FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

July 20, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. REMINGTON, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2012-533 A.C. No. 46-09230-275179 Mine: Winchester Mine

ORDER OF DISMISSAL

Before: Judge Moran

On January 16, 2015, the Secretary filed his motion to approve settlement in this matter. That motion sought a 50% reduction of the proposed penalties for each of the two section 104(a) citations in the docket, which were both marked as significant and substantial with the likely expected injury as fatal. An accident involving a loaded tractor-trailer coal truck was related to both citations. That truck lost power while going up a haul road. It then began rolling backwards and overturned, injuring the driver, who suffered a lost time injury. Based on the statement in the citation, the results could easily have been more serious, as the truck operated in congested areas and traveled a steep haul road that provides access to the mine for all persons who work there, including miners and vendors. Because the motion inadequately explained the basis for the settlement, the Court, pursuant to its responsibilities under Section 110(k) of the Mine Act, required the Secretary to justify the large reduction. The Secretary did not comply. Instead, it retreated to its unchecked authority to vacate citations, dropping entirely the citation for failing to inspect equipment prior to its operation. Although present law allows the Secretary to vacate a citation, the Court is of the view that, in these circumstances, for the reasons which follow, that decision was antithetical to the purpose and spirit of the Federal Mine Safety and Health Act.

The background to this case is as follows. The Secretary's authorized representative, Inspector Douglas W. Johnson, investigated the event and then issued the two citations the day after the accident.[1] Both citations involved the same tractor-trailer truck and the overturning accident that resulted in the lost time injury to the truck driver.

[1] The record does not indicate when MSHA was called, nor when the inspector first arrived at the mine.

Inspector Johnson cited Respondent ("Remington") for violations of 30 C.F.R. § 77.1606 and 30 C.F.R. § 77.404. The former standard, entitled "Loading and haulage equipment; inspection and maintenance," provides that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator." Thus, the focus of the standard is upon the inspection of equipment for defects prior to its use. The latter standard, 30 C.F.R. § 77.404, entitled "Machinery and equipment; operation and maintenance," requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The focus of this standard is the requirement for maintaining equipment in safe condition and removing such equipment when it is not safe.

Citation No. 8120822, citing conduct violating 30 C.F.R. § 77.1606(a), described that the truck lost power going up a haul road and then rolled backwards and turned over, injuring the truck driver who sustained a lost time injury. The Secretary has now vacated this citation, which relates that *upon an examination, it was determined that 6 of 10 brakes on the trailer and coal truck were not functioning properly. Beyond the brake defects, there was another significant defect: the seat belt tether was not connected to the body of the truck cab*. As the Inspector stated in the citation, those defects should have been observed by the pre-operation examiner and corrected before the truck was put into operation. As noted, adding to the seriousness of this accident, the citation recorded that the haul road where the accident occurred "is used by all persons, including miners and vendors traveling to and leaving the mine site."

Citation No. 8120824, which alleges a violation of 30 C.F.R. § 77.404(a), provides additional details, stating what is plain, that the truck was not being maintained in safe operating condition, thus violating the standard. Adding to the information provided in Citation No. 8120822, the investigation determined

> that the right front and right rear tandem brake shoes were not contacting the drums, as evidenced by the fact that a person could turn the wheels by hand[] as well as easily move a feeler gauge between the brake shoes and the drum.
>
> Further, it was determined [th]at all four brake units on the trailer were functionally inoperable. The left front brake stroke was measured to be 2 and 3/4ths inches. A feeler gauge would easily pass between the shoes and the drum on all four brakes. When tested after the trailer was turned upright by pulling the trailer empty, all four wheels rolled easily. Therefore, 6 of 10 brakes on the tractor trailer unit were not working.

It should be noted that none of the statements in either citation were challenged in the motion to approve the settlement or in the decision to vacate Citation No. 8120822. Instead, in a manner which could be construed as inconsistent with the purpose of the Mine Act, the Secretary only cryptically advises that "[u]pon further review of the facts and the available evidence [for

that citation, he has] determined that the Citation shall be vacated," citing *RBK Construction,* 15 FMSHRC 2099 (Oct. 1993).[2]

When the Court reviewed the Secretary's Motion to Approve Settlement, it noted the following claim in the motion:

> The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence.

Except for minimal non-substantive, grammatical changes in the rationale, and with absolutely no substantive changes to the text of the rationale, the settlement justification for the second Citation, No. 8120824, simply repeated the language presented to justify Citation No. 8120822.[3]

---

[2] It is worth observing that, some 22 years ago, the Commission in *RBK Construction* arrived at the conclusion that the Secretary has carte blanche authority to vacate, but only by analogy to a case involving the Occupational Safety and Health Review Commission, in which the Supreme Court made a conclusion to that effect. *See Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985). But, of course, the Occupational Safety and Health Act has neither the uniquely deadly history of the mining industry nor a provision in that Act akin to the Mine Act's Section 110(k). A fair reading of the Mine Act is that Congress intended greater enforcement oversight for the Federal Mine Safety and Health Review Commission to meet the solemn responsibility to protect the safety and health of our Nation's miners. That the Secretary of Labor proceeds in these settlements with an antipathy towards openness and transparency, opposed to the need to explain to MSHA or to the miners who are exposed to safety and health hazards, of the reasoning for its settlements or decisions to vacate citations and orders, is a basis for revisiting that present authority to vacate.

[3] It should be noted that, prior to ultimately offering up the most minimal justification for the penalty reductions, the Secretary begins each settlement with truculence, advising that

> [i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above [and that] [c]onsistent with the position the Secretary has taken before the Commission in *The American Coal Company,* LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

The full text of the rationales for the two citations demonstrates that they merely repeat themselves:

> [For Citation No. 8120822:]The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence. As a compromise, the Operator agreed to accept a penalty reduction with the paper remaining as issued.
>
> [For Citation No. 8120824:]The operator asserts that policies properly were in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence. As a compromise, the Operator agreed to accept a penalty reduction with the paper remaining as issued.

The above information was the only support given for the 50% penalty reduction sought in the Secretary's Motion to Approve Settlement.

The Court, fulfilling its responsibilities under section 110(k) of the Mine Act, denied the motion on March 26, 2015. *Remington, LLC*, 37 FMSHRC 674 (Mar. 2015) (ALJ). In its denial, the Court noted:

> Examining the Secretary of Labor's offered language for Citation No. 8120822, it may be broken down into 2 asserted justifications:
>
> > 1. The Operator's policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment.
> >
> > 2. All such independent contractors were required to undergo training before working on the mine's property.
>
> From that, the Secretary asserts that "[g]iven *the steps taken* by the mine operator to ensure that independent contracting companies on its property work in a safe

---

The translation of this is that, despite the clear language of Section 110(k), the Secretary does not believe it owes an accounting to anyone to explain its penalty reductions of any size. Beyond not informing the Commission, the Secretary takes the position that neither its client, the Mine Safety and Health Administration, the inspectors who enforce the safety and health standards, nor the miners themselves are entitled to any explanation for penalty reductions.

manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence." (emphasis added). Yet, the Secretary's motion does not contend that the gravity or negligence findings should be modified. The only change is the 50% reduction in the penalty.

Therefore, it becomes necessary to analyze exactly what were "the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner." This means, of course, steps taken in advance of the alleged violation. However, the motion does not identify at all the policies that were in place regarding the proper examination and maintenance of equipment, nor are any details provided about the training that "all such independent contractors were required to undergo [] before working on the mine's property."

Set against the detail-free rationale are the allegations of the citation, which relate that an accident occurred with a loaded tractor-trailer coal truck in which the driver sustained a lost-time injury. That citation asserts that following an accident, it was found that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly. This was especially significant, as the truck lost power, began rolling backwards, and turned over and, as noted, with the driver being injured. In addition, there was another significant defect beyond the brake defects in that the seat belt tether was not connected to the body of the truck cab. As the Inspector stated in the citation, those defects should have been observed in the pre-operative check of the vehicle. Adding to the seriousness, the citation noted that the haul road where the accident occurred "is used by all persons, including miners and vendors traveling to and leaving the mine site."

The citation concludes with the Inspector's statement that the operator "failed to provide adequate oversight to ensure the safety of persons on the mine property." In abating the violation, the truck was removed from service and additional training was provided to truck operators.

In the Court's view, the Secretary's motion fails to identify the steps taken in advance to ensure that there are proper examinations of equipment, nor does the motion provide detail about the training provided for independent contractors prior to working on the mine's property. The claim that "policies were properly in place" for proper examinations is not supported in the motion and the facts alleged in the citation refute that claim. Thus, it is disconcerting for the Secretary to tout "the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner."

The second citation alleges a violation of 30 C.F.R. § 77.404, entitled "Machinery and equipment; operation and maintenance," which requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The citation involves the same tractor-trailer truck and accident identified in Citation No. 8120822. The focus of this alleged

violation is the requirement for maintaining equipment in safe condition and removing such equipment when it is not safe. The body of the citation essentially provides additional details concerning the statement in Citation No. 8120822, that 6 of the 10 brakes on the tractor trailer were not working. The post-accident investigation revealed that the truck's brake shoes were not contacting their drums, and that this was easily determinable. For the trailer itself, "all four brake units [on it] were functionally inoperable," and those defects were likewise easy to detect. The citation also added to the information provided in the first citation that the "truck operates in congested areas and travels [a] steep haulroad (sic)." For the abatement, the citation relates that "[t]he truck and trailer have been removed from service and additional truck inspection and maintenance programs have been implemented." (emphasis added).

The Motion's assertion that the operator had proper examination and maintenance procedures in place is negated by the statements in the citation that show that they were plainly ineffective. Policies claimed to be "properly … in place" cannot support a 50% reduction in a penalty, where those policies, properly in place or not, miss obvious defects. The citation makes this point, asserting that the operator failed to provide adequate oversight or programs to ensure that contractor equipment is being maintained in safe operating condition. In its rawest form, the Motion essentially seeks the large reduction for an examination and maintenance program which was demonstrably ineffective. Accordingly, merely repeating the inadequately supported justification offered for Citation No. 8120822 does not work for Citation No. 8120824 either. Therefore, the rationale for this 50% reduction is also unsupported. It seems obvious that, based on the citation's statement, which was not challenged in the Motion, the equipment was not being properly maintained and the defects were, as the citation alleges, easily detectable. Further, the Secretary cannot claim as the basis for its penalty reduction, that the training, alleged to have been provided for proper examination and maintenance, was properly in place where there was a need to implement additional truck inspection and maintenance programs.

In sum, an inspection program to ensure that defects affecting safety are detected, a training program to ensure that those who make such inspections are competent, and related training to ensure that unsafe equipment is immediately removed from service cannot be cited as the basis for a penalty reduction, let alone a reduction on the order of 50%, where such programs utterly fail to detect obvious defects and patently unsafe equipment. Accordingly, the Secretary's Motion is DENIED.

The Secretary is directed to either provide the required information to support the claims about the nature of the mine operator's policies that were in place and the details of the training provided prior to the accident and to then explain how those translate into a justification for a 50% penalty reduction, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks from the issuance of this decision. The Court also directs the Secretary to advise it as to whether the contractor, Powers Trucking

> Company, was cited for these alleged violations, and if so, the status of such matters.

Id. at 675-77.

In a disappointing reaction to this Court's decision denying the Secretary's settlement motion, the Secretary has, as noted, only filed a motion to dismiss. Whereas the Court identified its concerns over the lack of justification for the twin 50% reductions of the two citations involved, the Secretary, citing its unreviewable ability to vacate citations/orders per *RBK Construction*, provided none of the supportive information and instead opted to vacate Citation No. 8120822. This action occurred *four years* after the citations were issued *and then only after* the Court required additional supportive information to justify the half-off reduction for each of the two citations. Under the new arrangement, Remington, LLC, agreed to pay the original, full proposed penalty for the other Citation, No. 8120824. That Respondent would go along with this outcome is not surprising; it would now pay approximately the same reduced total dollar amount as originally proposed and gain a bonus in the bargain in that now only one, instead of two violations, would appear on its history of violations, a manifestly improved outcome.

Although it is presently true that the Secretary can opt to vacate, the Court still considers it useful and enlightening to set forth the circumstances that brought forth that approach in this case. This docket originally, and by "originally," the Court means since June 9, 2011, cited Remington for an alleged violation of 30 C.F.R. § 77.1606(a) (citation No. 8120822) and another for 30 C.F.R. § 77.404(a), (citation No. 8120824). One needs to appreciate that these two cited standards address different safety concerns. In the case of 30 C.F.R. § 77.1606(a), the section cited, entitled, "Loading and haulage equipment; *inspection* and maintenance," provides: "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and additionally requires that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator." Thus, the focus of the standard is upon the *inspection* of equipment for defects prior to its use. In contrast, 30 C.F.R. § 77.404(a) entitled "Machinery and equipment; *operation* and maintenance," requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The focus of this alleged violation is the requirement for *maintaining equipment in safe condition and removing such equipment when it is not safe*.

For Citation No. 8120822, the Secretary relates in his motion to dismiss that, "[u]pon further review of the facts and available evidence [four years after the citation was issued], the Citation shall be vacated," thereby dropping the charge alleging a violation of the *inspection* of equipment requirement for defects prior to its use. Perforce, dropping this citation means that the Secretary no longer had any issue with Respondent's inspection duties in this instance, a troubling invocation of his prosecutorial discretion, as this matter involved an accident in which a loaded tractor-trailer haul truck lost power, rolled backwards and overturned, injuring the truck driver. That the Secretary "[u]pon further review of the facts and available evidence" would now decide that he had no issue with the inspection duty is a curious development, since the citation alleged that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly and, an additional defect, the seat belt tether was not connected to the body of the truck cab. Pointedly, none of these defects have been withdrawn by the Secretary as being inaccurate — not in the

original settlement motion, nor in his decision to vacate the citation. In his original settlement motion for Citation No. 8120822, the Secretary said nothing to contradict the core allegation of the alleged violation: a failure to properly inspect loading and haulage equipment. Settlement Motion at 3.

In contrast, the citation stated that the cited conditions, brakes and seat belt problems, "should have been observed by the pre-operation examiner and corrected before the truck was put into operation." Significantly, for this now-vacated citation, the MSHA inspector added, again without contradiction in this record, that "[t]he brake failure directly led to the accident and the lost time injury that the driver sustained."

No one has claimed that the two citations were duplicative, either, which is not surprising since, as noted above, the focus of 30 C.F.R. 77.404(a) (the standard allegedly violated in the non-vacated citation) is upon *maintaining* mobile equipment in safe condition and removing such equipment immediately when it is not safe.

With his presently unfettered right to vacate, the Secretary has concluded that Respondent failed to properly maintain its truck, but that there was no failure to properly inspect it, and by that decision that there were no equipment defects affecting safety and therefore, with no defects, there was no duty to record them.

At bottom, the Secretary by his action has concluded that the truck was not being properly maintained, but somehow the obvious defective conditions were outside of the inspection responsibilities of 30 C.F.R. § 77.1606(a), with that standard's obligation to inspect *before* equipment is placed in operation. Ostensibly, by vacating Citation No. 8120822, he must have concluded that all of the defects found by the MSHA investigation occurred *after* the truck was placed in operation. But it is plain what has really transpired here: a recalcitrant Secretary of Labor, steadfastly protesting that he need not tell the Commission anything other than that a matter has been settled, despite section 110(k) of the Mine Act, rather than explain the basis for reducing both violations by 50%, simply collaborated with the mine operator to drop one citation entirely and have the other paid fully, as originally assessed. The effect was the Secretary reached the same result it sought originally, but now without having to explain the reductions. As noted above, this result is a win for the mine operator, as it ends up paying nearly the same total penalty as presented in the original motion to approve the settlement and with the bonus in the bargain that only one violation, instead of two, will now appear on its history of violations.[4]

[4] Perhaps embarrassed at the Secretary's tactic, Respondent felt compelled to speak to the turn of events. In its Notice of Withdrawal of its Contest on Citation No. 8120824, Remington states:

> Remington has contended throughout this contest that the Secretary's decision to cite Remington for the conduct of Powers Trucking Company was duplicative, contrary to MSHA's own policy regarding the issuance [of] citations to both independent contracting companies and production operators, and not in furtherance of mine safety or the aims of the Mine Act.

It would appear that the Secretary considers himself a victor by taking this approach in response to the Court's reasonable request for additional information to explain the half-off reduction in the two citations. However, just because under the present state of case law the Secretary can vacate a citation without explaining the basis for the decision, does not mean that he should do so.[5] In this Court's view, the practical effect, invoked from the comfy safety of an

---

> Moreover, Remington has contended that, even assuming the issuance of citations to Remington was appropriate, the gravity and negligence findings on both 8120822 and 8120824 were inappropriate given the facts of this situation. Powers Trucking Company was an independent contractor responsible for complying with MSHA regulations including [performance of] pre-operational checks of its equipment and the maintenance of that equipment in safe operating condition. Remington provides training to such companies prior to the commencement of work, alerting the company to any hazards on the site and reinforcing the fact that compliance with MSHA regulations, in addition to being required by law, is required as a condition of performing work on Remington's property. There were no issues, accidents, or citations relating to the condition of equipment or the preoperational checks of equipment with regards [sic] to this independent contracting company which would have alerted Remington that greater oversight was warranted. This was another company with no prior compliance issues, and the pre-operational check of this truck may have been performed by that company at another location.

Resp't Notice at 2. The Court would comment that these protestations would be more convincing had the defects not been so obvious and extensive.

[5] Abuse of prosecutorial discretion has been discussed by the Commission. *See, e.g.*, *Phillips Uranium*, 4 FMSHRC 549, 553 (Apr. 1982); *Speed Mining*, 27 FMSHRC 935, 936-37 (Dec. 2005) ("[I]t is the Secretary's position that, based on prosecutorial discretion, her decision to cite an operator and/or an independent contractor is not reviewable by the Commission. However, in a recent decision, *Twentymile Coal*, 27 FMSHRC 260 (March, 2005), the Commission considered and rejected this position. The Commission took cognizance of the Secretary's reliance upon *Heckler v. Chaney*, 470 US 821, 830-32 (1985), and its progeny, also relied on by the Secretary herein, which preclude review under Section 701, (a)(2) of the Administrative Procedure Act. The Commission found such authority to be inapplicable. The Commission, 21 FMSHRC supra, at 265-266 set forth its holding as follows: 'As the Commission has previously recognized, Section 507 of the Mine Act expressly provides that Section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable. Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion. To the contrary, the breadth of the Commission's review is broad. The Commission, in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).'").

office, and not a mine, is to undermine the hard work done by mine inspectors, MSHA's enforcement efforts generally, and, potentially, the future safety of miners. So, while there is a winner in one sense, the Secretary of Labor, there are also several losers when an unreviewable approach is utilized. The approach taken here can hardly be deemed a plus for MSHA or for miners. When asked legitimate questions to defend a half-off penalty imposition, the Secretary, rather than being anxious to explain a safety-based explanation, has merely advised that it has decided to withdraw one of its citations. Under such an approach, there may be expected discouragement on the part of MSHA mine inspectors doing their enforcement job. After all, if legitimate citations can simply be vacated, as a natural human reaction, this can be expected to adversely affect inspectors in the performance of their jobs.

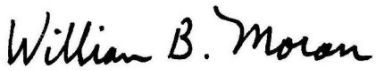
It is also noted that the Secretary, rather than vacating as here, has in the past vigorously enforced cases where these two standards were cited together. A few examples make this point. In *Kentucky Fuel Corp.*, 36 FMSHRC 159 (Jan. 2014) (ALJ), Judge Margaret Miller dealt with the same two standards, 77.404 and 77.1606, and both were directed to the same dozer. The Judge addressed Kentucky Fuel's argument that the two alleged violations were duplicative and that one should be vacated. Finding no merit to the contention, Judge Miller noted that in *Cumberland Coal Resources, LP*, 28 FMSHRC 545 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008), the Commission explained that "citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator." *Ky. Fuel Corp.*, 36 FMSHRC at 167 (quoting 28 FMSHRC at 553 (citing *W. Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997), and *Cyprus Tonopah Mining Corp*., 15 FMSHRC 367, 378 (Mar. 1993))). The Judge went on to observe that "one standard imposes a requirement that defects be repaired or the equipment be taken out of service, while the other standard requires that the equipment not be operated until they are repaired. These are separate and distinct requirements and require different actions from the operator in order to comply." *Id.*

Similarly, in *A&R Trucking*, 35 FMSHRC 3628 (Dec. 2013) (ALJ), Judge John Lewis upheld violations of 30 C.F.R. § 77.404(a) and 30 C.F.R. § 77.1606(a), where both citations pertained to the same truck. Even though no accident was involved in *A&R Trucking*, included among the factors considered, the Secretary took into account the road conditions in seeking penalties, as enhancing the risk of injury occurring. *Id.* at 3630-31. Unlike the Secretary's actions here, in *A&R Trucking, special assessments were sought in the amount of $110,900.00 and $25,800.00 for the violations of* §§ 77.1606(c) and 77.404(a), respectively. *Id.* at 3631.

Yet another example is *Reading Anthracite Co.*, 32 FMSHRC 399 (Apr. 2010) (ALJ), in which the Secretary cited both 30 C.F.R. § 77.1606 and 30 C.F.R. § 77.404 for safety issues relating to the same truck. In that instance the failures to comply with the cited standards played a role in the death of a miner, the truck's driver. *See generally id.*

In the face of the two citations that were issued here, and despite that an accident occurred resulting in a lost-time injury to the miner who was operating the defective truck, the Secretary has in this instance taken an approach to enforcement at odds with cases such as those cited above.

The Court regrets that the Secretary, more concerned with asserting that he alone can compromise penalties, without accounting the reasons for such reductions to the Commission, MSHA, or our Nation's miners, has opted for this shuttered approach to mine safety and health. For now, the Court has no recourse to this misguided view. Accordingly, as the Secretary has vacated Citation No. 8120822, that citation is dismissed. Given Respondent's withdrawal of its contest of the penalty for Citation No. 8120824 and its agreement to pay the assessed penalty of $4,329.00 for that citation, this case is **DISMISSED**.



William B. Moran
Administrative Law Judge

Distribution:

Anh T. LyJordan, Esq., U. S. Department of Labor, MSHA, 201 12th Street South, Arlington, VA 22202

Jonathan R. Ellis, Steptoe & Johnson PLLC, Chase Tower, Eighth Floor, P.O. Box 1588, Charleston, WV 25326