

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 22, 2022

SECRETARY OF LABOR  
 MINE SAFETY AND HEALTH  
 ADMINISTRATION (MSHA),  
 Petitioner

v.

PERRY COUNTY RESOURCES,  
 Respondent

CIVIL PENALTY PROCEEDING(S)

Docket No. KENT 2022-0024  
 A.C. No. 15-19015-546383

Mine: E4-2

**ORDER**

Before the Court is the Secretary’s Motion to Approve Settlement of the citations and order involved in this matter. The parties move to modify one of the citations, as stated below. The penalty would be reduced accordingly, from the original assessed amount of **\$1,470.00** to **\$1,204.00**.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modification
<b>KENT 2022-0024</b>			
9282163	\$302.00	\$302.00	Admitted violation of 30 C.F.R. §75.380(d)(1) involving primary escapeway on 1 West Mains No modification, paid as assessed
9282162	\$336.00	\$336.00	Admitted violation of 30 C.F.R. §75.202(a), also involving primary escapeway on 1 West Mains No modification, paid as assessed but 104(b) order issued and not in the record
9282123	\$530.00	\$264.00	Modified to “Low” negligence, <b>50% penalty reduction</b> Yet another escapeway related violation, this time involving the secondary

			escapeway – directional lifeline not maintained
9282125	\$302.00	\$302.00	Admitted violation of 30 C.F.R. §75.1722 moving machine part tailpiece guard not maintained No modification, paid as assessed
<b>Total</b>	<b>\$1,470.00</b>	<b>\$1,204.00</b>	18% Total Penalty Reduction

The Court reviewed the Motion and the draft Order submitted by the Secretary. Upon doing so, a problem was revealed. The record for this docket is not complete because the official record for Citation No. 9282162 is missing the documents regarding a section 104(b) order issued in connection with that citation. The Secretary may not elect to hide official documents in connection with Mine Act enforcement actions from public view.

Before addressing the missing section 104(b) order, it is necessary to step back and examine the underlying section 104(a) citation. Citing a violation of 30 C.F.R. §75.202(a), that standard, titled “Protection from falls of roof, face and ribs,” requires that “[t]he 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).

The MSHA inspector issued the Citation, No. 9282162, on October 25, 2021, and informed under the condition or practice section that “[t]he roof bolt plates are missing, due to rusting, on several roof bolts along the primary escapeway entry on the 1 West Mains. The missing plates extend from crosscut #5 to crosscut #22 in various locations. This condition exposes miners to hazards of roof fall dangers. **Draw rock has fallen into the roadway in these locations. The weekly examiner travels this area one time a week.**” (emphasis added).

In his evaluation, the Inspector marked the injury as reasonably likely to occur, resulting in lost workdays or restricted duty. Accordingly, he listed the violation as “significant and substantial.” The negligence was marked as “moderate.” Though originally the inspector marked the termination of the violation to be due the next day, October 26<sup>th</sup>, thereafter the operator requested additional time to abate the violation for “spot bolt[ing] the roof in the cited location,” with the delay needed to “get[] the bolt machine to the area.” The inspector granted the additional time, with the new termination date of October 29, 2021 by 3 p.m.

The record does not reveal whether the extended termination date was met, though one may presume it was not, because Exhibit A for this docket reveals that a section 104(b) order was issued. It is that information which is missing from the record and about which the Secretary has refused to supply it. The Court requested that the Secretary supply the missing documents related to the section 104(b) order. The Secretary’s non-attorney representative, a conference and litigation representative, (“CLR”), Gary W. Oliver, refused to supply the missing documentation. In an email, Mr. Oliver stated “[t]he (b) order requested is not related to the single violation modified in this settlement, Citation No. 9282123. The underlying violation to the (b) order, Citation No. 9282162 has been affirmed and as reflected to the Exhibit A, the good faith abatement discount was not given. Therefore there is no compromise of penalty for Citation

No. 9282162 requiring the court's approval pursuant to Section 110(k). The Secretary requests an order approving or denying the motion to approve settlement as filed." E-mail from Gary W. Oliver, CLR, MSHA (May 31, 2022).

The Court responded that it did not see the matter as the CLR did, informing that "each citation/order, being part of the docket, is within [the Court's] authority to conduct an informed review. [The Court added] that it doesn't speak well of MSHA to hide information under cover of a settlement. As [the Court] told [the CLR] in an earlier email today, the order is part of the public record. It should have been in the official record, yet it is not there. If [the CLR] do[es] not want the order to see the light of day, [the Court] think[s] that is an unwise course of action as the representative charged with protecting the safety and health of miners. As former Supreme Court Justice Louis Brandeis stated: 'sunlight is said to be the best of disinfectants.' If you refuse to comply, [the Court] will have no choice but to file a FOIA request and in [the Court's] ruling on the motion to approve settlement [it would have] to take note of the agency's unwillingness to provide public record information for this admitted violation." June 14, 2022 email from the Court to the parties.

Thereafter, on June 13, Emily Toler Scott, an attorney for the Secretary, entered her appearance.<sup>1</sup>

## DISCUSSION

The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. Citation No. 9282162 is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation, No. 9282162. The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.

A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein ... and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by

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<sup>1</sup> On behalf of the Secretary, on June 13, 2022, Attorney Toler Scott filed a Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review. That motion will be addressed in a separate order.

the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase “order under section 104” in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary’s notification of the proposed assessment of penalty.... 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA’s regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) (“Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.”).

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

**[T]he Secretary is to similarly notify operators and miners’ representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)].* The notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977),

*reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622-23 (1978).*

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, ‘the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.’ 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) (‘Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.’).

*UMWA v. Maple Creek Mining*, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A).<sup>2</sup> The legislative history, as also cited by the Commission, makes this plain: “[t]he notice of proposed **penalty** to operators in such cases shall state that a [104(b)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.*” *Id.* at 593. (emphases added).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners’ representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well aware that its review of settlements is presently cabined within the terms of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court’s review role has become statistically perfunctory.<sup>3</sup> However, there is still an

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<sup>2</sup> In that connection, as noted above, the Commission observed that in circumstances of such failures, the Secretary is to notify the operator of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure. Under such circumstances the Secretary may assess steep, daily, penalties. Those penalties may now be up to \$8,101.00 per day. 30 C.F.R. Part 100.5(c) (2021).

<sup>3</sup> As Commission Chairman Arthur Traynor and Commissioner Mary Lu Jordan have noted, judges applying this precedent are able to approve 99.96% of settlement motions submitted for their review. *See AmCoal I*, 38 FMSHRC at 1977 n.7 (noting that in a five-year period from

obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.<sup>4</sup>

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example, Argus v. U.S. Dept Agriculture*, 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, 5 U.S.C. § 552. To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).

For these reasons, the Court **ORDERS** the Secretary to disclose all documents pertaining to the issuance of the section 104(b) order associated with Citation No. 9282162.

*William B. Moran*

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William B. Moran  
Administrative Law Judge

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approximately 2011 to 2016, Commission Judges approved 38,501 settlements and denied only 17); *Hopedale Mining*, 42 FMSHRC 589, 604, n.2 (Aug. 2020) (Commissioners Jordan and Traynor, dissenting).

<sup>4</sup>The 104(b) Order, presently hidden from the record, is of additional concern because five minutes after issuing Citation 9282162, the inspector issued another Citation, No. 9282163, citing a separate safety hazard in the same escapeway.

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