FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2022-0024
PERRY COUNTY RESOURCES, LLC	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), comes before us on interlocutory review of a decision of a Commission Administrative Law Judge denying a motion to approve settlement between Perry County Resources, LLC ("Perry") and the Secretary of Labor. The Judge based his denial on the Secretary's refusal to provide an order issued pursuant to section 104(b) of the Mine Act,[1] which was associated with a citation that was included in the motion to approve settlement.

For the reasons discussed below, we conclude that the Judge abused his discretion in denying the motion. Therefore, we reverse the Judge's decision and approve the settlement.

I.

Factual and Procedural Background

A. Factual Background

The Department of Labor's Mine Safety and Health Administration ("MSHA") sent Perry a proposed penalty assessment, proposing civil penalties against Perry for several citations

[1] Section 104(b) provides in part that if an authorized representative of the Secretary finds during a follow-up inspection that a violation described in a citation "has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and . . . that the period of time for the abatement should not be further extended," the representative shall issue an order requiring the removal of certain persons from the affected area until "such violation has been abated." 30 U.S.C. § 814(b).

issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), at Perry's E4-2 mine. Perry contested the penalty proposals with respect to four of the citations by checking the appropriate boxes on MSHA Form 1000-179. The Secretary subsequently filed a petition for assessment of penalty, and Perry filed an answer to the petition.

The four citations and associated penalties that Perry contested may be summarized as follows:

1. Citation No. 9282162, alleging a significant and substantial ("S&S")[2] violation of 30 C.F.R. § 75.202(a) because roof bolt plates were missing, due to rusting, on roof bolts along the primary escapeway. **Proposed penalty**: $336.
2. Citation No. 9282163, alleging an S&S violation of 30 C.F.R. § 75.380(d)(1) because the primary escapeway was not being maintained in safe condition because it had draw rock and thick mud which would impede safe passage. **Proposed penalty**: $302.
3. Citation No. 9282123, alleging an S&S violation of 30 C.F.R. § 75.380(d)(7)(i) because the lifeline in the secondary escapeway was broken and pulled apart and was not being properly maintained. **Proposed penalty**: $530.
4. Citation No. 9282125, alleging an S&S violation of 30 C.F.R. § 75.1722(a) because the equipment guard was not being properly maintained due to an opening in the guard along the belt tailpiece. **Proposed penalty**: $302.

Ex. A to PIR. In the row of MSHA Form 1000-179 that pertains to Citation No. 9282162, the type of action is listed as "104(a) C/104(b) O."

B. Motions and Correspondence

In April 2022, the parties filed a Joint Motion to Approve Settlement. In the motion, the parties proposed that there should be no modifications with respect to three of the four citations, and that the operator would pay the proposed penalties associated with those citations. Jt. Mot. at 2. Regarding the remaining citation, Citation No. 9282123, the parties agreed that the operator should pay a penalty of $264 rather than $530 due to a reduction in negligence from moderate to low. *Id.* at 2, 4. The parties proposed no modification with respect to Citation No. 9282162, which was associated with the failure to abate order.

A few weeks later, the Judge and the parties exchanged emails about the absence of the section 104(b) order from the record. On May 31, 2022, the Judge emailed the parties that he noticed that the section 104(b) order was not in the official file, and that he needed to be provided with a copy of the order before he could rule on the joint motion. Ex. C to PIR at 3. The Conference and Litigation Representative ("CLR") representing the Secretary's interests responded that the Secretary declined to provide other documents not before the court because the order requested by the Judge was not contested. *Id.* at 2-3. The Judge replied that he would

[2] The "significant and substantial" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished 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."

be unable to proceed on the motion until he received the order and stated his opinion that the order was a matter of public record. *Id.* at 2. The CLR then stated that the citation affiliated with the order, Citation No. 9282162, had been affirmed and that the good faith discount had not been given for the penalty for the underlying violation. *Id.* at 1. The Judge again responded that he disagreed with the CLR's position and that he would have no choice but to file a request under the Freedom of Information Act in order to obtain the order. *Id.*

Approximately two weeks later, the parties filed a Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review, which incorporated by reference the Joint Motion to Approve Settlement. Supp. Mot. at 1. In the supplemental motion, the Secretary submitted that she had not attached a copy of the section 104(b) order to the petition for assessment of penalty because she had not proposed a penalty for that order. *Id.* at 2. She noted that because Perry had not contested the order or sought temporary relief from it, the Commission never had jurisdiction over the order. *Id.* The Secretary asserted that the motion to approve settlement should be approved because the settlement satisfies the Commission's standard for approval of settlements. *Id.* at 3. Alternatively, the Secretary requested the Judge to certify this case for interlocutory review because the requirements for review had been met pursuant to 29 C.F.R. § 2700.76. *Id.* at 5-6.

C. Judge's Orders

On June 22, 2022, the Judge issued an order directing the Secretary to disclose all documents pertaining to the issuance of the section 104(b) order associated with Citation No. 9282162. 44 FMSHRC 501, 506 (June 2022) (ALJ). The Judge noted that the abatement time had been extended for Citation No. 9282162, that the record does not reveal whether the extended termination had been met, and that the section 104(b) order would provide such information. *Id.* at 502. The Judge reasoned that a section 104(b) order has significance in its own right in that a penalty may be assessed in connection with the order and that its issuance impacts the amount of penalty that is assessed for the underlying violation based upon consideration of the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. *Id.* at 504-05. The Judge observed that the record also does not reveal if the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period. *Id.* at 505.

The Secretary and operator provided no further documents in response to the Judge's June order.

On October 5, 2022, the Judge issued an order denying the Secretary's settlement motion and denying the Secretary's motion to certify the matter for interlocutory review. 44 FMSHRC 621 (Oct. 2022) (ALJ). The Judge reiterated much of the reasoning set forth in his June order, concluding that when presenting a motion to approve settlement, the Secretary should provide the entire documentary record related to the citations involved in the docket. *Id.* at 624. The Judge explained that Citation No. 9282162 is part of the docket, and that the documentary record concerning the violation is incomplete without the section 104(b) order. *Id*. at 627. The Judge further denied the Secretary's Motion to Certify for Interlocutory Review concluding that the requirements for interlocutory review had not been met. *Id.*

D. Interlocutory Review

The Secretary subsequently filed a petition for interlocutory review of the Judge's October 5 order. The Commission granted review "of the Judge's order of October 5, 2022, and the issue of whether the Judge abused his discretion in denying approval of the settlement motion based on the Secretary's refusal to provide a section 104(b) order that was associated with a citation that was a subject of the motion to approve settlement." 44 FMSHRC 703 (Dec. 2022).

On review, the Secretary argues that the Judge abused his discretion in denying the settlement motion. She explains that the instant docket involves four violations and only one penalty compromise, and that the failure to abate order was irrelevant both to the compromised penalty and to the citation associated with such penalty. The Secretary submits that she provided sufficient facts to permit the Judge to determine if the penalty modification protected the public interest.

She further notes that the section 104(b) order was a separate enforcement action with its own issuance number, and that if Perry wanted to contest the order, it could have done so separately. The Secretary explains that because MSHA did not propose a penalty for the order and Perry did not contest it, the Secretary did not attach a copy of the section 104(b) order to the penalty petition.

II.

Disposition

Section 110(k) of the Mine Act sets forth the Commission's authority to approve settlements of the Secretary's proposed assessments once contested. It provides:

> 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. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k). Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include, for each violation, the original amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty amount agreed to by the parties. 29 C.F.R. § 2700.31(b)(1).

The Commission has explained that "Congress authorized the Commission to approve the settlement of contested penalties . . . 'to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.'" *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*") (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). In "effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and

protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. The Commission has recognized that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors. *Id.* at 1982.

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014). An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Id.* at 1101. In *Solar Sources Mining, LLC*, 41 FMSHRC 594, 599 (Sept. 2019), the Commission concluded that the Judge abused his discretion in denying a settlement motion because he: (1) failed to apply the *AmCoal I* standard, (2) denied the settlement based on the Secretary's refusal to provide a copy of the inspector's notes and photographs, and (3) erred in finding that the Secretary failed to prove any facts in support of the settlement.

We conclude that the Judge also abused his discretion in the case at hand; the Judge's decision is based on an improper understanding of the law. The Judge failed to apply the *AmCoal I* settlement standard and instead denied the settlement motion because the Secretary did not provide a copy of the section 104(b) Order related to Citation No. 9282162.

The Commission has repeatedly recognized that a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. *Solar Sources*, 41 FMSHRC at 602 (citing *Black Beauty*, 34 FMSHRC at 1863).

However, the Commission has explained that during the review of a proposed settlement, the Judge is not expected to engage in fact finding as the Judge would post-hearing. *Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). In the context of reviewing a proposed settlement, a Judge may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *American Coal Co*, 40 FMSHRC 983, 991 (Aug. 2018) ("*AmCoal II*"). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties." *See Solar Sources*, 41 FMSHRC at 602.

Under the circumstances of this case, the Judge erred by denying the settlement on the basis that he was not provided the section 104(b) failure to abate order associated with Citation No. 9282162. The operator agreed to accept Citation No. 9282162 as written and pay the proposed penalty in full. The Judge failed to identify relevant facts that would be provided by the order that had not already been made a part of the record.[3]

[3] In *Solar Sources Mining, LLC*, 41 FMSHRC 594, 603 (Sept. 2019), the Commission held that the Judge abused his discretion when he denied a settlement, in part, because the Secretary refused to provide evidentiary documents such as the inspector's notes and photographs. Without reaching the question of whether a section 104(b) order issued for a failure to abate a contested citation may ever appropriately be sought by a Judge to further the

An operator's timeliness in achieving abatement impacts the penalty criteria of "the demonstrated good faith of the person charged in attempting to achieve rapid compliance." 30 U.S.C. § 820(i). Here, the Secretary provided factual information that the good faith abatement discount was not given with respect to the proposed penalty for Citation No. 9282162. Supp. Mot. at 3 (citations omitted).[4]

In addition, the Judge's repeated concern that the record does not reveal if the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period (44 FMSHRC at 627; 44 FMSHRC at 505) is irrelevant to the subject proceeding. Section 105(b)(1)(A) [5] requires the Secretary to provide notice to an operator and to the miners' representative that the operator has failed to timely abate a violation and that a penalty will be proposed under section 110(b) of the Mine Act, 30 U.S.C. § 820(b). Here, the Secretary provided factual information that she did not propose a penalty in connection with the section 104(b) order. Therefore, the provisions of section 105(b)(1)(A) do not apply to this proceeding.

Under Commission Procedural Rule 28, the Secretary is required to attach to a petition for assessment of penalty "[a] legible copy of each citation or order for which a penalty is sought." 29 C.F.R. § 2700.28(c). Since the Secretary did not propose a penalty for the section

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Judge's *AmCoal I* analysis or whether it constitutes prohibited evidentiary documentation, we find the Judge's request was inappropriate in this case. The Judge failed to identify a rationale for requiring the order, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full.

[4] Moreover, regarding the Judge's statement in his June 22 order that although the termination date had been extended in Citation No. 9282162, the record was missing information about whether the extended date had been met, the Judge acknowledged that "one may presume it was not, because Exhibit A for this docket reveals that a section 104(b) order was issued." 44 FMSHRC at 502.

[5] Section 105(b)(1)(A) provides in part:

> If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) . . . . A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. . . .

30 U.S.C. § 815(b)(1)(A).

104(b) order, the Secretary was not required to attach a copy of the order to the Secretary's petition.[6]

The Judge further erred by failing to evaluate the facts provided by the parties under the settlement against the *AmCoal* standard and to determine whether those facts support the penalty agreed to by the parties.[7] While we could remand this case to the Judge to apply the standard, relying upon relevant factual support in the record, we conclude that remand is unnecessary because the parties presented sufficient facts to support the conclusion that the settlement is fair, reasonable, appropriate, and serves the public interest.

In the Joint Motion to Approve Settlement, the parties stated in part that they had considered the alleged violations, the six statutory penalty criteria, "and other non-monetary considerations that fall outside of [section] 110(i) but that support settlement." Jt. Mot. at 2. The parties agreed that Citation Nos. 9282162, 9282163, and 9282125 should be accepted by Perry as written and that the operator should pay the original proposed penalties associated with those citations. *Id.* at 3; Supp Mot. at 1.

In addition, the parties stated that modification was appropriate for Citation No. 9282123. This citation alleged an S&S violation of 30 C.F.R. § 75.308(d)(7)(i) due to the lifeline in the secondary escapeway not being properly maintained. The parties provided information that the negligence associated with the violation should be reduced from moderate to low, and that the operator should pay a penalty of $264 rather than $530. The lowering of negligence was based on statements provided by the parties that: (1) mine management did not have knowledge of the condition or reason to believe that it existed; (2) the alleged condition was not present during the morning pre-shift examination or when the crew traveled to the section at the start of their shift; (3) the condition likely occurred when a load of supplies was transported to the section without the knowledge of the equipment operator; and (4) the condition was promptly corrected as soon as it was discovered. Jt. Mot. at 4.

The Commission has recognized that an "operator's knowledge (actual or constructive) is a key component of a negligence determination." *Ohio Cty Coal Co*., 40 FMSHRC 1096, 1099 (Aug. 2018). The Commission has considered evidence relating to an operator's lack of knowledge to support a reduction in negligence when approving a settlement agreement. *Id.*

Here, the parties have provided relevant information regarding the operator's lack of knowledge to support a reduction in negligence from moderate to low. We conclude that the facts alleged by the parties are sufficient to establish that the penalty reduction is fair, reasonable,

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[6] The section 104(b) order was a separate enforcement action with its own issuance number (Order No. 9282166). S. Br. at 2 & Ex. A. Although the operator could have chosen to contest the order, it did not. The Commission has held that Commission jurisdiction attaches upon contest. *Black Beauty*, 34 FMSHRC at 1862 n.4.

[7] Although the Judge noted that the penalty reduction related to Citation No. 9282123 was based upon a reduction in negligence, the Judge did not evaluate the facts against the *AmCoal* standard. 44 FMSHRC at 622 n.1.

appropriate under the facts, and protects the public interest.[8] The settlement involved a modest reduction in penalty, and the parties provided sufficient facts to support that penalty reduction. Accordingly, we reverse the Judge's denial of the motion to approve settlement, and we hereby approve the settlement.

III.

Conclusion

For the foregoing reasons, we reverse the Judge's denial of the motion to approve settlement, and we approve the settlement.

Mary Lu Jordan, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

[8] We note that the following principle–ensuring that the public interest is adequately protected by the reduction of a penalty in settlement–does not require a determination of whether the proposed settlement *best* serves the public interest. *Shemwell*, 36 FMSHRC at 1103-04. Rather, we consider whether the proposed settlement is "*within the reaches* of public interest." *Id.* at 1104 (quotations omitted and emphasis added).

Distribution:

Tracy E. Wolf, Esq.
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Wolf.tracy.e@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor, Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Gregory Q. Jensen
Perry County Resources, LLC
P.O. Box 606
Fishers, IN 46038
GQJ@AmericanResourcesCorp.com

Administrative Law Judge William Moran
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
wmoran@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

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