FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER GRANTING MOTION TO CONTINUE, DEFERRING RULING ON MOTION TO BIFURCATE DOCKET, GRANTING CERTIFICATION OF QUESTION FOR INTERLOCUTORY REVIEW

Respondent moved to continue the hearing scheduled for July 25, 2023, because of issues with witness availability for deposition and pending decisions on docket bifurcation and certification for interlocutory review of issues related to this Court's denial of a proposed partial settlement. *See* Mot. to Continue, Docket No. WEVA 2023-0141, at 1–2 (June 23, 2023). The Secretary has similarly expressed such intent. *See* Email from Robert S. Wilson, Attorney for the Department of Labor, to Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young (June 26, 2023; 8:56 a.m. ET).

The Secretary previously moved to bifurcate two unresolved citations from four proposed for settlement. *See* S. Mot. to Bifurcate Docket, Docket No. WEVA 2023-0141, at 1 (June 12, 2023); *see also* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 2 (May 9, 2023). I denied the proposed settlement, not on the merits of the contentions in support, but on the Secretary's continued misstatement of two cases I previously held inapposite to the Secretary's asserted unfettered authority to remove S&S designations. *See* Order Den. Mot. to Approve Settlement & Striking Material from Mot., Docket No. WEVA 2023-0141, at 1–3 (May 11, 2023).

Acknowledging the parties' discovery issues, and for the reasons set forth below, I hereby **GRANT** Respondent's motion to continue the hearing, **DEFER** ruling on the Secretary's motion to bifurcate the docket pending certification and decision by the Commission on the motion to certify an issue in this case for interlocutory review, and **CERTIFY** for interlocutory review the question impeding consideration of the motion to approve settlement.

I. Continuance of This Matter is Appropriate and Will Best Facilitate the Efficient Resolution of the Issues Before Me.

The Secretary had requested that the citations proposed for settlement be bifurcated from those that appear to be progressing toward a resolution at hearing. The operator has now moved to continue those matters.

I generally disfavor continuance for unresolved discovery, but I have approved an amendment of the gravity and negligence findings, and it is important to ensure that the operator is not prejudiced by that decision. *See* Order Granting S. Mot. to Amend Pet., Docket No. WEVA 2023-0141, at 2 (June 16, 2023). Furthermore, a continuance may allow related matters to be tried together, eventually. I therefore find it appropriate to continue the matter and to defer ruling on the motion to bifurcate until such time as it appears that the issues either must or may not be tried together.

II. Certification of the Settlement Issue for Interlocutory Review is Appropriate.

I am skeptical of the need to certify for interlocutory review an issue that may not even be a question of law, let alone a controlling question. Furthermore, as explained below, there is no reason why the Secretary should not comply with an order to remove material that a tribunal has deemed to be offensive. As has been explained *ad nauseum* to the Secretary, these cases have no bearing on the questions before me and will not be considered. Therefore, their absence will not affect the resolution of any issue before me.

It would seem then that the more appropriate course would be to require the offending materials to be excluded, and to permit the Secretary to appeal the question of a tribunal's authority to govern the proceedings before it *after* a final order has been issued. However, I do not have contempt or other power to enforce such an order.

I further note that the Secretary seems not to care whether a final adverse order is issued or not. In a recent case, she appealed an *approved* settlement, apparently having conflated "adversely affected or aggrieved," in section 113(d)(2)(A)(i) of the Act, with "annoyed." *See* S. Pet. for Discretionary Rev., Docket No. WEVA 2023-0092 (June 9, 2023) ("Pocahontas PDR"). While the Commission certainly does have the authority to grant review of important questions without a finding that a party has been adversely affected by a judge's order, *see* 30 U.S.C. § 823(d)(2)(B) (2023), it is telling that the Secretary sought, again, to impose her priorities on the Commission.

I will therefore **CERTIFY** the following questions to the Commission for interlocutory review, in order to break the impasse and permit this case to proceed toward resolution:

1. Whether a Commission Judge may exclude, strike from the record, and refuse to consider material that is scandalous, impertinent, irrelevant, or otherwise inappropriate; and
2. If so, whether the citations to *Mechanicsville Concrete* and *American Aggregates of Michigan* are excludable on that basis.

The parties are further **ORDERED** to continue coordinating with the Court to schedule a new hearing date and effect discovery as permitted by the procedural posture.

III. The Secretary's Citation to *Mechanicsville Concrete* and *American Aggregates of Michigan* Is Not the Result of a "Good Faith" Disagreement, but Rather a Blatant and Obvious Misstatement of the Law.

While I have certified the question for interlocutory review, it is important for the Commission to understand why I have sanctioned the Secretary in this case. The Secretary has asserted that there is some relationship between *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (Aug. 2020), and the question pending review—i.e. "Whether the Secretary has unreviewable discretion to remove an S&S designation." *See* Pocahontas PDR at 2–3. But the language cherry-picked from those decisions, and relied upon by the Secretary, cannot support this groundless argument.

For example, *Mechanicsville Concrete* noted that there is "no material difference between the Secretary's [unreviewable] discretion on the one hand to vacate a citation . . . and his discretion on the other hand not to designate a citation as S&S." Pocahontas PDR at 4 (citing *Mechanicsville Concrete*, 18 FMSHRC at 879). But as the Secretary well knows, there *is* a material difference here.

This case is not in an enforcement posture, where the Secretary has the discretion conferred by Congress and discussed at length in *Mechanicsville Concrete*. This case is before the Commission. And just as Congress granted the Secretary authority over enforcement, it granted adjudicatory authority to the Commission, not to the Secretary. *See* 30 U.S.C. § 830(k) ("No proposed penalty *which has been contested before the Commission* shall be compromised, mitigated, or settled *except with the approval of the Commission.*") (emphasis added). This is black-letter statutory law.

A close reading of *Mechanicsville Concrete*—not the thoughtless recitation of an out-of-context quote that the Secretary would have us consider as an "argument"—thus reveals a disturbing irony. Congress' choices in crafting the Mine Act, and the Commission's respect for the language and structure ordered by Congress are the very bedrock of that decision.

The respect is obviously not mutual. Just as the Commission affirmed in *Mechanicsville Concrete* that the Secretary's authority to assess S&S in the first instance is an enforcement function, the Commission also has affirmed—in accordance with the clear language of the Act—that the Commission, and not the Secretary, is responsible for approving settlements once a matter has been placed before the Commission. *See The Am. Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal I*"); *The Am. Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*").[1] The Secretary, though, continues to pretend as though this didn't happen—that she had somehow

[1] It is worth noting that *Mechanicsville Concrete* was decided decades before the Commission decisions in the *AmCoal* cases, which as explained, *infra*, unquestionably control the review of settlements by the Commission and its judges.

prevailed in a matter that entitles her to cite as authority cases that have nothing to do with the Commission's established standards for the approval of settlements.

The citation to *American Aggregates of Michigan* is even more problematic. The language cited by the Secretary, *see* 42 FMSHRC at 576, is clearly dicta. It appears in a section titled "Commission Review" that begins by reaffirming that "*Congress vested the Commission with authority to approve settlements of contested assessments*," citing the language of the Act in section 110(k) of the Act and the Commission's decision in *AmCoal I*. *Id.* at 575 (emphasis added).

In concluding in the next section of the opinion that the judge erred in not approving the settlement, the Commission led by clearly articulating the applicable legal standard, adopted in *AmCoal I*: "[T]he Commission and its judges consider whether the settlement of a proposed penalty is 'fair, reasonable, appropriate under the facts, and protects the public interest.'" *Id.* at 576. The Commission further noted that its review must ensure that "a judge's approval or rejection of a settlement" must be "'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Id.* (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012)).

The disposition nowhere mentions or relies upon the Secretary's exercise of prosecutorial discretion but concludes instead that the Judge "erred by denying the settlement on the basis of an inappropriate legal determination on S&S based on an undeveloped record and in contravention to the facts presented by the parties in support of the settlement." *Id.* at 577. That is the holding of the case, and any second-semester law student who could not recognize it as such would be well advised to seek another line of work.

There is, of course, more firmament supporting the unmistakable basis for the holding. The Commission noted that the problem was that the Judge's decision was "not supported by the facts presented by the parties" and "misapprehended the correct legal standard" established by the Commission in the *AmCoal* cases. *Id.* at 577.[2]

In case there was any doubt about the governing standard applicable to settlements, and the authority for administering that standard, the Commission concluded its disposition by observing, again, that

> Primary authority to approve settlements of contested proposed assessments is vested by Congress to the Commission. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1976. While such authority may be delegated to the Judges, the

[2] The Commission identified nine distinct factual circumstances related to the proposed gravity and negligence modifications, cited by the parties in the settlement motion, which should have been considered by the Judge, but were not. *See* 40 FMSHRC at 578–79. I concede the possibility that the Commission may find similarly deficient my evaluation of the facts in *Knight Hawk* and/or the other S&S cases I have rejected. But it is beyond question that my analysis will be assessed in accordance with the *AmCoal* standards.

> Commissioners retain such full authority to approve such settlements. Accordingly, we find the proffered penalty to satisfy *AmCoal*.

Id. at 581.

This is all from a case that the Secretary cites as support for her position that she has unreviewable discretion to remove an S&S designation in settling a matter that has been contested before the Commission. Where? *How*? The continued misuse of this authority amounts to a breach of the ethical duty of candor to the tribunal or a woeful ignorance of the law and how it operates, either of which reflects a flagrant disrespect for the law and the tribunals entrusted with its administration.

The operative subtext here is that the Secretary has repeatedly tried to wrest from the Commission its statutory responsibilities under the Act. In addition to challenging the Commission's authority to approve settlements in the *AmCoal* cases, the Secretary proposed a rule requiring the Commission to assess penalties in accordance with 30 C.F.R. Part 100, despite Congress' clear grant of independent authority to assess penalties under the Act. *See* 30 U.S.C. § 820(i); *Criteria and Procedures for Assessment of Civil Penalties*, 79 Fed. Reg. 44,494, 44,510–11 (July 31, 2014).

The intransigence continues with the offense present in this case. We are at this point because the Secretary has disregarded an order. Told not to include citations to cases that, as fully explained above, are not merely irrelevant to the issue for which they are offered but offensive to constitutional order, she has insisted on citing the cases anyway.[3]

One case, *Mechanicsville Concrete*, stands for the inverse of the Secretary's argument—i.e., the Commission held that Congress' assignment of responsibilities under the Mine Act must be respected. The other case, *American Aggregates of Michigan*, emphatically and unquestionably reinforces the Commission's *AmCoal* standard for reviewing settlements under the Act and cannot be read to support the Secretary's assertion that her authority must instead be unreviewable under any standard.

Perhaps the Secretary cites these cases because she has no real legal support for her position. A true "good faith argument" in favor of expanding the scope of her unreviewable discretion would rely on the D.C. Circuit's decision in *Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006). Of course, citation to *Twentymile* would spotlight the glaring incongruity between the pure enforcement action there and the settlement review authority present here.

[3] It is not the Secretary's claim of unreviewable discretion itself—which is on review before the Commission—that has offended this Court, but the continued citation to cases I have ordered not be proffered before me because the patently have nothing to do with the issue on review or the issues before me in any proposed settlement. The Secretary need not cite them in support of her position, because they have no persuasive force, but she has nonetheless consciously chosen to disobey my order not to cite them.

Such review would also be required to concede that far from the absence of standards under which review of purely prosecutorial decisions might be conducted, *see id.* at 155 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)), the Commission has spoken clearly in establishing such standards for the approval of settlements. And the Commission has also provided a standard for determining whether a violation of a mandatory health or safety standard is S&S.[4]

Beyond that, the Commission, and not the Secretary, is entitled to deference in the interpretation and administration of sections 110(i) and (k) of the Act, because Congress vested authority for the administration of those provisions in the Commission. And if ever there was a time when reflexive deference to the Secretary might have held some currency, that hour has passed.

The Supreme Court has narrowed considerably the requirement to defer to the Secretary's interpretation of her regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019).[5] Further, there is a growing recognition of the separation of powers problems inherent with combined prosecutorial and adjudicatory authority. *See Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) ("Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it.").

The Commission does not have the latter problem, because Congress chose to separate enforcement from adjudication under the Act. The sanctity of that choice was recognized in *Mechanicsville Concrete* and its fulfillment has been evinced by the Commission's decisions in the *AmCoal* cases and cases, including *American Aggregates of Michigan,* controlled by the standards enunciated therein.

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[4] I have not made an S&S determination in rejecting any proposed settlement. Instead, I have affirmed every settlement agreement removing an S&S designation for which the answer to the question, "Would the Secretary be entitled to summary decision on the S&S question based on the facts presented by the parties?" has been, "No."

[5] It should also be noted that section 110(k) was enacted to prevent abuses of discretion by the Secretary, specifically regarding unsupported settlements that did little to enforce the Act and protect miner safety. *AmCoal I*, 38 FMSHRC at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862) ("[T]he 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."); *id.* (quoting S. Rep. No. 95-181, at 44, *reprinted in Senate Subcommittee* on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978)) ("'By imposing [the] requirements' of section 110(k), it 'intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of the off-the-record negotiations* are avoided.'"). The Secretary should not have the authority to interpret the provision to limit Commission review and enable the offensive settlements Congress intended to prevent.

It is thus abundantly clear that the Secretary's defense of the continued citation to these cases is meritless. Aristotle said, "The law is reason, free from passion." But citations to the law, free from reason, are simple nonsense. Once the lack of any reasonable basis for an asserted legal authority has been pointed out to an attorney *by a judge*, it is incumbent on that attorney to cease engaging in malpractice. The issue presented here is about more than the mere choices made in the citation of cases. While I have certified a question for interlocutory review, an unasked and important question is, "Who determines the appropriate minimum standards of competence and conduct before a tribunal—the tribunal or a party litigant?"

Is there a county magistrate anywhere in the country who would not be offended by the mere suggestion of this inversion of authority? I doubt it, and if the Commission has any self-regard, it will rebuke the Secretary, as I have done, for her disregard for constitutional order and the rule of law, manifested in her continuing contempt for the authority of the Commission and its decisions and orders.

Michael G. Young
Administrative Law Judge

Attachments:

Appendix A: Secretary of Labor's Motion to Approve Partial Settlement, Docket No. WEVA 2023-0141 (May 9, 2023)

Appendix B: Order Denying Motion to Approve Settlement and Striking Material from Motion, Docket No. WEVA 2023-0141 (May 11, 2023)

Appendix C: Secretary of Labor's Motion to Bifurcate Docket, Docket No. WEVA 2023-0141 (June 12, 2023)

Appendix D: Secretary's Motion for Certification for Interlocutory Review and Stay Pending Review, and Renewed Motion to Bifurcate, Docket No. WEVA 2023-0141 (June 20, 2023)

Appendix D: Motion to Continue, Docket No. WEVA 2023-0141 (June 23, 2023)

Appendix E: Decision Approving Settlement With Significant Reservations, Docket No. WEVA 2023-0092 (May 12, 2023)

Appendix F: Secretary's Petition for Discretionary Review, Docket No. WEVA 2023-0092 (June 9, 2023)

Distribution:

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APPENDIX A

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0141 Assessment Control No. 46-09569-568207
v.	:	
Consol Mining Company LLC, Respondent	:	Mine ID: 46-09569 Mine: Itmann No. 5 Administrative Law Judge Young

SECRETARY OF LABOR'S MOTION TO APPROVE PARTIAL SETTLEMENT

The Secretary of Labor files this Motion to Approve Partial Settlement, and in support hereof respectfully submits the following.

1. This case involves six 104(a) citations of which four the parties have reached agreement on a settlement. The two remaining citations (Nos. 9590300 and 9590301) are scheduled for hearing July 25, 2023. The Mine Safety and Health Administration ("MSHA") proposed civil penalties for the citations at issue in accordance with the statutory penalty criteria in § 110(i) of the Mine Act, 30 U.S.C. § 820(i). The penalties were regularly assessed pursuant to 30 C.F.R. § 100.3
2. Respondent is the operator of the Itmann mine, Mine ID Number 46-09569, the products of which enter commerce, or the operations or products which affect commerce within the meaning of Section 4 of the Act.
3. Representatives for the parties have considered the alleged violations, the six statutory criteria stated in § 110(i) of the Act, and other non-monetary considerations that fall outside of § 110(i) but that support settlement, and propose to modify the penalties for the settled citations as follows:

Citation	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation
9569452	$1,869	$840	Modify negligence to low
9569457	$563	$133	Modify from reasonably likely to unlikely and from S&S to Not S&S
9569459	$133	$133	Modify negligence to none
9569462	$909	$407	Modify negligence to low
Total	$3,474	$753	

4. The legal standard for evaluating proposed penalty reductions is whether the proposed reductions are fair, reasonable, appropriate under the facts, and protect the public interest. *American Coal Company*, 40 FMSHRC 983, 987 (Aug. 2018) (citing *American Coal Company*, 38 FMSHRC 1972, 1976 (Aug. 2016)).

5. Consistent with Commission precedent, the Secretary has evaluated the enforcement value of the compromise and is maximizing his prosecutorial impact in partially settling this case on appropriate terms. See *American Coal Company*, 40 FMSHRC 983, 989 (Aug. 2018). Further, the Secretary has considered the deterrent value of the penalty and obtaining a partial resolution to this matter. See *American Coal Company*, 40 FMSHRC 765, 766 n.1 (June 2018). A partial resolution of this matter in which some violations are resolved is of significant enforcement value to the Secretary. The fact that the Secretary modified the citations in this case is immaterial, as the Secretary's evaluation of these citations, as modified, remain preserved for future enforcement actions and are not subject to potential vacatur or further downward adjustment after a hearing.

6. To assist the Commission in evaluating whether the proposed penalty reductions are fair, reasonable, adequate under the facts, and in the public interest, the Secretary presents the following information. As described more fully below with respect to each citation, and

unless otherwise stated, the parties agree to disagree, and the proposed penalty modifications to these citations are acceptable to the parties in lieu of the hearing process.

A. Citation 9569452 – Respondent argues the condition was likely caused by equipment tramming through the area and could have occurred at any time without management's knowledge. MSHA recognizes that condition could have occurred at any time and without warning. The parties have agreed that the citation shall be modified to low negligence with a recalculation of the penalty from $1,869 to $840 per Part 100.

B. Citation 9569457 – Respondent argues that the cited area was infrequently traveled because it was on the tight side of the belt, between the rib and the belt, and was in an outby area. Respondent also argues that the cited section of rib was not likely to fail, required significant force with a pry bar to pull and disputes the statement that the section of rib was pulled with little effort. Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)). The parties have agreed that the citation shall be affirmed as otherwise issued and the penalty is recalculated to $133 per Part 100.

C. Citation 9569459 – Respondent would argue at hearing that the citation should be vacated because the cited fire suppression system was in proper working condition and free of any defects. The cited condition was the normal result of mining in the face and the material would have been removed prior to taking the

next cut. The parties have agreed to settle the citation by modifying the negligence to none. The penalty remains at $133.

D. Citation 9569462 – Respondent argues that the cited materials resulted from a combination of spillage, sloughage o the ribs and the scoop cleaning the area creating windrows. The parties agree to modify the citation to low negligence which lowers the penalty to $407 per Part 100.

7. In accordance with 29 C.F.R. § 2700.31(b)(2), the undersigned representative for the Secretary certifies that Respondent has authorized the Secretary to represent that Respondent consents to the granting of this motion for approval of partial settlement and the entry of the proposed Order Approving Partial Settlement.
8. The parties submit that the foregoing penalty reductions are fair, reasonable, appropriate under the facts, and protect the public interest.
9. The parties agree to bear their own attorney's fees, costs, and other expenses incurred by the parties in connection with any stage of the above referenced proceedings, including attorney's fees which may be available under the Equal Access to Justice Act, as amended.
10. Except for proceedings under the Act, nothing contained herein is intended by Respondent to constitute an admission of a violation of the Act or regulations. Further, except for proceedings under the Act, nothing contained herein is intended by Respondent to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.
11. Within 30 days of an order approving this settlement, the Respondent shall pay a penalty of $753.00 at www.pay.gov or by sending a check made payable to "U.S. Department of

Labor/MSHA" and mailed to the following address: P.O. Box 790390, St. Louis, MO 63179-0390.

WHEREFORE, the parties move the Administrative Law Judge to approve the above partial settlement agreement pursuant to 29 C.F.R. § 2700.31 and to order payment of the proposed penalty of $753.00.

Mailing Address:

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U.S. Department of Labor
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Respectfully submitted,

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Solicitor of Labor

April E. Nelson
Associate Solicitor for Mine Safety and Health

Jason Grover
Counsel

/s/Robert S. Wilson
Robert S. Wilson
Attorney

UNITED STATES DEPARTMENT OF LABOR

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023, a copy of the foregoing Secretary of Labor's Motion to Approve Partial Settlement was served by Electronic Mail on the following:

James P. McHugh
jmchugh@hardypence.com

Craig Aaron
craigaaron@consolenergy.com

/s/Robert S. Wilson
Robert S. Wilson
Attorney

APPENDIX B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is.* Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing

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[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

unless and until a motion that meets the standards of practice before the Commission has been filed.

Michael G. Young
Administrative Law Judge

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APPENDIX C

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR (MSHA) Petitioner, v. CONSOL MINING COMPANY, LLC, Respondent.	)))))))))	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-141 A.C. No. 46-09569-568207 Mine: Itmann No. 5 Mine ID: 46-09569 **The Honorable Judge Michael Young**

SECRETARY OF LABOR'S MOTION TO BIFURCATE DOCKET

The Secretary moves that the Administrative Law Judge issue an Order bifurcating this docket into two dockets so that the case can proceed to hearing on the two unresolved citations in the docket and so the Secretary can pursue an appeal of the May 11, 2023, Order Denying Motion to Approve Partial Settlement and imposing sanctions issued by the ALJ.

1. This docket contains six 104(a) citations. The parties reached a settlement agreement resolving four of the citations. The parties have not reached settlement of the two remaining citations, Nos. 9590300 and 9590301. A hearing is scheduled for July 25, 2023. The parties are engaged in ongoing discovery and hearing preparation for the two unresolved citations. Depositions are scheduled for June 28 and 29. The Secretary recently filed a motion to amend the petition seeking to increase the gravity and negligence findings for the two unresolved citations and to seek correspondingly increased penalties. (See Secretary of Labor's Motion to Amend Petition dated June 6, 2023)

2. The Secretary filed a Motion to Approve Partial Settlement on May 9, 2023, seeking approval of the penalty reductions agreed to by the parties on the four settled citations. The Administrative Law Judge issued an Order Denying Motion to Approve Settlement and Striking

Material from the Motion dated May 11, 2023. That Order denied the motion to approve partial settlement, imposed sanctions on the Secretary and threatened additional more severe sanctions in the future. The purpose of this current motion is to advance the progress and resolution of this case and does not address the merits of the court's May 11 Order. However, the Secretary has filed a Petition for Discretionary Review with the Commission, seeking review of that Order, dated June 9, 2023.

3. Meanwhile, the parties are faced with uncertainty on how to proceed with the matter. The parties continue to prepare for hearing on the two citations that have not been settled but it is unclear how that hearing will proceed. The parties do not want to expend time and resources on the four citations on which the parties agree. On the other hand, the parties do not want to appear at the hearing and be unprepared to address citations that the court expects to be addressed. Additionally, the issues raised and addressed in the Order Denying Partial Settlement do not apply to the two remaining citations in the docket that have not been settled.

4. As a solution to the above stated uncertainty and the conundrum that the parties face, the Secretary moves that the court issue an Order bifurcating Docket WEVA 2023-0141 into two dockets. The newly created docket would contain the two citations not addressed in the Secretary's Motion to Approve Partial Settlement. The four citations that are addressed in that motion would remain in Docket WEVA 2022-411. The Secretary will pursue appropriate appellate remedies to challenge the denial of the motion, the imposition of sanctions and the threat of additional more severe sanctions. The remaining citations, Nos. 9590300 and 9590301, could then be addressed apart from that dispute and would proceed to hearing on July 25.

5. Delaying resolution of the citations not directly involved in the May 11 Order would negatively impact the administration of the Act and would be contrary to the safety promoting

purpose of the Act. A primary purpose of the Act is to protect miners from hazardous conditions. The company has challenged the S&S findings for the two remaining citations. Citation 9590300 involves an inadequately insulated electrical trailing cable exposing miners to an electrical shock or electrocution hazard. Citation 9590301 involves an inadequately supported section of rib which exposed miners to a rib fall hazard. Consol's refusal to acknowledge that these violations contributed to these serious hazards and posed a serious risk of injury raises concerns about Consol's future compliance with the Act. A final resolution of these citations and imposition of an appropriate civil penalty will encourage compliance and will promote protection of Consol's workforce.

6. From the company's perspective, expeditious resolution of the citations is also important. Should Consol prevail on the S&S issues, prompt resolution of those issues is important because the mine's pattern of violations status is based on issued citations and so long as the citations remain unresolved, those violations count towards the mine's POV status.

7. There are additional reasons why prompt finality of the violations at issue promotes the efficient administration of the Act. Pursuant to Part 100.3(c) of the Secretary's penalty regulations, violations are not counted as part of a mine's history of violations until the violation is final. Bifurcating this matter will allow the other citations at issue to become final while the settlement dispute is resolved. Bifurcation and separately addressing the remaining citations will also allow for the timelier imposition of civil penalties for those violations. Prompt assessment and collection of civil penalties for final violations promotes the purpose of the Act and delay in the assessment and collection of those penalties has the opposite effect. Civil penalties are recognized as an important tool in encouraging compliance by mine operators. Allowing these citations to flounder while the settlement issue is resolved will undercut the purpose of the Act

by unnecessarily delaying the finality of those violations and the imposition of civil penalties. Resolution of the issue raised in the court's May 11 Order could conceivably take years pending consideration by the Commission and then possibly a court of appeals.

8. For the above reasons, the Secretary moves that an Order be issued bifurcating Docket WEVA 2023-0141 into two separate dockets, that the hearing scheduled for July 25 proceed and be limited to consideration of Citations 9590300 and 9590301.

9. The undersigned has conferred with counsel for Consol and he has indicated that Consol takes no position on the motion at this time but reserves the right to file a response to the motion pursuant to Commission Rule 10(d).

WHEREFORE, the Secretary moves that an Order be issued bifurcating this docket, creating a new docket, transferring Citation Nos. 9590300 and 9590301to the new docket, and proceeding on those citations as discussed above.

Mailing Address:

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U. S. Department of Labor
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Respectfully submitted,

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Counsel for Trial Litigation

/s/Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

Attorneys for Secretary of Labor (MSHA)

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, a true and correct copy of the foregoing Secretary of Labor's Motion to Bifurcate was sent via email attachment to:

James P. McHugh
jmchugh@hardypence.com

/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR (MSHA) Petitioner, v. CONSOL MINING COMPANY, LLC, Respondent.	)))))))))	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-141 A.C. No. 46-09569-568207 Mine: Itmann No. 5 Mine ID: 46-09569 **The Honorable Judge Michael Young**

SECRETARY'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW AND STAY PENDING REVIEW, AND RENEWED MOTION TO BIFURCATE

The Secretary moves that the Administrative Law Judge certify for interlocutory review this question: whether the May 11, 2023, Order Denying Motion To Approve Settlement And Striking Material From Motion is an abuse of discretion. The Secretary also renews her motion to bifurcate and moves for stay of part of the bifurcated docket pending interlocutory review. This will enable the Secretary to appeal the May 11 order while not delaying the resolution of the rest of this case.

Background

1. On May 9, 2023, the Secretary filed a motion to approve partial settlement in this case. The motion explained that the Secretary decided to modify the negligence on three violations in this docket, and on a fourth, to modify the gravity and remove the S&S designation.

2. On May 11, 2023, the Administrative Law Judge issued an order denying that motion and sanctioning the Secretary for articulating her legal position—currently on appeal—that she has unreviewable discretion to remove S&S designations. The order also said that the Secretary should expect increasingly severe sanctions if the Secretary articulates that position in the future.

3. On May 12, 2023, in *Pocahontas Coal Company LLC*, WEVA 2023-0092, the Administrative Law Judge issued an Order Approving Settlement with Significant Reservations in which he put the Secretary's representative on notice that articulating the Secretary's position on S&S removals would result in future sanctions.

4. On June 9, 2023, the Secretary filed a petition for discretionary review of both the May 11 order in this case and the May 12 *Pocahontas* order with the Commission.

5. On June 16, 2023, the Commission granted the Secretary's petition in *Pocahontas* but denied it, without prejudice, in this case. The Commission reasoned that the May 11 order was not a final Administrative Law Judge's order, so interlocutory review was the appropriate way to obtain Commission review. The Commission also noted that the Secretary's motion to bifurcate is pending, and that bifurcating this matter "would both facilitate potential Commission interlocutory review and prevent any unintentional delays leading up to the scheduled hearing on the unresolved citations."

Certification for Interlocutory Review

6. Interlocutory review is appropriate when a ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. 2700.76(a)(1)(i).

7. The May 11 order is based on two legal conclusions: that the Secretary does not have unreviewable discretion to remove S&S designations, and that it is a sanctionable misstatement of law to take the position that she does. If those conclusions are wrong, then the order is an abuse of discretion. *The Am. Coal Co.*, 38 FMSHRC 1972, 1984 (Aug. 2016) ("An abuse of discretion may be found . . . if the decision is based on an improper understanding of the law."). The Secretary seeks certification of questions that will determine whether those conclusions are

wrong. Those questions therefore are controlling, and certification and would materially advance the final disposition of the proceedings. See Wright & Miller, *Federal Practice and Procedure* § 3930 (3d ed.) ("There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings.").

8. Certification also is appropriate because the same question—whether it is an abuse of discretion to sanction the Secretary for articulating her legal position on S&S removals—is now pending review in *Pocahontas*. There is no briefing schedule in that case yet, so certification would not delay the resolution of the issue, and it would be efficient to permit the Commission to resolve this case at the same time as it resolves *Pocahontas*.

Bifurcate

9. The Secretary renews her June 12, 2023, motion to bifurcate. It would be efficient to bifurcate this case for the reasons explained in that motion, and for the reasons contained in the Commission's order denying discretionary review in this case.

Stay Pending Review

10. If the motion to bifurcate is granted, the Secretary moves for a stay of this docket (containing the four settled citations, not the docket containing the two citations to be tried) pending interlocutory review. A stay would allow the underlying legal issues to be resolved, allow the Secretary to preserve her legal position, and allow the parties to preserve the settlement to which they have agreed.

11. The Administrative Law Judge has stayed other similar cases in which settlement denials are pending interlocutory review by the Commission. *See, e.g.*, Order Denying Certification for Interlocutory Review and Staying Proceedings, *Peabody Gateway N. Mining,*

LLC, No. LAKE 2023-0043 (FMSHRC Mar. 8, 2023) (ALJ); Order Denying Mot. to Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Bluestone Oil Corp.*, Nos. WEVA 2022-0176 et al. (FMSHRC Oct. 31, 2022) (ALJ). It would be fair to Consol, and to the Secretary, to take the same approach in this case.

12. The undersigned has conferred with counsel for Consol; it takes no position on the Secretary's motion.

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Respectfully submitted,

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/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

Attorneys for Secretary of Labor (MSHA)

Certificate of Service

I hereby certify that on June 20, 2023, a true and correct copy of the foregoing motion was sent via email attachment to:

James P. McHugh
jmchugh@hardypence.com

/s/ Robert S. Wilson
Robert S. Wilson
Senior Trial Attorney

APPENDIX E

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

May 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0092 A.C. No. 46-08878-565698
v.	
POCAHONTAS COAL COMPANY LLC, Respondent	Mine: Affinity Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citation at issue was $3,171.00, and the proposed settlement amount is $2,695.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550934	$169.00	$169.00	None.
9550935	$169.00	$169.00	None.
9550936	$169.00	$169.00	None.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550403	$133.00	$133.00	None.
9550937	$169.00	$169.00	None.
9550938	$169.00	$169.00	None.
9550939	$183.00	$183.00	None.
9550940	$169.00	$169.00	None.
9550941	$198.00	$198.00	None.
9550942	$188.00	$188.00	None.
9550943	$169.00	$169.00	None.
9550404	$169.00	$169.00	None.
9557339	$610.00	$134.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S," and negligence from "Moderate" to "Low."
9551135	$169.00	$169.00	None.
9551136	$169.00	$169.00	None.
9551137	$169.00	$169.00	None.
Total	**$3,171.00**	**$2,695.00**	

The parties have set forth the justification for the modifications in the motion filed by the Secretary. As required by the Mine Act, I have reviewed the motion and penalty criteria and evaluated the proposed settlement pursuant to the requirements set forth in Sections 110(i) and 110(k). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violation has been considered. The negligence and gravity of the violation are addressed in the motion, in the citations, and in the file in general.

Citation 9557339 concerns a failure to conduct a required methane test. The cited provision states:

> A qualified person shall make tests for methane—(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

30 C.F.R. § 75.362(d)(1)(iii) (2023). The citation reads, in part:

> The roof bolt operators installing permanent roof support on the No. 3 active section (005-0 / 002-0 MMU's) in the 5X6 cross-cut exceeded the 20 minute required methane test. The roof bolt operators were being observed installing bolts, when 25 minutes elapsed and no attempted [sic] was made to take the required methane test. Asked the operators what time was the last methane test was [sic] taken, both operators could not say when the methane test was made.

> The roof bolting machine was shut off and an examination was made with an extendable probe and large display CH4 detector. This mine is on a 10 day methane spot.

Citation No. 9557339 (Sept. 8, 2022).

The Secretary submitted a settlement motion on April 19, 2023, but I expressed my reservations caused by the inadequate support for the removal of the S&S designation. *See* Email from Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young, to Douglas W. Johnson, CLR, MSHA (Apr. 20, 2023; 10:25 a.m. ET). In her amended motion, the Secretary provided more thorough Respondent contentions challenging the likelihood of the hazard occurring:

> The Respondent would have argued at hearing that no methane was found on the section during numerous pre and on-shift examinations prior to the issuance of this citation and that this is normal for this mine. Though this mine does liberate substantial amounts of methane and is a "spot" inspection mine, most methane enters the mine's ventilating area from worked out areas where methane enters the mine through cracks in the mine floor from a coal seam below that develop after a panel or area has been mined.
>
> The mine had no prior history of methane inundations from active workings of the mine nor any history of methane ignitions. The Respondent would have argued that a hazardous accumulation of methane in the face area where this bolting machine was operating was highly unlikely and virtually impossible with even a modest quantity of ventilating air. The quantity of ventilating air in this face area where the roof bolter was operating was in compliance with the mine's approved ventilation plan which experience has shown to be more than capable of diluting hazardous gases including methane and dust, rendering them harmless and carrying them away.
>
> The inspector, a roof control specialist, observed the roof bolting crew perform work in this area for approximately twenty-five (25) minutes before issuing this citation. Had the inspector reasonably believed that the cited condition presented a hazard, such that the condition warranted an S&S issuance, then he likely would not have permitted the miners to be unnecessarily exposed to the alleged S&S hazard for an additional five (5) minutes. Additionally, the area was nearly bolted and only a few minutes work remained to complete the bolting cycle. Thus, the miners were near the face area at the time of issuance and no methane was detected at any time.
>
> Both of these roof bolter operators carried properly calibrated multi-gas detectors which would have provided an alarm of elevated methane should it be encountered. Upon issuance of the citation, they backed the roof bolting machine out of the cut and ran the remote "probe", containing a methane detector, up into the face area to take the required 20 minute gas check as part of the abatement

> effort. The probe went just as far as the two miners had been standing moments before with their own multi-gas detectors. No methane was found by the remote probe.

S. Mot. to Approve Settlement, at 3–5 (May 11, 2023).

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

I find the contentions meet the bare minimum standards for relevance and plausibility to support removal of the S&S designation. The Secretary provides multiple Respondent contentions that are precedentially irrelevant to an S&S analysis. The hazard contemplated by the cited provision is the ignition of methane. The following contentions do nothing to challenge the likelihood of the hazard occurring, or any of the other *Mathies* elements.

An S&S analysis assumes the continuation of normal mining operations without abatement of the violative condition. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement of inference that the violative condition will cease.").

Respondent's contentions that no methane was found during pre- and on-shift inspections, that there is no history of methane inundations, and that no methane was found in the test made to abate the violation, are therefore irrelevant. Respondent was conducting roof bolting operations, and methane accumulations have been found to occur without warning—thus requiring compliance with provisions that prevent possible ignition sources, like permissibility requirements. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014) ("[G]iven the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur."). As I assume a methane build up at a gassy mine is reasonably likely to occur suddenly during continued operation, any reference to a lack of methane, past or present, is irrelevant to my evaluation.

Commission judges may not consider redundant safety measures in an S&S evaluation. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028–29 (D.C. Cir. 2013) ("'[C]onsideration of redundant safety measures,'—that is, 'preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely'—'is inconsistent with the language of [Section] 814(d)(1).'"). Multi-gas detectors, both personnel- and equipment-based, are redundant safety measures, on top of the requirement to conduct regular tests, aimed at preventing the hazard. References to such are therefore irrelevant to challenge S&S.

The Secretary, nonetheless, appropriately challenged the likelihood of the hazard by citing the available ventilation and time of violation. While lacking specificity and being minimally persuasive, Respondent contended that the quantity of ventilating air may have been demonstrated as sufficient to prevent ignition. I also recognize, to a miniscule extent, the minimal time Respondent was allegedly in violation.[1]

While I am skeptical of the decision to delete the S&S designation, the explanation in the motion is not facially implausible. It is possible that at hearing, if supported by substantial evidence, the violation might not be proved to be S&S. Applying the *American Coal* factors to the settlement as a whole, I have also considered that all of the other violations have been accepted as issued, and that the reduction in the overall penalty is minimal.

I separately emphasize that the Secretary again inappropriately asserted her authority to remove S&S designations, citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–80 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020). S. Mot. at 5. I have repeatedly explained, as have other Commission judges, that these cases are irrelevant to my evaluation of the proposed removal of S&S designations in settlement. *See*, *e.g.*, Order Accepting Appearance & Denying Mot. to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023).

I made clear to the Secretary that this constitutes misstating the law, and I cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me. *Id.* As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice.

Having considered the representations and documentation submitted, I find that the modifications are minimally reasonable, and concede, with noted concern, that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

It is **ORDERED** that for Citation No. 9557339, the gravity be **MODIFIED** from "Reasonably Likely" to "Unlikely," and the "S&S" designation be removed, and the negligence be **MODIFIED** from "Moderate" to "Low."

---

[1] I do not accept the contention that the inspector's failure to cite for five minutes demonstrates his belief that the hazard was not likely, nor is that an appropriate consideration. I simply acknowledge that the combination of the purported quantity of ventilating air and the short duration of exposure might demonstrate at hearing that the hazard was unlikely to occur.

It is also **ORDERED** that the Respondent pay the Secretary of Labor the sum of **$2,695.00** within 30 days of the date of this decision.[2]

Michael G. Young
Administrative Law Judge

Distribution (by email):

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[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

APPENDIX F

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Mine Safety and Health Administration (MSHA), Petitioner v. Pocahontas Coal Company LLC, Respondent	Docket No. WEVA 2023-0092

Secretary's Petition for Discretionary Review

The Secretary seeks review of part of the judge's May 12, 2023 order in this case. (A copy is attached as Exhibit A.) The order sanctions the Secretary for articulating the Secretary's legal position about her authority to remove S&S designations—an issue that is on appeal—by putting the Secretary's CLR "on notice" and threatening to bar the CLR from practicing if the CLR articulates that argument again. The Secretary seeks review of the part of the order putting the CLR on notice and threatening future sanctions, because a necessary legal conclusion is erroneous, and because that part of the order is contrary to law and involves substantial questions of law, policy, and discretion. See 30 U.S.C. 823(d)(2)(A)(ii)(II), (III), (IV).

The issue presented for review is: did the judge abuse his discretion by sanctioning the Secretary for articulating the Secretary's legal position, and by threatening to sanction the Secretary for articulating that legal position in the future?

Background

1. The Secretary's position on removing S&S designations

In fall 2021, the Judge Young denied a motion to approve settlement in a case involving three violations. Ord. Denying Mot. to Approve Settlement, *Knight Hawk Coal, LLC*, No. LAKE 2021-0160 (FMSHRC Sept. 30, 2021) (ALJ Young). The operator accepted one violation as issued and decided to pay the proposed penalty; Secretary decided to reduce the gravity from reasonably likely to unlikely, and to remove the S&S designation, on two violations. The Secretary filed a motion to approve settlement, and then in response to the judge's request for more facts, two amended motions. The motions provided facts in support of the gravity reduction and articulated the Secretary's longstanding position that she has unreviewable discretion to remove an S&S designation. The motion cited *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (Aug. 2020) to support this position. The judge denied the motion because, in his view, the Secretary had not provided enough facts to justify removing the S&S designation on one violation. *Knight Hawk* Ord. 3-5. The Secretary then filed a motion to certify for interlocutory review the question of whether the Secretary has unreviewable discretion to remove an S&S designation; the judge certified the question, and on April 7, 2022, the Commission directed review.

Later in 2022, the judge denied two other settlements and certified the same question for interlocutory review. Ord. Denying Mot. To Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Bluestone Oil Corp.*, Nos. WEVA 2022-0176, WEVA 2022-0350 (FMSHRC Oct. 31, 2022) (ALJ Young); Ord. Denying Mot.

To Approve Settlement, Certifying Case for Interlocutory Review, and Staying Proceedings, *Greenbrier Minerals, LLC*, Nos. WEVA 2022-0403 (FMSHRC Nov. 22, 2022) (ALJ Young). The Commission directed review in both cases. And in March 2023, the judge stayed another case pending the same issue, but did not certify for interlocutory review; he reasoned that "[c]ertification will not materially advance the proceeding's final disposition—the question has already been pending before the Commission for 11 months, and it seems unlikely that a grant of interlocutory review here will accelerate a decision on the question and may delay one." Ord. Denying Certification for Interlocutory Rev. and Staying Proceedings, *Peabody Gateway N. Mining, LLC*, No. LAKE 2023-0043 (FMSHRC Mar. 8, 2023) (ALJ Young).

While the appeal has been pending, the judge has rejected the Secretary's position but approved settlements in many cases. See, *e.g.*, *Appalachian Res. W. Va.*, Nos. WEVA 2022-0464, WEVA 2022-0590 (FMSHRC Jan. 10, 2023) (ALJ Young); *Casella Constr. Inc.*, No. YORK 2022-0068 (FMSHRC Dec. 5, 2022) (ALJ Young); *Raw Coal Mining Co., Inc.*, No. WEVA 2022-0297 (FMSHRC Oct. 7, 2022) (ALJ Young). Sometimes the judge has approved settlements without remarking on the Secretary's position at all. See, *e.g.*, *Phillips & Jordan, Inc.*, Nos. SE 2022-0092 et al. (FMSHRC Jan. 3, 2023) (ALJ Young); *Prospect Mining & Dev. Co., LLC*, Nos. SE 2022-0034, SE 2022-0035 (FMSHRC Oct. 20, 2022) (ALJ Young).

On appeal, the Secretary has argued that she has unreviewable discretion to remove S&S designations, supporting that argument in part with the Commission's decisions in *Mechanicsville* and *American Aggregates*. See Brief for the Sec'y of Lab. at 3-5, *Bluestone Oil*

Corp., Nos. WEVA 2022-0176, WEVA 2022-0350 (Jan. 6, 2023); Brief for the Sec'y of Lab. at 3-5, *Greenbrier Minerals, LLC*, No. WEVA 2022-0403 (Jan. 5, 2023); Brief for the Sec'y of Lab. at 4-5, 11-12, *Knight Hawk Coal, LLC*, No. LAKE 2021-0160 (May 9, 2022). In *Mechanicsville*, the Commission said that there is "no material difference between the Secretary's [unreviewable] discretion on the one hand to vacate a citation . . . and his discretion on the other hand . . . not to designate a citation as S&S." 18 FMSHRC at 879. And in *American Aggregates*, the Commission held that the judge abused his discretion by rejecting a settlement in which the Secretary removed an S&S designation because the judge did not believe that removal was justified; the Commission said that "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion," so that "if MSHA does not charge an S&S violation, the Commission cannot make an S&S finding. Commission Judges do not have the discretion to make such elevated finding unless it is asserted in the first instance by MSHA." 42 FMSHRC at 576 (citation to *Mechanicsville* omitted). Since the appeal has been pending, when the Secretary has filed motions to approve settlement in cases in which the Secretary has decided to remove an S&S designation, the Secretary has continued her longstanding practice of articulating that she has discretion to do so, citing *Mechanicsville* and *American Aggregates*.

The Commission has not decided the S&S-removal cases. Judges have taken different approaches to settlements in which the Secretary has removed an S&S designation. Sometimes judges do not comment on the Secretary's position. See, *e.g.*, *Knight Hawk Coal, LLC*, No. LAKE 2023-0095 (FMSHRC Apr. 19, 2023) (ALJ Paez); *W.A. Murphy*

Inc., No. WEST 2023-0005 (FMSHRC Apr. 19, 2023) (ALJ Manning); *Quikrete Cos., Inc.*, No. CENT 2023-0003 (FMSHRC Apr. 18, 2023) (ALJ Bulluck); *Twin State Mining, Inc.*, No. WEVA 2022-0391 (FMSHRC Jan. 24, 2023) (ALJ Sullivan); *Continental Cement Co.*, No. CENT 2022-0236 (FMSHRC Jan. 10, 2023) (ALJ Simonton); *Consol Penn. Coal Co. LLC*, No. PENN 2022-0061 (FMSHRC Jan. 10, 2023) (ALJ Lewis). Sometimes judges reject the position but consider the merits of the settlement. See, *e.g.*, *Hibbing Taconite Co.*, No. LAKE 2022-0176 (FMSHRC Jan. 26, 2023) (ALJ McCarthy); *Appalachian Res. W. Va., LLC*, No. WEVA 2022-0554 (FMSHRC Jan. 24, 2023) (ALJ Moran); *Grimes Rock, Inc.*, No. WEST 2022-0336 (FMSHRC Dec. 30, 2022) (ALJ Miller).

2. Recent ALJ orders on S&S removals

On April 25, 2023, Judge Moran issued an "Order Approving Settlement with Significant Reservations." *Consol Pennsylvania Coal Co., LLC*, No. PENN 2022-0129 (FMSHRC Apr. 25, 2023) (ALJ Moran) (Ex. B). In it, Judge Moran said that citing *Mechanicsville*[1] for the S&S-removal position was a violation of an attorney's "obligation not to misstate case law" and told the Secretary to "cease invoking that decision for propositions not supported by it." *Id.* at 6. The judge also asserted that Federal Rule of Civil Procedure 11, which requires attorneys to ensure that the "legal contentions [in a pleading] are warranted by existing law or by a nonfrivolous argument for extending, modifying, or

[1] That motion to approve settlement did not cite *American Aggregates*, which may explain why the judge did not discuss it.

reversing existing law or for establishing new law," is implicated by the Secretary's position. Fed. R. Civ. P. 11(b)(2); Ex. B at 6.

About a week later, without reaching the merits of the settlement, Judge Young issued an order denying a settlement that removed two S&S designations. Ord. Accepting Appearance & Ord. Den. Mot. to Approve Settlement, *Extra Energy, Inc.*, No. WEVA 2023-0071 (FMSHRC May 4, 2023) (ALJ Young) (Ex. C). In it, the judge disapproved of the Secretary's position on S&S removals, saying that it is inappropriate to cite *Mechanicsville* and *American Aggregates* because "[t]hese cases are known by now to be invalid as authority for the principles they claim to represent." *Id.* at 7. The judge quoted Judge Moran's order, noted that Rule 11 sanctions may be imposed for "misstating" the law, and threatened to impose sanctions:

> There are minimum standards of practice in every tribunal, including this one. Erroneous mischaracterizations of precedent fail to meet those standards and will not be tolerated. A CLR who cites these cases, falsely, in a subsequent motion as they have been cited here may be barred from practice before me. There may be other consequences.

Ibid. (footnote omitted). In a footnote, the judge also said that "Although these cases were included by a pleading drafted by a CLR, I would expect an attorney to know better, and a transgression against the law of this sort by an attorney would be even more egregious." *Ibid.* n.5. The judge also served the Department of Labor's CLR Coordinator, an attorney in the Division of Mine Safety and Health in the Office of the Solicitor, even though the attorney had not entered an appearance. The judge did not acknowledge that the S&S-removal issue is on appeal.

About a week after *Extra Energy*, the judge issued an order denying settlement and sanctioning the Secretary by striking from the record the Secretary's position on S&S removals.[2] Order Denying Mot. to Approve Settlement and Striking Material from Mot., *Consol Mining Co. LLC*, WEVA 2023-0141 (FMSHRC May 11, 2023) (ALJ Young) (Ex. D). Ignoring any review under Section 110(k), the judge discussed his order in *Extra Energy*, then said that this settlement motion contained the same "offending citations," which are "obviously inappropriate" and "impertinent." *Id.* at 2. The judge sanctioned the Secretary's representative by striking from the motion to approve settlement the Secretary's position on S&S removals and threatened to impose more severe sanctions in future cases: "those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued." *Ibid.* Finally, the judge denied the settlement "without reaching the merits." *Ibid.*

3. This case

The day after his order in *Consol*, the judge issued the order in this case. See Ex. A. The case involves 16 violations. The operator accepted 15 as issued and decided to pay the proposed penalties; the Secretary decided to modify one violation by reducing the gravity and negligence and removing the S&S designation. (That was Citation No. 9557339, which alleged a violation of 30 C.F.R. 75.362(d)(1)(iii) for roof bolters that failed to take methane checks every 20 minutes.)

[2] The Secretary filed a petition for discretionary review of this order concurrently with this petition for discretionary review.

Consistent with the Secretary's position on appeal, the motion to approve settlement provided facts supporting the reduction in gravity and negligence and articulated the Secretary's position that she may remove S&S designations without Commission approval, citing *American Aggregates* and *Mechanicsville*. Although the judge approved the settlement, the judge "separately emphasize[d] that the Secretary again inappropriately asserted her authority to remove S&S designations," cited his order in *Extra Energy*, and "cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me." Ex. A at 5. The judge said that, "As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice." *Ibid.*

The judge also served the order on the Department of Labor's CLR Coordinator, an attorney in the Division of Mine Safety and Health in the Office of the Solicitor, even though the attorney had not entered an appearance. The judge did not acknowledge that the S&S-removal issue is on appeal.

Argument

1. There is no legal basis for sanctioning, or threatening future sanctions against, the Secretary.

The judge's order is legally wrong, see 30 U.S.C. 823(d)(2)(A)(ii)(II)-(III), because articulating the Secretary's position on S&S removals is not sanctionable conduct.

Commission practitioners "shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. 2700.80(a). Those standards include the obligation to ensure that the "legal contentions [in a pleading] are

warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. . . .” Fed. R. Civ. P. 11(b)(2).

It is not unethical or unprofessional to cite *Mechanicsville* and *American Aggregates* for the proposition that the Secretary has discretion to remove an S&S designation. As the Secretary has argued in the cases pending before the Commission, that *is* what those cases mean. But even if those cases did not directly support the Secretary's argument, they certainly support a nonfrivolous argument for extending or modifying existing law. The pending appeal shows as much. See *supra* pp. 2-5. And the Secretary did not have to explain whether her S&S-removal position is warranted by *Mechanicsville* and *American Aggregates* or by extending them: "The text of the Rule . . . does not require that counsel differentiate between a position which is supported by existing law and one that would extend it. The Rule on its face requires that the [position] be either one or the other." *Golden Eagle Distrib. Corp.* v. *Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986).

Commission review is essential because this is not an ordinary legal error. The judge not only has imposed sanctions; he has promised that more sanctions will come. That threat applies to all the Secretary's representatives, so the judge has effectively barred the Secretary from making a non-frivolous legal argument; that would warrant review on its own. But the 's order is especially pernicious because it applies to the Secretary's position about the allocation of authority between the Secretary and the Commission. It is contrary to the Mine Act's split-enforcement scheme to prevent the Secretary from articulating her view about those issues. See *Sec'y of Lab.* v. *Knight Hawk Coal, LLC*, 991 F.3d 1297 (D.C. Cir. 2021); *Mach Mining, LLC* v. *Sec'y of Lab.*, 728 F.3d 643 (7th Cir. 2013); *Speed*

Mining, Inc. v. *FMSHRC*, 528 F.3d 310 (4th Cir. 2008); *Sec'y of Lab.* v. *Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006); *Sec'y ex rel. Wamsley* v. *Mut. Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996); *Sec'y ex rel. Bushnell* v. *Cannelton Indus., Inc.*, 867 F.2d 1432 (D.C. Cir. 1989). And by barring the Secretary from raising those issues at the ALJ level, the judge has effectively barred the Secretary from preserving them for appeal. See 30 U.S.C. 816(a)(1), (b); 823(d)(2)(iii).

2. This order raises significant questions about law, policy, and discretion.

This order raises significant questions of law and policy, 30 U.S.C. 823(d)(2)(A)(ii)(IV), because of its scope. Although this order imposes sanctions in just one case, the judge said—in this order and in others—that he will impose sanctions on any representative who articulates the Secretary's position. Ex. A at 5; Ex.C at 7 & n.5; Ex. D at 2. Simply put, the judge has threatened to sanction everyone who is authorized to represent the Secretary. A baseless order with such sweeping effects requires review. Cf. *United States* v. *Williams*, No. 22-10174, 2023 WL 3516095, at *5 (9th Cir. May 18, 2023) (holding that a district judge's order disqualifying an entire United States Attorney's office is immediately appealable as a collateral order) (collecting cases).

The order also raises significant questions about the judge's exercise of discretion. 30 U.S.C. 823(d)(2)(A)(ii)(IV). Judges certainly can reject legal arguments they disagree with, but disagreeing with an argument does not mean that the argument is sanctionable. And there is no basis for the judge's conclusion that the Secretary's S&S-removal position is a misstatement of the law. *See* supra pp. 2-5.

The judge abused his discretion by sanctioning the Secretary for articulating a position when the issue is unresolved and on appeal, and when the judge *himself* previously found that position not to warrant sanctions. See *supra* p. 3. The judge knows that the S&S-removal issue is on appeal, because in each of the three cases presenting that issue, this judge certified the question for interlocutory review. See *supra* pp. 2-3. It is an abuse of discretion for the judge to impose sanctions on the grounds that the position is a misstatement of law, since he knows that issue is on appeal. See *Peabody Gateway North* Ord. at 2 (acknowledging that the Commission has not decided the S&S issue); *Asai* v. *Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1978) (declining to impose sanctions when the appellate court had not addressed the relevant issue). It is arbitrary and an abuse of discretion for the judge abruptly to begin imposing sanctions for a position that the judge had not sanctioned before. See, *e.g.*, *Sec'y of Lab.* v. *Westfall Aggregate & Materials, Inc.*, No. 22-1088, 2023 WL 3830210, at *5 (D.C. Cir. June 6, 2023) (the Commission must engage in reasoned decisionmaking, "especially" when it "has taken a sharp turn from prior holdings") (quoting *Leeco, Inc.* v. *Hays*, 965 F.2d 1081, 1085 (D.C. Cir. 1992)).

Conclusion

The Commission should direct review.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

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Certificate of Service

I certify that on June 9, 2023, a copy of this petition for discretionary review was served by email on:

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Exhibit A

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

May 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. POCAHONTAS COAL COMPANY LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0092 A.C. No. 46-08878-565698 Mine: Affinity Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the citation at issue was $3,171.00, and the proposed settlement amount is $2,695.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550934	$169.00	$169.00	None.
9550935	$169.00	$169.00	None.
9550936	$169.00	$169.00	None.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9550403	$133.00	$133.00	None.
9550937	$169.00	$169.00	None.
9550938	$169.00	$169.00	None.
9550939	$183.00	$183.00	None.
9550940	$169.00	$169.00	None.
9550941	$198.00	$198.00	None.
9550942	$188.00	$188.00	None.
9550943	$169.00	$169.00	None.
9550404	$169.00	$169.00	None.
9557339	$610.00	$134.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S," and negligence from "Moderate" to "Low."
9551135	$169.00	$169.00	None.
9551136	$169.00	$169.00	None.
9551137	$169.00	$169.00	None.
Total	**$3,171.00**	**$2,695.00**	

The parties have set forth the justification for the modifications in the motion filed by the Secretary. As required by the Mine Act, I have reviewed the motion and penalty criteria and evaluated the proposed settlement pursuant to the requirements set forth in Sections 110(i) and 110(k). The parties agree to the size of this operator, good faith abatement, and the ability to pay. The history of violation has been considered. The negligence and gravity of the violation are addressed in the motion, in the citations, and in the file in general.

Citation 9557339 concerns a failure to conduct a required methane test. The cited provision states:

> A qualified person shall make tests for methane—(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

30 C.F.R. § 75.362(d)(1)(iii) (2023). The citation reads, in part:

> The roof bolt operators installing permanent roof support on the No. 3 active section (005-0 / 002-0 MMU's) in the 5X6 cross-cut exceeded the 20 minute required methane test. The roof bolt operators were being observed installing bolts, when 25 minutes elapsed and no attempted [sic] was made to take the required methane test. Asked the operators what time was the last methane test was [sic] taken, both operators could not say when the methane test was made.

> The roof bolting machine was shut off and an examination was made with an extendable probe and large display CH4 detector. This mine is on a 10 day methane spot.

Citation No. 9557339 (Sept. 8, 2022).

The Secretary submitted a settlement motion on April 19, 2023, but I expressed my reservations caused by the inadequate support for the removal of the S&S designation. *See* Email from Christopher A. Jannace, Attorney Advisor to the Honorable Judge Michael G. Young, to Douglas W. Johnson, CLR, MSHA (Apr. 20, 2023; 10:25 a.m. ET). In her amended motion, the Secretary provided more thorough Respondent contentions challenging the likelihood of the hazard occurring:

> The Respondent would have argued at hearing that no methane was found on the section during numerous pre and on-shift examinations prior to the issuance of this citation and that this is normal for this mine. Though this mine does liberate substantial amounts of methane and is a "spot" inspection mine, most methane enters the mine's ventilating area from worked out areas where methane enters the mine through cracks in the mine floor from a coal seam below that develop after a panel or area has been mined.
>
> The mine had no prior history of methane inundations from active workings of the mine nor any history of methane ignitions. The Respondent would have argued that a hazardous accumulation of methane in the face area where this bolting machine was operating was highly unlikely and virtually impossible with even a modest quantity of ventilating air. The quantity of ventilating air in this face area where the roof bolter was operating was in compliance with the mine's approved ventilation plan which experience has shown to be more than capable of diluting hazardous gases including methane and dust, rendering them harmless and carrying them away.
>
> The inspector, a roof control specialist, observed the roof bolting crew perform work in this area for approximately twenty-five (25) minutes before issuing this citation. Had the inspector reasonably believed that the cited condition presented a hazard, such that the condition warranted an S&S issuance, then he likely would not have permitted the miners to be unnecessarily exposed to the alleged S&S hazard for an additional five (5) minutes. Additionally, the area was nearly bolted and only a few minutes work remained to complete the bolting cycle. Thus, the miners were near the face area at the time of issuance and no methane was detected at any time.
>
> Both of these roof bolter operators carried properly calibrated multi-gas detectors which would have provided an alarm of elevated methane should it be encountered. Upon issuance of the citation, they backed the roof bolting machine out of the cut and ran the remote "probe", containing a methane detector, up into the face area to take the required 20 minute gas check as part of the abatement

> effort. The probe went just as far as the two miners had been standing moments before with their own multi-gas detectors. No methane was found by the remote probe.

S. Mot. to Approve Settlement, at 3–5 (May 11, 2023).

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

I find the contentions meet the bare minimum standards for relevance and plausibility to support removal of the S&S designation. The Secretary provides multiple Respondent contentions that are precedentially irrelevant to an S&S analysis. The hazard contemplated by the cited provision is the ignition of methane. The following contentions do nothing to challenge the likelihood of the hazard occurring, or any of the other *Mathies* elements.

An S&S analysis assumes the continuation of normal mining operations without abatement of the violative condition. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement of inference that the violative condition will cease.").

Respondent's contentions that no methane was found during pre- and on-shift inspections, that there is no history of methane inundations, and that no methane was found in the test made to abate the violation, are therefore irrelevant. Respondent was conducting roof bolting operations, and methane accumulations have been found to occur without warning—thus requiring compliance with provisions that prevent possible ignition sources, like permissibility requirements. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014) ("[G]iven the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur."). As I assume a methane build up at a gassy mine is reasonably likely to occur suddenly during continued operation, any reference to a lack of methane, past or present, is irrelevant to my evaluation.

Commission judges may not consider redundant safety measures in an S&S evaluation. *See Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028–29 (D.C. Cir. 2013) ("'[C]onsideration of redundant safety measures,'—that is, 'preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely'—'is inconsistent with the language of [Section] 814(d)(1).'"). Multi-gas detectors, both personnel- and equipment-based, are redundant safety measures, on top of the requirement to conduct regular tests, aimed at preventing the hazard. References to such are therefore irrelevant to challenge S&S.

The Secretary, nonetheless, appropriately challenged the likelihood of the hazard by citing the available ventilation and time of violation. While lacking specificity and being minimally persuasive, Respondent contended that the quantity of ventilating air may have been demonstrated as sufficient to prevent ignition. I also recognize, to a miniscule extent, the minimal time Respondent was allegedly in violation.[1]

While I am skeptical of the decision to delete the S&S designation, the explanation in the motion is not facially implausible. It is possible that at hearing, if supported by substantial evidence, the violation might not be proved to be S&S. Applying the *American Coal* factors to the settlement as a whole, I have also considered that all of the other violations have been accepted as issued, and that the reduction in the overall penalty is minimal.

I separately emphasize that the Secretary again inappropriately asserted her authority to remove S&S designations, citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–80 (June 1996), and *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020). S. Mot. at 5. I have repeatedly explained, as have other Commission judges, that these cases are irrelevant to my evaluation of the proposed removal of S&S designations in settlement. *See*, *e.g.*, Order Accepting Appearance & Denying Mot. to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023).

I made clear to the Secretary that this constitutes misstating the law, and I cautioned both agency attorneys and CLRs not to continue incorrectly citing this authority in these circumstances on threat of being barred from practice before me. *Id.* As I did not threaten such a sanction on review of the first motion, I do not impose it on the CLR here. But he is now on notice.

Having considered the representations and documentation submitted, I find that the modifications are minimally reasonable, and concede, with noted concern, that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

It is **ORDERED** that for Citation No. 9557339, the gravity be **MODIFIED** from "Reasonably Likely" to "Unlikely," and the "S&S" designation be removed, and the negligence be **MODIFIED** from "Moderate" to "Low."

---

[1] I do not accept the contention that the inspector's failure to cite for five minutes demonstrates his belief that the hazard was not likely, nor is that an appropriate consideration. I simply acknowledge that the combination of the purported quantity of ventilating air and the short duration of exposure might demonstrate at hearing that the hazard was unlikely to occur.

It is also **ORDERED** that the Respondent pay the Secretary of Labor the sum of **$2,695.00** within 30 days of the date of this decision.[2]

Michael G. Young
Administrative Law Judge

Distribution (by email):

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[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Exhibit B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

April 25, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	: : : :	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0129 A.C. No. 36-07230-561904
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	: : :	Mine: Bailey Mine

DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed settlement. The originally assessed total amount for the citations at issue was **$9,036.00** and the proposed total settlement amount is **$1,897.00, reflecting a 79% (seventy-nine percent)** overall reduction, as reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9205312	$6,898	$1,393	Citation modified to moderate negligence; **80% reduction in penalty**
9204928	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
9205356	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
TOTAL REVISED PENALTY	**Original total: $9,036.00**	**Revised total: $1,897.00**	**79% overall reduction in penalty**

The Citations in issue

Citation No. 9205312

This citation invoked 30 U.S.C. §876(b), pertaining to "**Communication facilities; locations and emergency response plans**." The section addresses telephone service or equivalent two-way communication facilities, which are to be approved by the Secretary or his authorized representative. Such communication facilities shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal. The cited subsection addresses the plan requirements.

The section 104(a) citation for this now-admitted violation stated:

> The Mine Operator failed to comply with their Approved Emergency Response Plan (Approved 9-11-2020), in that, there were no leaky feeder line (communication) or tracking tags installed in the 2-K Working Section (009-0 MMU) Alternate Escapeway (number 3 entry of 2-K) from the loading point inby 8 crosscut outby to the 5 South Mains Right (K) Track at the number 80 crosscut (2420 feet in length). Therefore **there was no redundant communication between the Primary or Alternate Escapeways** and **no communication or tracking at all in the alternate escapeway** or **at the Working Section refuge alternative/SCSR cache from the alternate escapeway**. After issuance of this citation, the Operator removed the persons from the working faces to outby the loading point until the condition can be corrected.
>
> The Following statements are from the Approved Mine Emergency Response Plan and have not been complied with:
>
> 1. Page 1, Communication, 2. Coverage Area, line b.,- The system will also generally provide continuous coverage along escapeways and a coverage zone approximately 200' feet inby and outby strategic areas of the mine. Strategic Areas are fixed work locations where miners are normally required to work, section SCSR caches, working section power centers and manned belt transfers.
>
> 2. Page 2., 6.,- Survivability, a. The post accident communication system will generally provide redundant signal pathways to the surface component. b.- Redundancy will be achieved by two or more systems installed in two or more entries, or one system with two or more pathways to the surface; provided that a failure in one system or pathway does not affect the other system or pathway. c.,- Redundancy means that the system can maintain communication with the surface when a single pathway is disrupted. Disruptions can include major events in an entry or component failure.
>
> 3. Page 3, Tracking System, 1. Performance, aiii.,- Locate Miners in escape-way at intervals not to exceed 2000 feet. iv.,- Locate miners within 200 feet of

strategic areas. Strategic Areas are fixed work locations where miners are normally required to work, section mass SCSR caches, working section power centers and manned belt transfers. vii.,- Locate miners at the key junction in the escape-ways. viii.,- Locate miners within 200 feet of refuge alternatives. d.- The electronic tracking system will be installed in active daily traveled areas of the mine Primary and Secondary escapeways.

4. Page 5, 8. Maintenance, d. In the event of system or component failures, the miners will be notified of the problem. The affected miners will begin manual zone tracking and continue to advise the surface communication facility of their travel until the system is repaired. Repairs will start immediately if there is a loss in tracking capabilities. e.- The system will be examined weekly to verify that it is maintained in proper operating condition and the results of the examination will be entered in a record book.

5. Page 5, 9. Purchase and Installation,- b. If there is system failure the mine will revert to manual tracking system that was previously used.

Petition for Civil Penalty at 11-13.

The citation was terminated the following day, with the inspector noting:

Through a visual observation after traveling the 2K MMU 009-0 #3 entry (return) (Alternate Escapeway) in its entirety and having communication throughout and verifying through the tracking software on the Mine's surface of this inspectors locations, this citation is hereby terminated. The system is working in the previously mentioned entry/area. Secondly, the Mine Operator is carrying a record/ledger (weekly exam) to show the systems functioning properly.

Id. at 13.

The issuing inspector, who diligently recorded the aspects of the Approved Mine Emergency Response Plan provisions which were not complied with, listed the "Gravity" of the injury or illness as 'Unlikely,' but listed such injury or illness as "Fatal" if it were to occur. Marked as non-significant and substantial, nine miners would be affected. Given the multiple subjects of non-compliance, the inspector listed the negligence as "High." *Id.*

Analysis for Citation No. 9205312

The penalty, which was *regularly* assessed at $6,898.00, is now proposed to be settled at $1,393.00, representing **an 80% reduction**. This figure is apparently derived by designating the negligence from 'High' to "Moderate.' Motion at 3. The justification for this is short, the Motion relating that the "Respondent has represented to the Secretary that it had assigned miners to install the missing equipment that is the subject of the citation, but that the work was not timely completed because of supply problems." Undercutting this claim is that the inspector found *five* instances of non-compliance, yet all five violative conditions were somehow corrected

the next day, the supply problems apparently having vanished rapidly. This is the sole basis presented in the motion for listing the negligence as moderate.

In support of the Secretary's contention, the Solicitor's attorney looks to *Vindex Energy Corporation*, 34 FMSHRC 223, 224 (Jan. 2012) (ALJ) ("*Vindex*"), asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." Motion at 3. The Solicitor's attorney is apparently unaware that an administrative law judge's decision is not precedential. Commission Procedural Rule 69(d) provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). *Rain for Rent,* 40 FMSHRC 976, 980 (July 2018), *Tilden Mining,* 36 FMSHRC 1965 (Aug. 2014). The Secretary also errs in asserting that there is an evidentiary dispute regarding the appropriate level of negligence but offers nothing to support the notion that the negligence should be deemed "Moderate," other than the vague remark about the short-lived claim of 'supply problems.' Merely asserting 'supply problems' is apparently sufficient to carry the day.

Citation No. 9204928

This section 104(a) citation, invokes 30 C.F.R. § 75.1403, well known as the 'safeguard standard.' It is also a statutory provision which requires that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

For this now-admitted violation, on July 8, 2022 the inspector identified multiple violations of the provision, noting that "[t]he 2K section (MMU 009-0) #2 entry track from 0xc - 9.5xc has failed to be properly maintained as identified by the safeguards for the Bailey Mine in the aspect: **39 loose track bolts**, a **loose fish plate and a missing bolt** are allowed to exist on this track. Also, at the #8 crosscut **the rail is out of alignment** by 1/4 inch at the time of the exam.

Petition for Civil Penalty at 15 (emphasis added).

The citation noted that the safeguard standard had been cited **59 times in two years** at the mine. *Id.*

The citation was terminated four days later, on July 12, 2022, after the identified violations were corrected with the inspector stating that the "operator was able to tighten the loose bolts with approved means, and properly adjust the rail at #8 crosscut, however will need to burn a hole in the rail to install the missing bolt on the right side of the track at #8 crosscut. Because the mine is currently operating on shutdown and minimal people are working, additional time is granted to get specialized manpower to this location to cut the rail to install the bolt. *Id.* at 16.

Analysis for Citation No. 9204928

The Secretary's attorney cites an administrative law judge decision as precedent, misconstrues the Commission's decision in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, (June 1996), and does not provide 'facts' to support the requirements for settlement, per

the Commission's *AmCoal* decisions: 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

If the basis for the 80% penalty reduction regarding the previously discussed Citation, No. 9205312, is arguably justified, the same cannot be said for Citation No. 9204928. This is so because the offering by the Secretary does not even meet the Commission's requirements for settlement motions. The justification, *in its entirety*, provides only that:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

The Secretary's attorney cites once again to the ALJ decision in *Vindex*, asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." *Id*. The inapplicability of ALJ decisions as precedent has been discussed above.

The Secretary then adds that she "possesses unreviewable discretion to withdraw an S&S designation," citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879 (June 1996) ("*Mechanicsville*") (finding "no material difference between the Secretary's discretion on the one hand to vacate a citation [pursuant to *RBK Construction, Inc*., 15 FMSHRC 2099, 2101 (Oct. 1993)] and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S."[1] Motion at 4 ("*RBK*").

The Secretary continues to inappropriately cite *Mechanicsville* as authority. This Court and other judges have noted that *Mechanicsville* does not support the Secretary's claim that she possesses unreviewable discretion to withdraw an S&S designation. Yet, the Secretary continues to assert otherwise. It's time to be clear about the Commission's holding in *Mechanicsville.*

At the outset of its decision in *Mechanicsville*, the Commission very plainly set forth the issue before it, stating that it "raises the issues of *whether a judge on his own initiative* can designate a violation of a mandatory safety standard to be significant and substantial." 18 FMSHRC 877. The Commission's answer to the issue was equally plain, stating that it "agree[d] with the Secretary that the judge erred in determining *on his own initiative* that the violation was S&S." *Id.* at 879 (emphasis added). Thus, the decision was expressly limited to the Commission's holding *that the judge erred* "*by adding a new finding and conclusion*, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." *Id.* at 880 (emphasis added). The Commission's decision

[1] *RBK* holds only that the Secretary has the authority to *vacate* the citations. 15 FMSHRC at 2101

added nothing more to that holding.

That the Commission's decision in *Mechanicsville* did not go beyond the very words it employed in that decision was made additionally clear in *Spartan Mining*, 30 FMSHRC 699 (August 2008). There, Spartan tried to expand *Mechanicsville* but the Commission would have nothing of it, informing that it "*reject[ed]* Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. … Spartan unpersuasively relies on *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. *However, Mechanicsville is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not.*" *Spartan* at *22 (emphasis added).

Accordingly, there is *no* basis for the Secretary's habitual citation to *Mechanicsville* as authority for the claim that she possesses unreviewable discretion to *withdraw* an S&S designation. It is one thing for the Secretary *to argue* that the Commission's holding in *Mechanicsville* should be *expanded* beyond that holding, but to assert that the decision affords the Secretary with unreviewable discretion to withdraw such a finding is beyond the pale. Here, the Secretary does not present its contention as an argument. Instead, the Secretary's attorney presents his position as the state of the law. It is not.

Attorneys have an obligation not to misstate case law. *Teamsters Local No. 579 v. B & M Transit, Inc.,* 882 F.2d 274, 280 (7th Cir.1989). Rule 11 of the Federal Rules of Civil Procedure requires attorneys to inquire about the … law before filing pleadings. … an attorney who submits a pleading must certify that: 'to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry [the pleading] is … warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Dzwonkoski,* 2008 WL 2163916 (May 16, 2008) (S.D. Ala. 2008) citing *Howard v. Liberty Memorial Hosp*., 752 F.Supp. 1074, 1080 (S.D.Ga.1990).

Therefore, unless and until the Commission revises its holding in *Mechanicsville*, the Secretary, both her attorneys and her non-attorney representatives, (Conference and litigation representative, "CLRs,") should cease invoking that decision for propositions not supported by it.

REVISITING PRESENT COMMISSION LAW FOR SETTLEMENT MOTIONS AS APPLIED TO THIS MATTER.

Fundamentally, the Secretary's Motion in this matter does not meet the Commission's test for settlement approvals, as set forth in *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

Once past the obvious preliminaries – that a motion for settlement must state the penalty amount originally proposed by the Secretary and the new amount the parties have agreed to pay,

the Commission's decision in *AmCoal II* sets forth the present requirements deemed sufficient for its judges in carrying out their "front line oversight of the settlement process" in order "to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 985, 987.

The Commission repeatedly spoke of the need for 'factual support' for penalty reduction. *Id*. at 989, 990. Though the Commission advised that such 'facts' "are not limited to facts related to the section 110(i) penalty criteria or to the alleged violations," the Commission still required that facts be presented. *Id.* at 986. Accordingly, it has "required parties *to submit facts* supporting a penalty amount agreed to in settlement." *Id.* at 987. It noted, "[i]n 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." *Id.*

The Commission rejected the need for a respondent to present *legitimate* questions of fact which can only be resolved through the hearing process and also rejected that there is a need to show any *legitimate* factual disagreement. *Id*. at 991. As such, the Commission stated that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement. Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id.*

Despite the above, the Commission's *AmCoal II* decision still requires the submission of 'facts.' Such facts must be "mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 991. Here, no facts have been presented.

It is not an exaggeration to describe the basis for the Secretary's justification as essentially '*because we can*.' Though set forth above, it is worth repeating what the Secretary presented here, to wit:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

None of this amounts to mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, *appropriate under the facts*, and protects the public interest.

Citation No. 9205356

This citation also invokes 30 C.F.R. § 75.1403. Issued on July 20, 2022, the inspector's Condition or Practice section of the citation states:

> The Mine Operator failed to maintain an unobstructed travelway of at least 24 inches in width on walk side of the 11-L Conveyor Belt between the outby end of the storage unit andthe bottom step of the 6 south Mains Left Track overcast stairs for a distance of 30 feet in length. Old pieces of conveyor belt were humped up in the air, there were 2 small rolls of conveyor belt, splicing nail buckets, splices, a conveyor belt cutter and splicing template filling most of the required walkway in the cited area. The walkways in this area was wet, muddy and very slippery without having to traverse this extraneous materials. The Operator immediately started to clear the extraneous materials after the issuance of this citation. **Standard 75.1403 was cited 61 times** in two years at mine 3607230 (60 to the operator, 1 to a contractor).

Petition for Civil Penalty at 18 (emphasis added).

The citation was terminated on July 21, 2022, with the inspectors remarking that "[a]ll of the extraneous materials have been cleaned out of the cited travelway/walkway. There is now at least 24 inches of clear, unobstructed travelway, therefore this citation is terminated. *Id.* at 19.

Analysis for Citation No. 9205356

As the Secretary's attorney seeks the same modifications to this citation as he did for Citation No. 9204928 and offers the same justification, the Court's previous analysis applies.

Summary:

As discussed above, the Secretary has cited to inapplicable precedent, by relying upon an administrative law judge decision, inappropriately cited to *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, (June 1996), for a proposition that case does not support, and failed to meet the Commission's standards for an acceptable motion to approve settlement, per its decisions in *AmCoal I* and *AmCoal II*.

That said, because the Commission has, to the best of this Court's understanding, a 100% approval rate for settlement motions, it has decided to approve the settlement in this instance because the Commission examines all settlement determinations made by its judges, and has the authority, per 29 C.F.R. §2700.71, to review a judge's decision on its own motion.[2]

[2] 29 C.F.R. § 2700.71, titled, "Review by the Commission on its own motion," provides "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented.

The Court has considered the Secretary's Motion and approves it solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. As noted, under those decisions, reasonable inquiry by the Court is not permitted.

Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is GRANTED. Citation No. 9205312 is modified to moderate negligence, Citation No. 9204928 is modified to unlikely and non-S&S, Citation No. 9205356 is modified to unlikely and non-S&S.

It is ORDERED that the Respondent pay the agreed-upon civil penalty of $1,897.00 within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

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The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

[3] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is vital to include Docket and A.C. Numbers when remitting payments.

Exhibit C

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 1400
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX 202 434-9949

May 4, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EXTRA ENERGY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0071 A.C. No. 46-09395-565851 Mine: Dry Branch Surface Mine

ORDER ACCEPTING APPEARANCE
ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Young

This case is before me upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Joint Motion to Approve Settlement and has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount was $6,548.00, and the proposed settlement amount is $1,324.00.

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

The proposed settlement includes the following modifications:

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9565489	$3,274.00	$662.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S."
9565490	$3,274.00	$662.00	Modify gravity from "Reasonably Likely" to "Unlikely," and from "S&S" to "Non-S&S."
Total	**$6,548.00**	**$1,324.00**	**80% Reduction**

The motion proposes to remove the S&S designation from each citation. These violations were for failure to maintain berms of adequate height on an elevated roadway. The provision reads, "Berms or guards shall be provided on the outer bank of elevated roadways." 30 C.F.R. § 77.1605(k) (2023).

The citations alleged the presence of three berm sections measuring 24–44 inches, 30 inches, and 42–55 inches, for varying distances (from 100 feet to .2 miles) abutting a 50-foot drop, where the largest equipment used on the road had a mid-axle height of 63 inches. *See* Citation No. 9565489 at 1 (Sept. 7, 2022); Citation No. 9565490 at 1 (Sept. 7, 2022).

The motion provided substantively the same explanation for the modification of each. The Secretary accepted Respondent's contentions that (1) "while not at the full required height" the berms were "substantially built," "wide," and "capable of restraining a vehicle," and (2) the affected area [road] was wide with good visibility. S. Mot. to Approve Settlement, at 3 (Mar. 23, 2023). These explanations are inadequate to support removal of an S&S designation.

Parties must "provide facts in support of the modification for *each violation*," 29 C.F.R. § 2700.31(b) (2022) (emphasis added), so that Commission judges may "set forth reasons for approval," *id.* § 2700.31(g), when reviewing settlements under the *AmCoal* factors, 30 U.S.C. § 820(k) (2023). The provided facts should therefore be substantive and relevant and, taken as true, should enable a judge to plausibly infer that the violation did not occur or does not meet the requirements of the designation the parties propose to modify. For S&S, this means that the facts should challenge one of the *Mathies* elements.

Before addressing the S&S issue, I note a regulatory anomaly that is susceptible to only one reasonable resolution. The regulations governing metal and nonmetal surface mines require that, where required, "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b), 57.9300(b).[1] In contrast, the cited provision of Part 77 requiring berms for elevated roadways at surface coal mines and the surface areas of underground coal mines merely defines berm as "a pile or mound of material capable of restraining a vehicle." 30 C.F.R. § 77.2.

Part 77 therefore does not include a mid-axle height standard. That language has been in place since the Coal Act. *See Final Rule*, 36 Fed. Reg. 9,364, 9,380 (May 22, 1971). The Part 56 mid-axle language, however, was established later. See *Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines*, 53 Fed. Red. 32,496, 32,520–21 (Aug. 25, 1988).

The parties appear to implicitly accept that Part 77 requires the minimum height of the cited berms in this case to be 63 inches, the mid-axle height of the largest vehicle regularly traveling the roadway. *See* Citations 9565489, 9565490, § 8 (Sept. 7, 2022) (citing inadequate berms and noting mid-axle height of largest equipment as 63 inches); Mot. at 3 (providing Respondent's argument conceding that berms were not at the required height at some areas). But

[1] Part 56 applies to surface metal and non-metal mines, while Part 57 governs the surface areas of underground metal and non-metal mines. The language in the two cited provisions is identical.

it is important for the Commission to recognize the mid-axle standard as binding upon the operators of surface and underground coal mines.

The Commission has not yet done so directly. But it has affirmed a judge's finding that mid-axle height was that which a reasonably prudent person would have recognized as required to prevent this provision's contemplated hazard. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735, 1748 (Aug. 2012).[2]

The Commission had previously applied the reasonably prudent person standard to this provision. *See U.S. Steel Corp.*, 5 FMSHRC 3, 7 (Jan. 1983) (requiring evidence as to what type of berm a reasonably prudent person would install under the circumstances); *The Hanna Mining Co.*, 3 FMSHRC 2045, 2045–46 (Sept. 1981) (finding substantial evidence supporting that a two-to-three-foot berm was inadequate to prevent overtravel).[3]

There is of course no substantive difference between roadways and trucks at coal mines and those at metal or nonmetal mines. In both contexts, berms have been deemed necessary to prevent overtravel and fall from an elevated roadway.

It has been the Secretary's litigation position that inadequate berm violations exist where they are not mid-axle height, and that they should be S&S where there exists the risk of a significant fall. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2044, 2045 (Oct. 1994) (affirming a Part 56 violation where an inadequate berm abutted a 25-foot drop, and reversing the judge's non-S&S finding).

Having made a formal determination in notice and comment rulemaking, and an informal determination in litigation, that the mid-axle height standard is necessary to protect miner health and safety, the Secretary is bound to uphold it now and should formalize the standard by regulation. In the absence of such action, the Commission should make clear that this standard is a binding norm.

The Secretary has gone to great lengths in the past to claim her litigation position is entitled to deference as an exercise of delegated rulemaking authority. *See Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)) ("But because 'in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as the Secretary's promulgation of a . . . health and safety standard . . . .");

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[2] *See also id.* at 1748 n.19 (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)) ("[T]he adequacy of an operator's . . . guards [is] evaluated in each case by reference to an objective standard or a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute.").

[3] I note that both decisions were published before the 1988 addition of the mid-axle language to Part 56, and *U.S. Steel* acknowledged the need for reform if the Secretary intended to apply a minimum height standard. *See* 5 FMSHRC at 5 n.7 ("The Secretary is privileged under the Mine Act to write a more specific berm standard setting forth more detailed specifications for construction of safe berms and guards.").

Adam Whitt, 35 FMSHRC 3487, 3490 (Nov. 2013); *BHP Copper, Inc.*, 21 FMSHRC 758, 764 n.11 (citing *Martin v. OSHRC*, 499 U.S. 144, 156–57 (1991)).

Such authority is based on "technical expertise and political authority to carry out statutory mandates." *Morton Int'l, Inc., Morton Salt*, 18 FMSHRC 533, 452 (Apr. 1996) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995)); *see also Sec'y of Labor on behalf of Wamsley v. Mut. Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) (quoting *Martin*, 499 U.S. at 152) (emphasizing that the Secretary's promulgation and enforcement of standards brings her into "constant contact with the daily operations of the mines," endowing her with the "'historical familiarity and policymaking expertise' . . . that are the basis for judicial deference to agencies").

The Secretary cannot legitimately assert that citation for a berm standard in a metal or nonmetal mine is a violation, and S&S due to likely injury from a fall from the elevated roadway, and simultaneously claim that the same situation—likely hazard and injury—are not S&S, or not even a violation. If the Secretary has decided that mid-axle height is the standard for berm size to prevent overtravel on an elevated road in a metal or nonmetal mine, and the protective purpose of the provision is to prevent injury from such a hazard, then that must be the standard for the same situation, even if in a different type of mine.

The Secretary cannot apply a different standard for coal mines and metal/nonmetal mines because there is no principled distinction. The laws of gravity and physics certainly will not recognize one, and a truck overtraveling an inadequate berm between a road and a long drop will produce the same tragic consequences in either case.

I also would point out that if the Secretary's litigation position is in effect an exercise of her delegated rulemaking authority, then a failure to adopt the mid-axle standard in litigation would be contrary to the Act's requirement that "[n]o mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. § 811(a)(9).

That is what makes the abdication of responsibility in this settlement so disturbing. While the inspector in this case appropriately detailed the failure to meet the mid-axle height requirement, the proposed settlement disregards what must be effectively considered to be the applicable health and safety standard and the attendant consequences of that failure.

The motion betrays an abject disregard of the Commission's S&S standards and the safety of miners imperiled by the hazard described in this case. There is no consideration of the degree or extent of the deficiency here. I thus reject Respondent's second contention and the Secretary's acceptance of it as one whose proof at hearing would "lessen[] the likelihood of an accident or injury," S. Mot. at 3, as contrary to the law and the safety purposes of the Act.

First, the limited facts that have been provided establish beyond debate that the hazard existed as described in the citation and would do nothing to make the case that an injury would not be reasonably likely to occur.

The motion's contention and the posited facts are insufficient to challenge the likelihood of the contemplated hazard's occurrence because the provision requiring berms is not qualified by roadway or environmental conditions. It does not say that berms are required *only if* the road is narrower than a designated, minimum width or when minimum visibility conditions are not met.

Nonetheless, the motion asserts that the berms are "capable of restraining a vehicle" based on undefined "substantial construction" and "width," two things that are not contemplated by the only standard the Secretary has applied to berms—*height*.

Nor does the motion suggest that this is not a roadway "usually traveled" by the largest vehicles at the mine. We cannot assume miner precaution, abatement, or other intervention. In sum, there is nothing to support the notion that this violation will not present a hazard of overtravel to the miners using this road.

Once the hazard has been found to be reasonably likely to materialize, it is an assumed fact binding on the remainder of the analysis, and the likelihood of injury is evaluated based on the occurrence of that hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2013). If I therefore reach the conclusion that the hazard—a vehicle falling from an elevated roadway due to inadequate berm height—is reasonably likely, then a contention regarding the width of the road or visibility would have no effect on the likelihood of injury.

The provision cited here does not expressly require berms to be "mid-axle height," but both the Secretary and Respondent appear to have accepted it as a standard in their own agreement: "while not at the full required height . . . ." And as noted above, I must apply that standard because any other approach would be inconsistent with the Act and the Secretary's now-binding interpretations of her own regulations.

Therefore, the applicable mandatory safety standard here, accepted by the parties and enshrined in the law, is the mid-axle height for the largest vehicle that usually travels this roadway. The motion does not challenge the inspector's determination that this *minimum* height is 63 inches.

There are thus only two possible means of avoiding an S&S determination in this case. Either the violation would not significantly and substantially contribute to a hazard of overtraveling the inadequate berms, or the consequences of the overtravel would not be reasonably likely to result in serious injury or death.

The second contention is readily dispensed with. Any serious argument would have required some qualification or dispute of the inspector's observation that the drop-off beyond the inadequate berms was *50 feet.* The motion does not challenge the inspector's observation. We therefore must accept as fact that a truck traveling over or through the berms would plummet or roll uncontrolled for that distance. Miners who know the consequences of serious overtravel have been seriously injured or killed trying to escape a truck that has encountered this hazard. *See Solar Sources Mining, LLC*, 43 FMSHRC 367, 382 n.1 (Aug. 2021) (Traynor, Chair, dissenting) ("Here, due to the deficiency in the berm, the dump truck's back wheel over-traveled

the ledge of the dump site, fell and flipped upside down into the slurry pit approximately 48 feet below. The driver escaped almost certain death by leaping from the truck's cab before it descended over the ledge. The jump and fall resulted in a broken foot that required multiple surgeries to reconstruct using donated bone, steel and screws.").

That leaves only the possibility that there was no reasonable likelihood that the trucks would overtravel the substandard berms. This, too, is logically untenable under the facts presented.

Worth noting is the extent of the violations. The berms failed to meet the height deemed necessary to protect miners for lengths ranging from one hundred to more than one thousand feet. Nowhere does the motion address the effect the extensive nature of the violation might have on the likelihood of a truck encountering a berm that was not constructed as required to prevent overtravel.

It is also important to note that the berm heights were not cited because they technically failed to meet the Secretary's standards or were marginally deficient. When measured, the height of some of the berms was between 24 and 30 inches—less than half (and perhaps as little as 40 percent) of the required height.

It is possible to make a principled, cogent argument questioning whether the degree of a violation would be sufficient to support an S&S designation. *See ICG Illinois, LLC*, 38 FMSHRC 2473, 2483–92 (Oct. 2016) (Althen, Comm'r, dissenting) (noting the lack of record evidence showing that an 11-percent exceedance in distance of refuge chamber from working face would impair the ability of miners to reach and use the chamber in an emergency). The motion completely fails to note any deficiency in the facts they have chosen to present, which establish these violations as S&S.

Commission precedent also forecloses the motion's assertion that these violations might not be found to be S&S at hearing. The berms here were similar to those in *The Hanna Mining Co.*, and the drop-off was significantly higher than that found sufficient for S&S in *Buffalo Crushed Stone, Inc*. Indeed, degree of danger, *as described in the facts the parties have chosen to present*, is extraordinary, and there is no rational basis upon which one might conclude that these violations, as defined in the citation and affirmed by the facts presented in support of the motion, are not S&S.

Rather than adequately challenging any of the *Mathies* elements, the facts provided instead abundantly support the conclusion that the violations must be affirmed as S&S. The cited berm heights were inadequate, sufficient for a finding of violation; overtravel and a substantial fall was reasonably likely due to that inadequacy, because the reasoned judgment of the Secretary has determined what must be provided, and the cited berms are woefully short of that standard; an injury was self-evidently likely to result from the 50-foot fall in heavy equipment; and permanent disability or death was the foreseeable consequence of that fall. The

facts presented therefore do not enable me to conclude that the Secretary has not abused her discretion in removing the designation; I would abuse mine if I approved the settlement.[4]

The Secretary also continues to incorrectly assert the ability to exercise discretion to remove an S&S designation as part of a settlement, citing *American Aggregates of Michigan, Inc.* and *Mechanicsville Concrete, Inc.* to claim this unfettered discretion. S. Mot. at 3–4. These cases are known by now to be invalid as authority for the principles they claim to represent.

Mechanicsville stated that a judge may not *add* an S&S designation on his or her own initiative. 18 FMSHRC 877, 880, 882 (June 1996). This action involves a proposal to *delete* one in settlement. *American Aggregates* stated, "Commission Judges do not have the discretion to make [an S&S finding] unless it is asserted in the first instance by MSHA." 42 FMSHRC 570, 576 (Aug. 2020). Here, the finding was asserted by MSHA in the first instance. Further, that decision reversed a judge's settlement denial because he ignored multiple provided facts relevant to the proposed modifications. *Id.* at 577, 581. The motion here does not provide facts that challenge the S&S designation. Neither, therefore, is applicable to the situation here.

Commission judges have repeatedly criticized the Secretary's use of *Mechanicsville Concrete* and *American Aggregates of Michigan* in this context as a blatant misstatement of the law. As one such order recently noted, "Attorneys have an obligation not to misstate case law." *Decision Approving Settlement with Significant Reservations*, Docket No. PENN 20222-0129, at 6 (Apr. 25, 2023) (ALJ) (citing *Teamsters Local No. 579 v. B&M Transit Co.*, 882 F2d. 274, 280 (7th Cir. 1989)). The court in *Teamsters Local No. 579* approved the imposition of Rule 11 sanctions for the transgression.

There are minimum standards of practice in every tribunal, including this one. Erroneous mischaracterizations of precedent fail to meet those standards and will not be tolerated. A CLR who cites these cases, falsely, in a subsequent motion as they have been cited here may be barred from practice before me.[5] There may be other consequences.

IT IS ORDERED that the motion to approve settlement is **DENIED**.

Michael G. Young
Administrative Law Judge

[4] This does not constitute a finding of violation or S&S; I have not required the Secretary to establish such. I merely note that the limited facts the parties have chosen to provide would preclude a non-S&S finding for this violation.

[5] Although these cases were included by a pleading drafted by a CLR, I would expect an attorney to know better, and a transgression against the law of this sort by an attorney would be even more egregious.

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Exhibit D

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710
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May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is.* Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing

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[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

unless and until a motion that meets the standards of practice before the Commission has been filed.

Michael G. Young
Administrative Law Judge

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