FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

APR 07 2015

SECRETARY OF LABOR,	:	Docket Nos.: LAKE 2008-378-R
MINE SAFETY AND HEALTH	:	LAKE 2008-379-R
ADMINISTRATION (MSHA)	:	LAKE 2008-380-R
	:	LAKE 2008-643
v.	:	LAKE 2009-72
	:	
BLACK BEAUTY COAL COMPANY	:	

Before: Cohen, Nakamura, and Althen, Commissioners[1]

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), an Administrative Law Judge affirmed Citation No. 6672658, issued to Black Beauty Coal Company by the Mine Safety and Health Administration ("MSHA"). The citation alleged that the operator altered the scene of an accident without MSHA's permission, in violation of 30 C.F.R. § 50.12. The Judge also vacated Order No. 6681047, which alleged an inadequate on-shift examination of a belt in violation of 30 C.F.R. § 75.362(b). The Judge further verbally approved the parties' joint settlement motion regarding the remaining citations and orders but did not specify the terms of the settlement agreement in his final decision. 34 FMSHRC 436, 437, 445 (Feb. 2012) (ALJ).

The parties filed cross-petitions for discretionary review, and the Commission granted both petitions. Black Beauty contends that the Judge erred with respect to his finding of a violation for Citation No. 6672658, and in his recitation of the parties' settlement agreement because he failed to memorialize the terms of the settlement in his decision. The Secretary maintains that the Judge's decision to vacate Order No. 6681047 is not supported by substantial evidence and should be reversed.

For the reasons stated below, we conclude that the Judge prematurely terminated the hearing regarding Citation No. 6672658, and we vacate and remand the Citation to the Judge

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[1] Chairman Mary Lu Jordan and Commissioner Michael G. Young assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

with directions to reopen the record. We also conclude that the Secretary did not raise before the Judge the theory of liability for Order No. 6681047 that he is presenting to the Commission; therefore, we decline to reach the merits of this argument on appeal. Accordingly, the Judge's decision vacating the order is affirmed. We also describe and affirm the terms of the parties' settlement agreement as approved by the Judge.

I.

Disposition

A. Citation No. 6672658

1. Factual Background

Black Beauty operates the Air Quality No. 1 Mine in Knox County, Indiana. On Saturday, April 5, 2008, at approximately 8:05 p.m., roof bolter Harold Driskill was struck in the head and torso by a fallen slab of rock that measured approximately 7 feet long, 4 feet wide, and 8 inches thick. The slab hit Driskill in the head, slid down his body, and pinned him against the mine floor and the roof bolter. Driskill stood up with assistance, walked to a mantrip, and was taken to the surface of the mine where he was transported to the hospital by ambulance. Jnt. Stip. 3 at 1 and 3; Gov. Exs. 15, 16, 18, 19; 34 FMSHRC at 438.

Black Beauty employee Steve Elliot reported the event to MSHA at 8:23 p.m., pursuant to the requirements of 30 C.F.R. § 50.10.[2] At the time the incident was reported, Elliot did not know the nature and extent of Driskill's injuries. MSHA Field Office Supervisor Ron Stalhut learned of the accident at approximately 9:41 p.m., at which time MSHA official Michael Rennie issued a verbal order, pursuant to section 103(k), 30 U.S.C. § 813(k), prohibiting Black Beauty from resuming mining operations at the accident site.[3] Elliot sent out messages over the mine's

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[2] 30 C.F.R. § 50.10 provides that:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
> (d) Any other accident.

[3] 30 U.S.C. § 813(k) states that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary . . . may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative . . . of any plan to . . . return affected areas of such mine to normal.

Personal Emergency Device to Second Shift Manager Terry Courtney advising him that a section 103(k) order had been issued and to shut down the unit. Jnt. Stip. 3 at 4, 6 – 8; Gov. Ex. 17; 34 FMSHRC at 438.

MSHA Inspector Sylvestor DiLorenzo arrived at the mine at approximately 10:50 p.m. for the purpose of securing the accident site and initiating an accident investigation. Upon arrival, he discovered that normal mining operations had resumed, that the fallen rock had been broken up when it was run over by the roof bolter, and that the cut had been bolted. Courtney and Acting Superintendent Rick Carie advised DiLorenzo that the call to MSHA was a misunderstanding. DiLorenzo also learned that Driskell had been sent to the hospital. DiLorenzo was presented with conflicting evidence as to the nature of his injuries. Courtney had decided that mining could resume. However, the mine had not received authority from the District Manager to continue its mining operations. Because Black Beauty had resumed mining and altered the accident site without MSHA's permission, DiLorenzo issued Citation No. 6672658, alleging a violation of 30 C.F.R. § 50.12.[4] Jnt. Stip. 3 at 5, 7, 9, 12-14; Gov. Exs. 1, 3 (at 2 and 6), 14; 34 FMSHRC at 438-39.

According to Driskill's medical records, he suffered abrasions to the arm and rib cage. Although Driskill was initially cleared to return to work two days after the accident without significant physical restrictions, the record indicates that three weeks later on April 28, 2008, Driskill's doctor advised that he not roofbolt for two weeks due to significant right shoulder pain and inflammation, and that he continue taking pain and anti-inflammatory medicine. He was cleared to return to work again with no restrictions on May 9, 2008. Gov. Exs. 18, 43, 45, 46; 34 FMSHRC at 439.

On the first day of the hearing, mid-way through the Secretary's direct examination of his first witness (Inspector DiLorenzo), the Judge called a brief recess to confer with counsel in chambers. When the hearing resumed, the Judge announced that the parties would attempt to resolve Citation No. 6672658 through other means and that they would explore this alternative resolution the following day. In a bench decision the next day, the Judge heard and granted a motion for summary decision by the Secretary affirming the citation. Tr. 272-325.[5] Consequently, Black Beauty did not cross-examine the Secretary's witness, nor did it present witness testimony regarding the citation. The Secretary did not complete direct examination of his witness. Tr. 272-325.

In his final written decision of February 10, 2012, quoting his bench decision, the Judge found that although Driskill experienced pain and discomfort, according to the evidence,

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[4] 30 C.F.R. § 50.12 provides: "Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

[5] The Secretary did not move for summary decision until the morning of the second day of trial. Tr. 278. It appears that the Secretary made the motion in response to a suggestion by the Judge during the conference with counsel in chambers the previous day. Tr. 272.

"Driskill's injuries were not life threatening." 34 FMSHRC at 439. While he concluded that no life threatening injury had occurred, the Judge nonetheless affirmed the citation on the basis of Black Beauty's call to MSHA reporting an accident. *Id.* In considering the requirement of section 50.12 that an operator refrain from altering an accident site without the permission of MSHA, the Judge reasoned that:

> The report of an accident, rightly or wrongly, is the condition precedent to the application of the provisions of section 50.12. Having reported an accident, Black Beauty's unilateral decision to resume operations constituted a violation of section 50.12. However, it is a mitigating factor that Black Beauty had correctly determined that the scene was not an "accident site" in that serious injury was not sustained.

Id.

2. Analysis

a) <u>The occurrence of an accident, not its reporting, triggers the prohibition on altering an accident site.</u>

The Judge erred as a matter of law in ruling that the reporting of an accident, by itself, is sufficient to trigger section 50.12. The Judge was instead required to determine whether an "accident" within the meaning of section 50.2(h)(2) had taken place. In accordance with the standard's language and controlling Commission precedent, it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one.

Here, however, the Judge erroneously concluded that it is "*the report* of an accident" that triggers the application of section 50.12. 34 FMSHRC at 439 (emphasis added). The standard, in fact, makes no mention of the "reporting" of an accident. Section 50.12 simply prohibits an operator from altering an "accident site" without MSHA's permission. The Commission has explicitly held that the requirements of section 50.12 are triggered by the "occurrence" of an accident. An "accident" is defined in section 50.2(h)(2), 30 C.F.R. § 50.2(h)(2), in relevant part, as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." *Cougar Coal* Co., 25 FMSHRC 513, 520 (Sept. 2003). Thus, the Judge's reliance on the phone call to MSHA was misplaced.

b) <u>The evidentiary record is incomplete.</u>

Because of his legal error, the Judge prematurely terminated the hearing and incorrectly truncated the evidentiary record with respect to Citation No. 6672658. The Secretary did not finish the direct examination of his first witness or any other witnesses. Further, the operator was not given the opportunity to cross-examine the Secretary's witness or to present any testimonial evidence in support of its case. Indeed, the record demonstrates that the injured miner Driskill, was scheduled to testify. He could have provided much clarification on how the incident occurred and the nature and extent of the injuries he suffered. The Judge's actions

prevented the entry of testimonial evidence necessary to resolve the factual and legal questions presented.[6]

Consequently, we vacate and remand the case to the Judge for further consideration. On remand, the Judge is directed to reopen the record to permit the parties to present evidence on the question of whether Driskill's injuries had a "reasonable potential to cause death," thereby making the event an "accident" within the meaning of section 50.2(h)(2) and making the site an "accident site" under section 50.12.[7]

Accordingly, we hereby vacate the Judge's decision on Citation No. 6672658 and remand to him this part of the case.

B. Order No. 6681047

1. Factual Background

The on-shift regulation the Secretary alleges was violated only requires an examination during a shift on which coal is produced. 30 C.F.R. § 75.362(b). On the date of the Order, there were two production shifts at Black Beauty's mine – the day production shift from 7:00 a.m. to 3:00 p.m., and the afternoon production shift from 3:00 p.m. to 11:00 p.m. There was a third shift, the midnight maintenance shift, which began at 11:00 p.m. and ended at 7:00 a.m. Tr. 85; 34 FMSHRC at 440.

On the afternoon of September 10, 2008, at 6:30 p.m., Black Beauty performed an on-shift examination. Tr. 676; 34 FMSHRC at 442. The September 10 afternoon shift overlapped with the midnight shift of September 11, 2008, in that the incoming midnight shift miners left the portal to go underground at 11:40 p.m. and the outgoing afternoon shift miners arrived at the portal to exit the mine at 1:30 a.m. R. Exs. 47-A, 47-B. The last car of coal for the afternoon shift was dumped at the feeder at 1:00 a.m. Tr. 85-89, 523-25; R. Ex. 47-A. The first coal of the

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[6] An Administrative Law Judge should not interrupt the presentation of testimonial evidence to suggest to a party that it file a motion for summary decision. *See* Commission Procedural Rule 67, 29 C.F.R. § 2700.67. However, this is what appears to have happened. *See* Tr. 120-22, 260, 272-78.

[7] The evidence should be considered within the parameters outlined by the Commission in *Signal Peak Energy, LLC,* 37 FMSHRC __, slip op. at 6, No. WEST 2010-1130 (Mar. 4, 2015) and *Cougar Coal*, 25 FMSHRC at 520-21. Specifically, because the separate reporting requirement in section 50.10 demands a prompt determination of whether an injury "has a reasonable potential to cause death," readily available information, such as the nature of the accident, is highly relevant in determining whether an injury constitutes an "accident." Similarly, operators cannot wait for medical or clinical opinions before determining whether an "accident" under section 50.2(h)(2) has occurred. An operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, "must resolve any reasonable doubt in favor of notification." *See Signal Peak,* 36 FMSHRC __, slip op. at 6-7; *Cougar Coal*, 25 FMSHRC at 520-21.

September 11 day shift was dropped on the feeder at 7:30 a.m. Tr. 526 (testimony of Mine Superintendent Gary Campbell); *see also* R. Ex 47-C.

On the morning of September 11, MSHA Inspector Glenn Fishback observed extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust, which ran along the energized 2 Main East conveyer belt header inby to the number 48 crosscut. 34 FMSHRC at 440; Gov. Exs. 32, 33. Cleaning up the accumulations required approximately 20 employees shoveling each shift for a total of 18 hours and the use of six 3,500-pound tanks of rock dust. 34 FMSHRC at 440. As a result of his observation, Fishback issued a section 104(d)(2) Order No. 6681046 citing a violation of section 75.400,[8] and section 104(d)(2) Order No. 6681047 citing a significant and substantial ("S&S") violation of the on-shift examination requirement of 30 C.F.R. § 75.362(b) that was also alleged to be the result of an unwarrantable failure.[9] Order No. 6681047 states:

> An inadequate onshift examination was conducted for the 2 Main East belt conveyor for the 4:30 AM to 7:30 AM examination on 9/11/2008. Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust were observed by MSHA on this date. The accumulations of combustible materials were cited today in 104(d)(2) Order No. 6681046. The examination record for the 4:30 AM to 7:30 AM examination of the 2 Main East belt showed no hazards listed.

34 FMSHRC at 441; Gov. Ex. 32.

The Judge vacated the order, finding that given the non-production status of the mine during the maintenance shift, the Secretary failed to demonstrate that an on-shift examination, pursuant to 30 C.F.R. § 75.362(b), [10] was required. He found it significant that the Secretary did

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[8] Order No. 6681046 was assigned to a different judge and is the subject of *Black Beauty Coal Co.*, 34 FMSHRC 677, 685-90 (Mar. 2012) (ALJ). That order is not at issue here.

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

The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.* If an MSHA inspector finds that a violation is S&S and due to the operator's unwarrantable failure, the citation is to be issued pursuant to section 104(d)(1), which can lead to more stringent enforcement measures.

[10] Section 75.362(b) provides that:

> *During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations* of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway *where a belt*

not "explicitly contend" or produce any documentary evidence that coal was produced during the midnight shift on September 11. 34 FMSHRC at 442. The Judge was also persuaded by Fishback's inability to recall whether coal was produced on the midnight shift. *Id.* (citing Tr. 458-60). He further noted that although it was reasonable to assume that the extensive accumulations existed during the on-shift examination on the afternoon of September 10, the Secretary did not seek to amend the order to include that shift. The Judge declined to do so *sua sponte*. 34 FMSHRC at 442-43 (citing *Cumberland Coal Res.*, 32 FMSHRC 442, 447 (May 2010)).

2. Analysis

The Secretary argues that the Judge's decision is not supported by substantial evidence. He maintains that based on the undisputed fact that the conveyor belt was transporting coal until 1:00 a.m. during the midnight shift and that miners were working underground, the cited maintenance shift was a "coal producing" shift that required an on-shift examination. He further contends that, based on the operator's own admission that an on-shift examination was not performed during the midnight shift, Black Beauty violated section 75.362(b).

Black Beauty responds that the Secretary's argument that a separate on-shift examination was required due to the coal produced during the two-hour overlap between the production shift and the maintenance shift is a new legal theory advanced by the Secretary on appeal and was not raised before the Judge. It maintains that an on-shift examination was not required during the maintenance shift, and that the brief overlap of the afternoon shift and the midnight shift does not transform the maintenance shift into a production shift.

We conclude that the Secretary failed to present for the Judge's consideration his theory that the coal produced during the two-hour shift overlap constituted coal production on the maintenance shift for purposes of section 75.362(b).

Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). The petitioner's actions cannot conflict with the basic principle that parties in Mine Act cases must first present their evidence and advance their legal theories before the Judge, and not for the first time on appeal. *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011) (citing *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992)).[11]

> *conveyor is operated.* This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b) (emphasis added).

[11] This explicit statutory limitation on the scope of Commission review may be raised by an objecting party or, *sua sponte*, by the Commission itself, at any appropriate time during the

The Commission has also recognized that a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal. *See, e.g., Oak Grove,* 33 FMSHRC at 2664 (citing *Beech Fork*, 14 FMSHRC at 1321); *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007); *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984). An issue that is "sufficiently related" to one raised before the judge satisfies these criteria. *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (quoting *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994)) (internal quotations omitted). If none of these criteria are met, an issue may be heard on appeal only upon a showing of "good cause." 30 U.S.C. § 823(d)(2)(a)(iii). The Commission's practice has been to resolve these "opportunity to pass" questions on a case-by-case basis. *See, e.g., Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (Mar. 1990).

A review of the record reveals that the Secretary did not present to the Judge the theory that the maintenance shift was a "coal producing" shift that required a separate on-shift examination by virtue of the 1-2 hour shift overlap. The Secretary quite clearly laid out the entirety of his argument in his Post-Hearing Brief. Specifically, he argued that the Judge should uphold the inadequate examination order because: (1) Black Beauty failed to record the obvious and extensive accumulations for at least a week prior to the issuance of the underlying accumulations Order; and (2) Black Beauty failed to complete an adequate on-shift examination of the entire beltline during the midnight shift even though the belts were running and miners were working in the section. *See* S. Post-Hrg. Br. at 2. He then specifically framed the issue for the Judge by stating that "the question for this Court to resolve is straightforward; did the examination records . . . identify the conditions on the . . . beltline." *Id.* at 11. The Secretary's assertions at trial did not address the threshold issue that to prove a violation of 30 C.F.R. § 75.362(b), the Secretary must establish that coal was produced during the shift in question.

The Secretary also failed to address this necessary element of the alleged violation at the hearing. In his opening statement, the crux of the Secretary's argument involved the deficiencies identified by Inspector Fishback in Black Beauty's exam records. Counsel stated that "the exam records are, in Mr. Fishback's estimation, totally inadequate because they simply failed to identify the condition that, in his estimation, had to have been present, his testimony will show, for at least a week." Tr. 35. Moreover, the direct and cross-examination by the Secretary provided little or no discussion about the possibility of coal production during the midnight shift, not even in the context of the two-hour shift overlap. Instead, the Secretary only elicited testimony that would prove the magnitude and duration of the accumulations and Black Beauty's alleged failure to record them. Tr. 395-458, 488-89, 490, 547-73, 582-85, 612-19, 621-28, 689-704.

Counsel for Black Beauty raised the issue of coal production during his cross-examination of Inspector Fishback and again in Black Beauty's post-hearing brief in which he plainly argued that coal had not been produced. Tr. 459-60; BB Post-Hrg Br. at 9. Even then, the Secretary made no attempt to rebut, assert, or address the issue of coal production except to say that "Black Beauty's examination records show that the . . . beltline was running during the

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Commission review process. *E.g., Beech Fork,* 14 FMSHRC at 1320 (finding that the judge "had not been afforded an opportunity to pass" on the legal theory raised on review by petitioner).

nearest so-called maintenance shift . . . even if the mine maintains that it did not produce coal during the shift." S. Post-Hrg Br. at 6. Moreover, the Secretary failed to submit or assert any record evidence in support of a theory that coal was produced on the midnight shift. *See* 34 FMSHRC at 442. The Judge recognized the Secretary's failure to proffer the argument of coal production in his decision. *Id.* ("Significantly, the Secretary does not explicitly contend, nor does any documentary evidence reflect, that coal was produced on the midnight shift on September 11, 2008").

Thus, at no point did the Secretary's case before the Judge rely on coal being produced after 11:00 p.m. on September 10 as part of his proof that a violation of the standard had occurred. Instead, he chose a litigation strategy that hinged on factors unrelated to the issue of coal production.

Moreover, we fail to see where the Secretary's coal production theory was implicitly raised or how it is "so intertwined with something tried before the judge that it may properly be considered on appeal." *See Beech Fork*, 14 FMSHRC at 1321; *San Juan Coal Co.*, 29 FMSHRC at 130. As stated above, the Secretary's presentation of evidence, through pleadings and testimony, was limited to the adequacy of the exam records and the extent and duration of the coal accumulations – lines of proof completely distinct from that which it now seeks to raise on appeal. We also fail to see "good cause" for why the Commission should entertain this new litigation strategy.

Accordingly, we conclude that the Judge was never "afforded an opportunity to pass" on the question of whether the coal produced after 11:00 p.m. by the afternoon shift constituted coal production during the separate maintenance shift that required a separate on-shift examination. Therefore, this argument has not been preserved for Commission review, and in accordance with section 113(d)(2)(A)(iii) of the Mine Act, it will not be considered. The Judge's decision regarding this order is affirmed.

II.

Terms of Settlement

Prior to the hearing, the parties settled 18 of the 20 citations and orders contained in Docket No. LAKE 2008-643, and 11 of the 14 citations and orders in LAKE 2009-72. 34 FMSHRC at 437; Tr. 9-10. The terms of the agreement were set forth in a Joint Motion to Approve Settlement Agreement and a draft Decision Approving Settlement, which the Judge admitted at hearing as Joint Exhibit 1. 34 FMSHRC at 437; Tr. 24. The Judge approved the settlement terms on the record and stated that he would incorporate them into the final decision. Tr. 24; 34 FMSHRC at 437. While the Judge included the total penalty amounts in his final written decision, he did not specify the agreed upon modifications.[12] 34 FMSHRC at 437.

The parties request that this issue be remanded to the Judge for the purpose of memorializing the terms of the settlement agreement.

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[12] Commission Procedural Rule 31(g) provides in pertinent part that "[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g).

In the interest of judicial economy, the terms of the parties' settlement agreement as outlined in Joint Exhibit 1 and as approved by the Judge are memorialized in the charts below. The citations, modifications, initial assessments, and the agreed upon settlement amounts are contained herein.[13]

A. LAKE 2008-643

Citation/ Order No.	Modification	Initial Assessment	Agreed Assessment
6672419	From: High Negligence To: Moderate Negligence	$23,229.00	$15,000.00
6672424	From: 3 persons affected To: 1 person affected	$23,229.00	$15,100.00
6672429	From: High likely To: Reasonably likely From: Section 104(d)(2) order To: Section 104(a) citation	$17,301.00	$11,250.00
6672444	From: High Negligence To: Moderate Negligence	$6,996.00	$4,000.00
6672454	From: High Negligence To: Moderate Negligence From: 13 persons affected To: 3 persons affected From: Section 104(d)(2) order To: Section 104(a) citation	$15,971.00	$6,000.00
6672475	From: 2 persons affected To: 1 person affected	$9,634.00	$6,744.00
6672481	From: High Negligence To: Moderate Negligence	$4,689.00	$3,000.00
6672490	Accept as Written	$11,500.00	$11,500.00
6672491	Penalty Reduction Only	$40,300.00	$30,000.00
6677676	Accept as Written	$15,570.00	$15,570.00
6677725	From: 3 persons affected To: 1 person affected	$3,405.00	$2,200.00
6678019	Accept as Written	$3,143.00	$3,143.00

[13] The hearing commenced with five violations at issue. Prior to the close of the record, the Secretary agreed to vacate Citation No. 6672659 (LAKE 2008-643), and the parties agreed to settle Order No. 6672674 (LAKE 2009-72) by modifying it from a section 104(d)(2) order to a section 104(a) citation and reducing the penalty, and Order No. 6676919 (LAKE 2009-72) by modifying it from S&S to non-S&S and reducing the penalty. Tr. 307-09, 322-23, 539-41. The settlements of these violations were approved by the Judge at hearing and again in his final written decision of February 10, 2012. Tr. 307-09, 322-23, 539-41; 34 FMSHRC at 437.

6678028	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	$2,473.00	$1,731.00
6678030	Accept as Written	$946.00	$946.00
6678214	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	$2,678.00	$2,142.00
6678217	Penalty Reduction Only	$3,996.00	$3,197.00
7639417	From: High Negligence To: Moderate Negligence	$7,300.00	$5,110.00
7639418	From: High Negligence To: Moderate Negligence	$9,800.00	$6,860.00

B. LAKE 2009-72

6669352	Penalty Reduction Only	$3,996.00	$3,000.00
6670740	Penalty Reduction Only	$6,458.00	$5,166.00
6670744	From: Fatal To: Lost workdays	$3,996.00	$2,797.00
6670754	From: Fatal To: Permanently Disabling	$6,996.00	$5,597.00
6670756	From: Fatal To: Permanently Disabling	$6,996.00	$4,897.00
6672692	Accept as Written	$3,405.00	$3,405.00
6678092	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	$3,996.00	$3,000.00
6681049	From: High Negligence To: Moderate Negligence From: 10 persons affected To: 2 persons affected	$40,180.00	$20,000.00
7493437	Accept as Written	$4,000.00	$4,000.00
7493438	Accept as Written	$4,000.00	$4,000.00
7493439	Accept as Written	$4,000.00	$4,000.00

WHEREFORE, as **ORDERED** by the Judge, Citation Nos. 6672490, 6677676, 6678019, 6678030, 6672692, and Order Nos. 7493437, 7493438, and 7493439 are **AFFIRMED**, as issued; and the remaining Citations and Orders are modified as outlined above.

III.

Conclusion

In summary, we vacate the Judge's decision regarding Citation No. 6672658 and remand the case with instructions to reopen the record to receive additional evidence. We further conclude that, regarding Order No. 6681047, the Judge did not have the opportunity to pass on the Secretary's theory of coal production asserted for the first time on appeal. Therefore, in accordance with section 113(d)(2)(A)(iii) of the Mine Act, we decline to reach the merits of this argument, and the Judge's decision is affirmed. Lastly, we incorporate and affirm herein the terms of the parties' settlement agreement regarding the remaining citations and orders.

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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