FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

January 29, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. BLUESTONE OIL CORPORATION	Docket No. WEVA 2022-0176 Docket No. WEVA 2022-0350

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). The cases involve the interlocutory review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Bluestone Oil Corporation ("Bluestone").

At issue is whether the Secretary has unreviewable discretion to remove a significant and substantial ("S&S") designation[1] from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[2] This same issue was recently decided by the Commission in *Knight Hawk Coal, LLC*, 46 FMSHRC 563 (Aug. 2024).[3] *See*

[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[2] Section 110(k) provides in relevant part:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

30 U.S.C. § 820(k).

[3] On September 10, 2024, the Secretary appealed the Commission's decision in *Knight Hawk* to the United States Court of Appeals for the District of Columbia Circuit. On October 22, 2024, the Secretary filed an unopposed motion with the Commission seeking to hold this case in abeyance pending a decision from the D.C. Circuit in *Knight Hawk*. S. Mot. at 1. After

also Greenbrier Minerals, LLC, 47 FMSHRC 933 (Nov. 2024). For the reasons set forth below and as more fully discussed in our lead decision in *Knight Hawk*, we hold that the Secretary does not have unreviewable discretion to remove a significant and substantial designation from a contested citation without the Commission's approval, affirm the Judge's denial of the settlement motion and remand the case to the Judge.

I.

Factual and Procedural Background

The Secretary filed a motion to approve settlement of 24 citations issued to Bluestone by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary proposed an overall penalty reduction from $51,023 to $30,500. Pursuant to the terms of the proposed settlement: 17 citations would remain unchanged with no penalty reduction; the penalties for two citations would be reduced without other modification; and five citations would be modified with a corresponding penalty reduction.

At issue here, the proposed modifications included removing the S&S designations for two citations (Nos. 9562449 and 9562452). The Secretary did not provide a factual justification for the proposed S&S removals. She explained that she had "exercised discretion to modify the significant and substantial designation" for the citations. Settl. Mot. at 6 (citing *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020)).

The Judge contacted the parties and informed them of his inability to approve the proposed settlement, based on the lack of any justification for the proposed S&S removals. In response, the parties requested that the Judge enter an order denying the settlement motion so that the Secretary could move for interlocutory review.

The Judge issued an order denying the motion to approve settlement on the basis that the parties had provided no justification in support of the proposed S&S modifications. Unpublished Order dated Oct. 31, 2022 ("Order"). He held that parties must provide justifications in support of the proposed modifications for each violation, so that the Judge may set forth reasons for his approval when reviewing settlements. *Id.* at 2. He rejected the Secretary's claim of unfettered discretion to modify a citation's S&S designation, finding the two cases relied upon by the Secretary to be inapposite. *Id.* at 3 (noting that both *Am. Aggregates*, 42 FMSHRC 570, and *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), address a Judge's authority to add an S&S designation rather than the Secretary's authority to delete an existing S&S designation). The Judge certified the matter for interlocutory review and stayed the proceedings pending the decision on interlocutory review.

The Commission granted interlocutory review on the issue of "whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 USC 820(k)." 44 FMSHRC 709 (Dec. 2022).

---

considering the Secretary's motion and the arguments therein, the motion for stay is hereby denied.

II.

Secretary's Arguments

The Secretary filed her appeal in this case prior to the Commission issuing decisions in *Knight Hawk* and *Greenbrier* and she makes essentially the same arguments in the instant case as she did in those cases.[4] The Secretary asserts that she has unreviewable prosecutorial discretion to remove an S&S designation because S&S designations are "enforcement decisions," and not "penalties," under the language of section 110(k). S. Br. at 1, 9-11. The Secretary cites to the Commission's decisions in *Mechanicsville Concrete* and *American Aggregates* to support her position that she has discretion to vacate S&S designations in settlements. S. Br. at 3-5, 9. Finally, the Secretary argues that the role of the Commission is limited to adjudicating disputes, and that other considerations support the Secretary's unreviewable discretion to remove S&S designations, such as fairness to operators, public confidence in Mine Act enforcement, and the Equal Access to Justice Act ("EAJA"). *Id.* at 14-15, 16-20.

III.

Disposition

A. The Secretary does not have unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k).

For the reasons set forth below and as stated more fully in *Knight Hawk*, we hold that sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. §§ 820(k) and 820(i), demonstrate an intent to circumscribe the Secretary's enforcement discretion, and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings.

Agency decisions not to enforce, including an agency's decision to settle, are generally committed to the agency's discretion, and are therefore presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459-60 (D.C. Cir. 2001). However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an *intent to circumscribe* agency enforcement discretion, and has provided *meaningful standards* for defining the limits of that discretion." 470 U.S. at 834 (emphasis added).

The Commission has held that, in the settlement context, section 110(k) provides an exception to the general rule of unreviewability. Section 110(k) expressly curtails the Secretary's authority to settle a case. As stated in *American Coal Co.*, 38 FMSHRC 1972, 1980 (Aug. 2016) ("*AmCoal I*"), "[s]ection 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability" under *Heckler*.

[4] The operator did not file a response brief.

As to the scope of the intended circumscription, a review of the language of the Mine Act, the legislative history, comparisons to other health and safety statutes, and practical considerations all signal an expansive role for the Commission. This includes the authority to review S&S removals in citations within settlements as a necessary component of its settlement review authority. In reaching this holding, we do not grant the Commission any new settlement review authority beyond that of *AmCoal I* and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"). 46 FMSHRC at 567.

With respect to the language of section 110(k), the inclusion of the terms "compromised," "mitigated," and "settled" indicates a Congressional intent for Judges to apply a holistic approach to reviewing settlements. The fact that Congress chose these words instead of using narrower language specifying that a penalty amount may not be lowered without Commission approval demonstrates that Judges must be able to review more than the mere settlement of civil penalty dollar figures. Congress' choice of broad language demonstrates that penalties are closely intertwined with the allegations set forth in citations in settlement proceedings.

Our reading of section 110(k) is consistent with previously announced interpretations of the Mine Act. For instance, the Commission has recognized that Judges must "accord due consideration to the *entirety* of the proposed settlement package, including *both its monetary and nonmonetary aspects*." *See, e.g.*, *AmCoal II*, 40 FMSHRC at 989 (emphases added). During settlement review, a Judge cannot be limited to looking solely at discrete penalty dollar amounts. Judges may look at compromises of the citation's allegations, and those compromises may impact the penalty amount or have other legal consequences.[5]

The legislative history and policy considerations of section 110(k) reinforce the need for Commission review of the Secretary's removal of S&S designations in settlement proceedings. As we have previously recognized, Congress unquestionably delegated to the Commission the power to administer section 110(k) by granting the Commission the authority to review *all* settlements of citations under the Act. *See AmCoal I*, 38 FMSHRC at 1976. Congress explained that section 110(k) was intended to assure that prior abuses involved in the unwarranted lowering of penalties, because of off-the-record negotiations, would be avoided by providing for independent Commission settlement review. 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 632–33 (1978). Section 110(k) serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing her authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1976 (citing S. Rep. No. 95-181, at 44). The Commission cannot effectively review the Secretary's reduction of a penalty without examining the factors that go

[5] For example, the decision to vacate the S&S designations for certain citations may affect whether the mine could be further considered by the Secretary to have demonstrated a "pattern of violations." *See* 30 U.S.C. § 814(e)(1) (providing that if an operator has a pattern of S&S violations it shall be given written notice that such pattern exists). The issuance of a pattern of violations notice provides the Secretary with enhanced enforcement authority, including the ability to issue withdrawal orders for future S&S violations of safety standards at the mine.

into it. This underscores the importance of a meaningful, all-encompassing review by the Commission that goes beyond mere dollar amounts.

As the Commission recognized in *Knight Hawk*, Congress' intent is further reinforced by a comparison of the Mine Act to the Occupational Safety and Health Act ("OSH Act"). 46 FMSHRC at 568-69. The OSH Act provides that the Secretary is *authorized* to take such actions to compromise, mitigate, or settle *without approval* by the Occupational Safety and Health Review Commission ("OSHRC"). However, in the Mine Act – which was passed seven years later – Commission approval is required. *Compare* 29 U.S.C. § 655(e) *with* 30 U.S.C. § 820(k). As with the Mine Act's legislative history, this comparison between the language of the statutes elucidates Congress' intent, in drafting the Mine Act, to avoid the abuses arising from off-the-record negotiations by the Secretary, by envisioning a greater role for the Commission under the Mine Act.

Practical and common-sense considerations support an interpretation of the statute that grants broad authority to the Commission to approve or deny settlement motions. Here, during a settlement proceeding, the Secretary's removal of citations' S&S designations resulted in a reduced penalty amount. Whether the penalty amount is appropriate cannot be properly determined without consideration of how other changes to the citations impact the penalty.

As to the requirement for the provision of a meaningful standard, in *Knight Hawk*, we held that sections 110(i) and 110(k) provide a "judicially manageable standard . . . for judging how and when [the Secretary] . . . should exercise [her] discretion" in removing S&S designations in settlement proceedings. 46 FMSHRC at 570 (quoting *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008) (other citations omitted)). Section 110(i) provides a judicially manageable standard by setting forth the six penalty factors that the Commission must consider in assessing a penalty. Although section 110(i) does not explicitly reference S&S, it does require consideration of evidence of the "gravity" of the violation. The Commission has held that gravity and S&S, although not identical, are "based frequently upon the same or similar factual circumstances." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (Sept. 1987), *citing* 30 U.S.C. §§ 820(i), 814(d). S&S is essentially the interplay between the "likelihood" and "severity" components of "gravity" in the Mine Act and its related regulations. *See, e.g.*, 30 C.F.R. § 100.3, Tables XI, XII. In short, the Commission's review of the Secretary's decision to remove an S&S designation is not arbitrary but is instead guided by the statutory language in section 110(i) regarding gravity.

In addition to section 110(i), the Commission has interpreted section 110(k) to require settlements to be "fair, reasonable, appropriate under the facts, and [to] protect[] the public interest." *AmCoal I*, 38 FMSHRC at 1976. This standard also applies with respect to the Secretary's decision to remove an S&S designation. Accordingly, as we held in *Knight Hawk*, the *Heckler* presumption of unreviewability for the Secretary has been overcome. *Knight Hawk*, 46 FMSHRC at 571 (citing *Heckler*, 470 U.S. at 834).

We reiterate that neither *Mechanicsville* nor *American Aggregates* support the Secretary's position in this case that S&S determinations made in the context of a settlement are presumptively unreviewable "enforcement decisions." 46 FMSHRC at 571.

Mechanicsville is distinguishable in two respects. First, *Mechanicsville* involved a *Judge's* attempt to *add* an S&S designation while the current case involves a proposal by the *Secretary* to *eliminate* an S&S designation. 18 FMSHRC at 879-80 (holding that, where MSHA has not charged an S&S violation, a Judge may not make an S&S finding on his or her own initiative). Second, *Mechanicsville* relies on a line of precedent stemming from a case brought under the OSH Act. *See RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), *citing Cuyahoga Valley Railway Co v. United Transportation Union*, 474 U.S. 3, 6-7 (1985). As noted above, the OSH Act and the Mine Act diverge regarding the Secretary's authority over settlements. Therefore, precedent developed under the OSH Act does not inherently apply to the Mine Act in the settlement context.

Meanwhile, in *American Aggregates*, the Commission reversed the Judge's denial of a settlement, including the removal of the S&S designation, solely because the Judge had failed to consider the relevant justification provided. 42 FMSHRC at 576–79. Nothing in that case supports the parties' broad, sweeping position that the Secretary's decision to remove an S&S designation in a settlement constitutes unreviewable prosecutorial discretion.

In sum, we conclude that sections 110(k) and 110(i) of the Mine Act demonstrate an intent to circumscribe the Secretary's enforcement discretion and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. We find unpersuasive the Secretary's arguments to the contrary.[6]

B. Parties must provide justification to support the removal of an S&S designation in a settlement motion.

Long-standing Commission caselaw holds that Commission Judges must review all settlements of citations, and parties seeking approval of a proposed settlement must therefore provide supporting justifications sufficient for the Judge to determine whether the proposed terms are fair, reasonable, appropriate under the facts, and protective of the public interest. *AmCoal I*, 38 FMSHRC at 1981; *AmCoal II*, 40 FMSHRC at 987-88. For the reasons above, this basic premise holds true for the removal of S&S designations in the settlement context. *Knight Hawk*, 46 FMSHRC at 566 (S&S removals in the settlement context are subject to Commission review and "parties must provide sufficient reasoning and justification to support the removal of an S&S designation in a settlement motion").

Here, the Secretary provided *no justification* to support the proposed removal of the S&S designations for Citation Nos. 9562449 and 9562452, instead relying solely on a claim that she had "exercised discretion" to justify the modification. Settl. Mot. at 6. The Judge rejected the Secretary's claim of unfettered discretion, and consistent with our long-standing caselaw, denied

[6] As in *Knight Hawk*, we reject the Secretary's argument that the Act's split-enforcement scheme precludes Commission review of the Secretary's S&S decisions during settlement proceedings. 46 FMSHRC at 573-74. We further hold that the Secretary's remaining policy arguments relying on fairness to operators, public confidence in Mine Act enforcement, and EAJA considerations are not sufficiently compelling reasons to withhold Commission review of S&S removals in settlements. *Id.* at 574-75.

the motion based on the Secretary's failure to provide any support for the proposed S&S removals. Ord. at 2. The Judge did not abuse his discretion in denying the settlement. *AmCoal I*, 38 FMSHRC at 1984-85; *Knight Hawk*, 46 FMSHRC at 566.

IV.

Conclusion

For the reasons stated above, we hold that the Secretary does not possess unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Act. Further, we hold that the parties must provide sufficient justifications and support to remove an S&S designation under such circumstances. We therefore conclude that the Judge did not abuse his discretion by denying the settlement motion. Accordingly, we affirm the Judge's denial of the motion and remand the case to the Judge.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

Distribution:

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420-N4430
Washington, DC 20210
Scott.Emily.T@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420-N4430
Washington, DC 20210
Nelson.April@dol.gov

Christopher D. Pence, Esq.
Pence Law Firm PLLC 10 Hale Street, 4th Floor
PO Box 2548
Charleston, WV 25329
cpence@pencefirm.com

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue NW, Suite 520N
Washington DC 20004-1710
gvoisin@fmshrc.gov

Administrative Law Judge Michael G. Young
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue NW, Suite 520N
Washington DC 20004-1710
myoung@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@DOL.GOV