant reduction in the proposed assessment amount is not impermissible as part of a proposed settlement agreement, the steep reduction invites closer scrutiny of the facts presented to ensure that the settlement is "fair, reasonable, appropriate under the facts, and in the public interest," consistent with Commission precedent.

As a threshold matter, the admitted facts do not support removal of the S&S designation. The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that the "reasonable likelihood" language in *National Gypsum* does not require the violation itself to create a reasonable likelihood of injury; a showing that the hazard contributed to by the violation can be reasonably likely to result in an injury is sufficient to affirm an S&S designation. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation;[2] (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[3] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel*

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[2] Step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

[3] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp.*, 811 F.3d at 160 (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Mining Co., 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation also considers the length of time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[4]

Section 104(g)(1) of the Mine Act states that, if a representative of the Secretary finds a miner "who has not received the requisite safety training as determined under section 115 of this Act [30 U.S.C. § 825], the Secretary or an authorized representative *shall* issue an order under this section which declares such miner *to be a hazard to himself and to others*, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act." 30 U.S.C. § 814(g)(1) (emphasis added).

In the proffered factual basis for settlement, both parties acknowledge that the miner did not have all of the mandatory safety training. The parties agree that on the day of the inspection, the miner had not received "[i]nstruction on the health and safety aspects of the tasks to be assigned" (30 C.F.R. § 46.5(b)(4)) and the "rules and procedures for reporting hazards." (30 C.F.R. § 46.5(b)(7)). Such training is a mandatory safety standard under Section 115 of the Mine Act. Section 104(g)(1) declares that such an untrained miner is "a hazard to himself and to others." The parties agree that the injury expected to result from the untrained miner violation is likely to result in lost workdays or restricted duty. Given these undisputed facts and principles of law, the Secretary can offer no persuasive explanation for why the violation should be modified by removing the S&S designation, other than the fact that is just more convenient to make this violation go away.[5] Accordingly, I conclude that the Secretary failed to adequately explain why the modifications to the Order are "appropriate under the facts" within the meaning of *American Coal I.*

The Secretary argues that he is merely required to present facts upon which the parties have "agreed to disagree" and that the facts need not raise a "legitimate disagreement that can only be resolved by a hearing." *American Coal II*, 40 FMSHRC at 991. This is not a situation,

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[4] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

[5] It should be noted that this Order neither challenges the Secretary's discretion to initially designate a violation as S&S nor raises the issue of whether a judge on his own initiative can designate a violation as S&S. *Cf. Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996). Rather, the question is whether a Commission judge must accept—once the Secretary has already designated a violation as S&S—a settlement of an S&S violation that is not fair, reasonable, or appropriate under the facts, and does not protect the public interest.

however, where the parties have agreed to disagree. Rather, the undersigned's review of the proffered settlement agreement indicates that the parties have agreed to fundamental, undisputed facts that would establish an S&S violation: the miner had not received the required mandatory training, rendering him "a hazard to himself and to others" according to the express language in the Mine Act, and there is a reasonable likelihood that the untrained-miner hazard contributed to by the violation will result in an injury that would result in lost workdays or restricted duty.[6]

Contrary to the Secretary, *American Coal II* does not dictate that the undersigned approve this settlement agreement. In fact, that decision counsels toward the opposite conclusion in fulfillment of my statutory obligations to review settlement agreements to ensure consistency with Commission precedent and the purposes of the Act. In *American Coal II*, the parties agreed to a 30% reduction in the overall proposed assessment in the penalty docket without changing the paper text of any the citations. *Id.* at 989. The Commission agreed with the parties that "the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Id.*

In the present settlement agreement, by contrast, the parties seek to modify the likelihood of occurrence, the severity of injury, the S&S designation, and the negligence of the underlying Order. In addition, the parties seek to reduce the proposed penalty by well-nigh 94%. Almost any future enforcement benefit that the Secretary might derive from the Order, as written, has been almost completely eliminated by the proposed extensive modifications to the paper text of the Order.[7] While there is likely still some marginal enforcement benefit to the modified Order,

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[6] Based on this determination, the undersigned finds it appropriate to recuse himself from any hearing on the merits in this matter, and requests that the Acting Chief Judge reassign this matter to another judge for hearing.

[7] The Secretary includes the following language in every motion to approve settlement that he submits to the Commission:

> 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.

it is nowhere near as substantive as the terms of the settlement in *American Coal II*, and nowhere near as substantive as the terms of the original Order.

Beyond failing to be fair, reasonable, and appropriate under the facts, the Motion fails to protect the public interest. The Mine Act was passed in 1977 in response to several accidents that caused the deaths of dozens of miners. As noted, Congress in particular was concerned with what it viewed as a pervasive practice of erstwhile regulators within the Department of the Interior, who surreptitiously sold out the public interest to protect our nation's miners based on a cozy relationship with mine operators. Specifically, the Senate Report stated 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 1971*, at 632. The facts here elicit concerns that this is the same type of convenient or misguided sellout that Congress sought to guard against when lodging final approval for settlement agreements in contested cases with the Commission.

The Secretary asks that I approve a 93.5% penalty reduction, as well as modifications to nearly every portion of the original Order issued for violation of a mandatory training standard, enshrined in the text of the Mine Act, on the basis of admitted facts that bear no interpretation other than the fact that Respondent violated the Act by allowing an untrained miner to work as a hazard likely to result in lost workdays or restricted duty injury to himself and other miners. The Secretary insists that the Commission has no right to seek clarification of the facts submitted to justify a settlement motion and that the Secretary has no obligation to respond to questions from Commission Judges regarding how he reached the conclusions he did in the settlement motion. Assuming arguendo that the Secretary is correct,[8] the undersigned is not obligated to approve a settlement agreement that lacks factual support and fails to be fair, reasonable, and appropriate under the facts, and to protect the public interest. Other than transparency, the undersigned sees little substantive distinction between MSHA's approach to the proposed settlement resolution in this case and the pre-1977 enforcement regime that led to creation of the Commission's settlement approval authority in the first instance.

Under section 110(k), Commission judges do not act as a rubber stamp for the Secretary's proposed settlement agreements. As outlined above, the proposed Settlement Agreement in this case lacks probative factual support, contains substantive admissions that amount to an S&S designation, contravenes Commission precedent, and collides with

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Motion at 2. Irrespective of the merits of such regularly-inserted and practical language, the undersigned notes that one Commissioner in *American Coal II* cogently observed that "[t]he Secretary's boilerplate recitations of having evaluated the value of the compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing" to the factual basis in support of settlement. *American Coal II*, 40 FMSHRC at 989 n.10 (Cohen, C.).

[8] *But see Solar Sources, Inc.*, Unpublished Order dated May 16, 2018 (granting interlocutory review of 39 FMSHRC 2052 (Nov. 2017) (ALJ)).

Congressional intent to protect the health and safety of our mining industry's most precious resource, our miners. Accordingly, the Secretary's Motion to Approve Settlement is **DENIED**.

Under Commission Procedural Rule 76, 29 C.F.R. § 2700, the undersigned certifies, on his own motion, that this interlocutory ruling involves a controlling question of law and that, in his opinion, immediate review will materially advance the final disposition of the proceeding. This Decision Rejecting Settlement raises similar issues to those currently before the Commission on assignments of error in *Solar Services, Inc.*, 39 FMSHRC 2052 (Nov. 2007) (ALJ). As such, there is a question of law that would materially advance the final disposition of the proceeding, to wit, whether the undersigned abused his discretion in denying the Secretary's Motion to Approve Settlement. *See American Coal II*, 40 FMSHRC at 987 ("The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard.").

This interlocutory ruling is hereby **CERTIFIED** under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. It involves a controlling question of law and interlocutory review will materially advance the final disposition of the proceeding.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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