FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

AUG 25 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2011-13
THE AMERICAN COAL COMPANY	:	
and	:	
UNITED MINEWORKERS Of AMERICA	:	
and	:	
UNITED STEEL, PAPER and FORESTRY, RUBBER MANUFACTURING, ALLIED and INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), a Commission Administrative Law Judge denied a motion to approve a settlement between The American Coal Company ("AmCoal") and the Secretary of Labor because no factual support had been provided for a 30% penalty reduction for each of the 32 citations issued to AmCoal by the Secretary. 35 FMSHRC 515 (Feb. 2013) (ALJ). The Secretary subsequently filed a motion for reconsideration, in which the Secretary refused to provide further factual support and challenged the basis for the Judge's action. The Judge again denied the motion. 36 FMSHRC 1489 (May 2014) (ALJ).

In this interlocutory appeal of the Judge's denial, the Secretary seeks to change the course of more than 35 years of administrative practice and case law. The Secretary has chosen this case to be the "test case" for advancing his position that the Commission's authority to review

settlements of contested penalties under section 110(k) of the Mine Act, 30 U.S.C. § 820(k),[1] is much more limited than that described in *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64 (Aug. 2012). *See* Intervenor's Br., Ex. D (Memorandum from Heidi Strassler, Assoc. Solicitor for Mine Safety and Health, to Regional Solicitors (May 2, 2014)). The Secretary also seeks to have the Commission import and apply the consent decree standard of review employed by the Second Circuit in *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014) ("*Citigroup II*"). For the reasons that follow, we decline to do so and affirm in all respects the Judge's denial of the motion to approve settlement.

I.

Factual and Procedural Background

This case involves 32 contested citations issued to AmCoal between July 13 and August 12, 2010, 14 of which were designated as significant and substantial ("S&S").[2] In February 2013, the Secretary filed a motion to approve a proposed settlement and dismiss the proceedings. Under the proposed settlement, AmCoal would accept the citations as written, including the allegations regarding gravity and negligence, but pay a 30% across-the-board penalty reduction. The proposed settlement states as the rationale for the reduction in penalties:

> After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties' interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.

Mot. to Approve Set. at 2-3.

The Judge issued a decision denying the settlement motion based upon his reading of section 110(k), its legislative history, and the Commission's decision in *Black Beauty*. 35 FMSHRC at 515-17. He reasoned that the motion failed to provide adequate factual support for the penalty reductions, and stated that the across-the-board reduction for each of the citations was itself a "red flag." *Id.*

The Secretary subsequently filed a motion for reconsideration. In the motion, the Secretary requested that the Judge reconsider his conclusions that section 110(k) compelled him to reject the settlement for lack of factual support, and that section 110(k) does not permit the

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[1] Section 110(k) provides in relevant part that a proposed penalty that has been contested can be settled only if approved by the Commission.

[2] 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."

Secretary to negotiate settlement agreements structured as a uniform percentage reduction of penalties. S. Mot. for Recon. at 4. The Secretary's counsel stated that:

> Exercising her professional judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial. The Secretary, through the undersigned counsel, represents that the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals.

Id.

The Judge again denied the motion to approve settlement. 36 FMSHRC at 1502. The Judge concluded that the Secretary had not altered the terms of the original settlement agreement or provided further explanation to justify it. *Id.* at 1489.

The Secretary subsequently filed a motion requesting that the Judge certify his ruling for interlocutory review. The Judge denied the motion and issued a certification for interlocutory review on his own motion. The Secretary then filed a petition for interlocutory review with the Commission. In light of the Judge's certification and the Secretary's petition, we issued an order granting interlocutory review on the issue of whether the Judge erred in denying the Secretary's motion to approve settlement.

We also issued an order permitting intervenor participation by the United Mine Workers of America ("UMWA") and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steel Workers"), and amicus curiae participation by former U.S. Representative George Miller.[3] In addition, we heard oral argument.

II.

Disposition

On review, the Secretary argues that the Judge erroneously denied the settlement proposal and rejected across-the-board percentage penalty reductions based on an incorrect reading of section 110(k). He contends that section 110(k) should be interpreted in light of the separation of powers principle that settlement decisions involve policy choices that the U.S. Constitution vests in political branches, not in court-like agencies like the Commission.

The Secretary asserts that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. Citing *Heckler v. Chaney*, 470 U.S. 821, 834 (1985), he submits that such a presumption can be overcome only where the controlling statute both (1) indicates an intent to circumscribe agency enforcement discretion; and

[3] AmCoal decided not to file a brief in this case.

(2) provides meaningful standards for defining the limits of that discretion. The Secretary argues that section 110(k) does not satisfy the second prong of the *Chaney* test because the statute provides no meaningful standards for judicial review of settlements, and that the Commission's role is no different than that of a "generalist court." S. Br. at 19-22; S. Reply Br. at 6-7.

The Secretary further contends that section 110(i) of the Act, 30 U.S.C. § 820(i),[4] cannot supply the standard that section 110(k) does not provide, that the Act's legislative history does not provide a standard for limiting the Secretary's prosecutorial discretion, and that to the extent Commission Procedural Rule 31, 29 C.F.R. § 2700.31, provides a substantive standard, the rule exceeds the Commission's authority to promulgate only procedural rules. He asserts that when reviewing settlement proposals, the Commission should apply the consent decree standard of review applied by the Second Circuit in *Citigroup II.* Under the Secretary's theory, the Judge was not entitled to request any additional information supporting the reduction in penalties.

The UMWA and United Steel Workers respond that the Judge correctly denied the settlement motion. They argue that section 110(k) plainly requires that proposed settlements be approved by the Commission and delegates to the Commission the authority to effectuate that mandate. Former Congressman Miller supports the position of the intervenors.

A. The Commission's Role in Approving Settlements

Section 110(k) of the Mine Act sets forth the requirements for the approval of proffered settlements of contested penalties. 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). Thus, section 110(k) states in very clear language that the Commission has the exclusive responsibility for approving all proposed settlements of contested civil penalties.

The legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("*Legis. Hist.*"). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned "that to a great extent the compromising of assessed penalties [did] not come under public scrutiny," and that "[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are

[4] Section 110(i) of the Act provides that the Commission is to assess all final civil penalties under the Act.

not on the record." *Id.* It noted that even after a petition for civil penalty had been filed, "settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge." *Id.*

In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that "the purpose of civil penalties, [that is,] convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public," where miners, Congress, and other interested parties "can fully observe the process." *Id.* at 633. "To remedy this situation," section 110(k) "provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission" and that a "penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court." *Id.*

Congress explained that "[b]y imposing [the] requirements" of section 110(k), it "intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations* are avoided." *Id.* (emphasis added). Congress expressed its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties."[5] *Id.*

Based on the language of section 110(k) and its legislative history, the Commission reaffirmed in *Black Beauty* that Congress authorized the Commission to approve the settlement of contested penalties in section 110(k) "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest." 34 FMSHRC at 1862 (citations omitted). 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.

The Commission's consideration of proffered settlements has worked well for more than 35 years.[6] Indeed, a majority of proceedings under the Mine Act have been settled, and the vast

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[5] The Secretary downplays the significance of the legislative history. S. Br. at 30-31 ("the statements about collection and litigation expenses and the Commission's role in determining the public interest are highly specific criteria that . . . should not be construed as legal restrictions"), 32-38; *see also* Oral Arg. Tr. at 10, 24. However, Congress chose to explain the purpose of section 110(k) and the Commission's role in approving settlements in unusually specific terms. That legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so.

[6] The Secretary's position in this case represents a reversal of a long-standing institutional position. *See* Amicus Br. at 13 (quoting the Secretary's response to an audit by the General Accountability Office in which the Secretary explains that supporting reasons for settlements are presented to the Commission and that "MSHA and SOL agree that transparency in any resulting civil penalty settlement agreement is essential to ensure public confidence").

majority of settlement agreements submitted for approval have been approved by Commission Judges.[7]

The Secretary argues that the Commission's review should be more limited than that described in *Black Beauty* because section 110(k) should be interpreted in light of the separation of powers principle that settlement decisions involve policy choices that are vested in political branches, not in court-like agencies like the Commission. He further argues that the Commission's function in reviewing settlement proposals is no different than that of a generalist court.

The Commission is an independent federal agency that shares a unique split enforcement scheme under the Mine Act with the Secretary of Labor. Under the split enforcement scheme of the Mine Act, Congress has given the Secretary and the Commission separate roles and functions, particularly with respect to civil penalties. Section 110(i) describes the distinct roles of the Secretary and the Commission with respect to the proposal and assessment of penalties: the Secretary proposes penalties based on an available summary of information and need not make factual findings, while the Commission assesses "all" penalties under the Act, based upon its consideration of six specified criteria.

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i). *See Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d, 1147, 1151-52 (7th Cir. 1984)) (other citations omitted) (noting "split-function" of penalty scheme under the Mine Act); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) ("Only the Commission has authority actually to impose civil penalties proposed by the Secretary, § 820(i), and the Commission reviews all proposed civil penalties *de novo* according to six criteria.").

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[7] Former Congressman Miller noted that "[i]n the past five years, Commission ALJs have approved 38,501 settlements and rejected only 17 (excluding the settlement in this case), or 0.04% of all settlements submitted for approval." Amicus Br. at 14. Counsel for the UMWA aptly described the Secretary's position in this proceeding as "a solution in search of a problem." Oral Arg. Tr. at 30.

The Commission cannot accurately be compared to a generalist court or any other judicial or administrative entity owing deference to the unreviewable settlement decisions of an executive agency. Section 113(a) of the Mine Act requires Commissioners to have certain qualifications to carry out the Commission's functions under the Act.[8] 30 U.S.C. § 823(a) (stating that the Commission shall be comprised of "five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act"); *see Thunder Basin*, 510 U.S. at 214 (noting the "Commission's expertise" in construing the Mine Act).

It is also noteworthy that civil penalties under the Mine Act ultimately become final orders or decisions "of the Commission," not of the Secretary. Uncontested penalties, that is, penalties that have been proposed by the Secretary but have not been contested by an operator or miner under section 105(a) or 105(b) of the Mine Act, are "deemed a *final order of the Commission*" 30 days after the operator or miner receives the penalty notification from the Secretary. 30 U.S.C. §§ 815(a), 815(b) (emphasis added). Contested penalties that are the subject of proceedings before the Commission and its Judges ultimately become part of final decisions of the Commission under section 113(d) of the Act, 30 U.S.C. § 823(d). Similarly, in cases in which an operator has defaulted on a proposed penalty assessment by failing to timely answer the Secretary's penalty petition, the Judge's default order on the penalty becomes a "*final decision of the Commission*" 40 days after its issuance. 30 U.S.C. § 823(d)(1); *see, e.g., Horton v. Coal River Mining,* LLC, 38 FMSHRC ___, slip op. at 2, No. WEVA 2013-1183-D (June 28, 2016) (emphasis added). Under section 110(k), courts of appeals may review a proffered settlement of a "penalty assessment which has become a *final order of the Commission.*" 30 U.S.C. § 820(k) (emphasis added).

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[8] The Senate Report explains:

> The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.
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> The Commission is to have five members, who shall be selected from among those who by reason of training, education, or experience are qualified for consideration. This qualification is not intended to limit the selection of members to technicians. It is the Committee's expectation that nontechnicians with requisite administrative experience or persons whose qualifications are based upon either formal training or practical experience in mine safety and health or related matters would qualify for appointment.

S. Conf. Rep. No. 95-181, at 47 (1977), *reprinted in Legis. Hist.* at 635.

With respect to settlements of contested penalties, section 110(k) explicitly grants approval authority to the Commission.[9] The very existence of section 110(k) makes comparisons between the Commission's review of settlement proposals with settlement review by other agencies and courts inappropriate. The Department of Labor and the Occupational Health and Safety Review Commission ("OSHRC") share a split-enforcement scheme under the Occupational Safety and Health Act of 1970 ("OSHAct"), while other agencies that follow this model are rare. However, there is no provision similar to section 110(k) in the OSHAct. Indeed, the parties have not revealed a single provision in any federal statute that is similar to section 110(k).

Accordingly, the Secretary's contentions that separation of powers principles are relevant have no merit. First, because the Department of Labor and the Commission are wholly separate Article II agencies, such principles do not come into play. Second, although Congress gave the Secretary most of the enforcement powers under the Act, it expressly chose to give to the Commission the authority to assess penalties and approve settlements – powers that usually are given to an enforcement agency. Congress spoke clearly in this regard.

B. Reviewability

We similarly find unavailing the Secretary's challenge to the scope of the Commission's review of proposed settlements. The Secretary argues that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. He contends, "[t]he default presumption of unreviewability is overcome, however, only where the controlling statute both (1) 'indicate[s] an intent to circumscribe agency enforcement discretion,' and (2) 'provide[s] meaningful standards for defining the limits of that discretion.'" S. Br. at 19, *quoting Heckler*, 470 U.S. at 834. He states that section "110(k) does not, however, satisfy the second part of the *Heckler* test because the statute provides no meaningful or substantive standards that limit the Secretary's prosecutorial discretion when the Secretary negotiates settlement agreements." S. Br. at 19-20. The Secretary concludes that because Congress gave the

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[9] Because the language of section 110(k) is clear, concepts of deference are not relevant. The Secretary does not argue that his interpretation of section 110(k) is owed deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Even if we were to consider the language of section 110(k) to be silent or ambiguous, our reading of the provision would be entitled to deference under *Chevron* because the Commission is charged with administering that provision. *See North Am. Drillers, LLC*, 34 FMSHRC 352, 356 n.5 (Feb. 2012). If a Court were to decide that section 110(k) was not clear and declined to give the Commission deference under *Chevron*, any interpretation of section 110(k) advanced by the Secretary may be entitled to a lesser degree of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944), since the Secretary's interpretation is not embodied in a citation or rules promulgated by MSHA. *See, e.g., Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 316 (7th Cir. 2012). Under *Skidmore*, the Secretary's position that he need not provide factual support for reduced penalties in settlements would not be persuasive since it is a reversal of a contrary position held for decades. *Id.* (considering whether an interpretation had the power to persuade based in part on the consistency in an agency's earlier and later pronouncements).

Commission "no law to apply" when reviewing settlement agreements, "the scope of [the Commission's] reviewing function is, at best, limited." *Id.* at 20.

As the Secretary argues, courts have determined that the presumption of nonreviewabilty generally extends to an agency's decision to settle an action. *See Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008), *citing Baltimore Gas and Elec. Co. v. FERC*, 252 F.3d 456, 461-62 (D.C. Cir. 2001). However, a "presumption of nonreviewability may be overcome by congressional limitations." *Baltimore Gas and Elec.*, 252 F.3d at 459.

Section 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability. The Commission does not review the Secretary's *decision to settle*. Rather, the Commission reviews the proposed reduction of civil penalties in settlements.

Moreover, the Secretary misreads *Heckler v. Chaney* to support his argument that the Commission's review is "at best, limited." In *Heckler*, the Supreme Court explained that if a statute does not set forth a meaningful standard against which to review an agency's exercise of discretion, the statute may be read to make the agency's decisionmaking unreviewable.

> [R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely.

470 U.S. at 830. The Court did not speak in terms of "limited" review but, rather, spoke in terms of an agency's actions under a statute being *reviewable or not* depending upon whether there are manageable standards for that review.[10]

Section 110(k) explicitly *limits the Secretary's authority* to reduce contested penalties in settlement and *grants the Commission authority* to approve proposed settlements. If the statute fails to set forth a meaningful standard for the Commission's review of reduced contested penalties in settlement, section 110(k) could be read to make the *Commission's* exercise of discretion unreviewable.[11] As discussed below, however, there are meaningful standards for the Commission's review of settlement proposals.

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[10] The Secretary has acknowledged "that the *Chaney* presumption of unreviewability is rebutted by the existence of [s]ection 110(k)." S. Reply Br. at 4.

[11] We note that the Commission's exercise of discretion in granting or denying petitions for discretionary review under section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A), is unreviewable. *See Eagle Energy, Inc. v. Sec'y of Labor*, 240 F.3d 319, 324-25 (4th Cir. 2001).

C. The Commission's Standard for Reviewing Proposed Settlements of Contested Penalties

As discussed above, in *Black Beauty* the Commission stated that the legislative history of section 110(k) reveals that Congress authorized the Commission to approve the settlement of contested civil penalties in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest. 34 FMSHRC at 1862.

The Commission and its Judges must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that "[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). The requirements to provide factual support in the settlement proposal and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979. *See* 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).[12]

The Commission has recognized that standards for such factual support may be found in section 110(i). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. 34 FMSHRC at 1864 ("The Judge did not abuse her discretion in requiring the Secretary to provide further factual support to demonstrate the penalty criteria as they relate to the subject penalties.").

The Secretary asserts that it is inappropriate for a Judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement. We disagree. Congress recognized that the approval of a proposed penalty reduction in settlement is part of the assessment and collection process. As stated in the Senate Report:

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[12] Contrary to the Secretary's argument, Rule 31 is not a substantive provision. *See* S. Br. at 40-41. The Commission has explained that a "critical feature" of a procedural rule is that "it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency." *Drummond Co.*, 14 FMSHRC 661, 688 (May 1992) (citations omitted). In contrast, substantive or legislative rules "grant rights, impose obligations, or produce other significant effects on private interests" and "constrict the discretion of agency officials by largely determining the issue addressed." *Id.* at 684 (citations omitted). The requirement in Rule 31 for parties to provide factual support is clearly procedural in that it directs parties to conform with a requirement in the manner in which they present their settlement to the Commission without constricting the Commission's discretion in determining whether to approve the settlement.

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when **the process by which these penalties are assessed and collected** is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
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> **To remedy this situation,** Section 111(l) [later codified as section 110(k)] provides that a **penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission.**

S. Conf. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.* at 633 (emphasis added). Thus, in *Black Beauty*, the Commission reasoned that its authority to "assess all civil penalties provided in [the] Act" under section 110(i) "clearly includes contested penalties that are the subject of a settlement agreement." 34 FMSHRC at 1862.

Upon reviewing information supporting a reduced penalty agreed to by the parties, the Commission Judge need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing. Rather, the Judge considers such information in the evaluation of whether the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest.

We note that parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement. For instance, parties may provide factual support demonstrating that the operator has provided additional training or made relevant engineering or personnel changes. As the Commission observed in *Black Beauty*, section 110(k) "contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal." 34 FMSHRC at 1865. Such a conclusion does not mean that the Commission's review is unbounded. Rather, it means that there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest.

Although the language of section 110(k) contains no explicit restrictions on the Commission's review, the Commission's review of proposed settlements of contested penalties is bounded. Such boundaries are provided by section 110(i) of the Mine Act, the Act's legislative history, and the Commission's Procedural Rules. *See, e.g., Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (citations omitted) ("Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes."); *Cargill, Inc. v. United States*, 173 F.3d 323, 335 (5th Cir. 1999) (considering legislative history to discern meaningful standard for an agency's exercise of discretion).

D. The Second Circuit's Consent Decree Standard

The Secretary argues that when reviewing settlement proposals, the Commission should apply the consent decree standard of review applied by the Second Circuit in *Citigroup II.*

Under that standard, the Commission would consider whether the proposed settlement (1) is legally sound, (2) is clear, (3) resolves the claims in the penalty petition, and (4) is not tainted by improper collusion or corruption. 752 F.3d at 294-95. The Secretary argues that, under this standard, he is entitled to deference with respect to his determination that the proposed settlement is in the public interest.

The Secretary's application of the *Citigroup II* standard to the 32 citations at issue in this case is set forth in approximately five pages of his brief. S. Br. at 49-53. He asserts that the proposed settlement is legally sound because section 110(k) does not prohibit uniform percentage reductions in penalties; that the settlement is clear because there is no doubt about the penalties AmCoal has agreed to pay or the effect of the conceded violations on AmCoal's history of violations; that the settlement reflects a resolution of the actual claims because no citations have been erroneously added or omitted; and that there have been no allegations of improper collusion or corruption. *Id.*

In *Citigroup II*, the Second Circuit broke with nearly three decades of practice by eliminating the consideration of the "adequacy," or the substantive validity, of a consent decree entered into by the Securities and Exchange Commission ("SEC"), and by focusing instead on the procedural propriety of the decree. 752 F.3d at 294-95. The court explained that it was excluding the requirement that a consent decree must be adequate because the adequacy factor was borrowed from the review standard applied to class action settlements, and that the factor was inapt in the context of a proposed SEC consent decree. *Id.* at 294. The court noted that if the decree involves injunctive relief, the court must determine that the "public interest would not be disserved" by the decree. *Id.* at 294. It stated that since the SEC has the "job of determining whether the proposed S.E.C. consent decree best serves the public interest," the SEC's decision merits "significant deference." *Id.* at 296.

Adoption of the Second Circuit's consent decree standard would effectively render section 110(k) meaningless. "[A] fundamental rule of construction is that effect must be given to every part of a statute . . . , so that no part will be meaningless." *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 194 (Mar. 1998) (quoting *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994). Because penalties become final orders or decisions "of the Commission," Commission Judges must necessarily determine the basic procedural propriety of proposed settlements requested by the Secretary even if section 110(k) were absent from the Mine Act.

As discussed above, Congress enacted section 110(k) in order to remedy a problem involving abuses involved in behind-the-scenes compromises by MSHA's predecessor, and to ensure that penalties serve as an effective enforcement tool. Congress explicitly stated its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties." S. Conf. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.* at 633. Thus, Congress intended that the Commission have the job of determining whether a reduced penalty in settlement serves the public interest.

The *Citigroup II* standard is also distinguishable because a settlement agreement involving violations of mandatory safety standards affects all miners working in the cited mine. Thus, the miners may be likened to a class affected by a settlement. In addition, under the Mine

Act, violations accepted by an operator in a settlement agreement may be considered as part of the operator's history of violations in the assessment of future civil penalty assessments. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 978-79 (June 1982).

The D.C. Circuit applies a consent decree standard of review that, unlike the Second Circuit's, includes the adequacy factor. *See, e.g., Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (citations omitted) (considering whether the "settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties."); *United States v. MTU America, Inc.*, 105 F. Supp.3d 60, 63 (D.D.C. 2015) (noting that courts must "consider both procedural and substantive fairness in their analysis of proposed consent decrees."). The Secretary did not note or discuss this standard.

Finally, the lack of detail required by the Second Circuit's consent decree standard, as evident in the Secretary's terse application of the standard, is completely inconsistent with the need for transparency that section 110(k) was enacted to address.[13] Indeed, the Secretary's counsel asserted during oral argument that "uncertainties of litigation," if proffered as the only rationale for settlement, would be sufficient factual support for the Commission's review. Oral Arg. Tr. at 67. Of course, the phrase "uncertainties of litigation" is devoid of content; all litigation contains uncertainties. Accordingly, we decline to adopt the *Citigroup II* standard in the Commission's review under section 110(k).

E. The Judge's Denial of the Proposed Settlement

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) (citations omitted) ("If an agency 'announces and follows – by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed,' that exercise may be reviewed for abuse."). 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. *Shemwell*, 36 FMSHRC at 1101.

We conclude that the Judge did not abuse his discretion by denying the motion to approve the subject proposed settlement. As discussed above, a Judge must have information sufficient to carry out the Commission's responsibility under section 110(k). Parties are required to provide facts in support of a penalty agreed to in settlement by the Commission's Procedural Rules. 29 C.F.R. § 2700.31(b)(1).

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[13] We find revealing the observation with respect to the *Citigroup II* standard that "between the court's explicit exclusion of the adequacy factor and its emphasis on procedural propriety, the court likely foreclosed all meaningful substantive review," and that the *Citigroup II* standard will "practically speaking, result in the rubber-stamping of consent decrees." *Securities Regulation – Consent Decrees – Second Circuit Clarifies that a Court's Review of an SEC Settlement Should Focus on Procedural Propriety*, 128 Harv. L. Rev. 1288, 1291, 1292 (2015).

Here, the Secretary provided no facts to support the proposed penalty reductions agreed to by the parties. When the Secretary initially filed the motion to approve the proposed settlement, the Secretary noted that the original allegations regarding the subject penalties would remain unchanged, but that the parties wished to settle the matter by a uniform penalty reduction of 30% "[i]n recognition of the nature of the citations at issue, and the uncertainties of litigation." Mot. to Approve Set. at 2. Upon the Judge's denial of the motion based on insufficient factual support, the Secretary filed a motion for reconsideration with the Judge but refused to provide further factual support. Rather, the Secretary merely represented to the Judge that "the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals."[14] S. Mot. for Recon. at 4.

This is not a case where the Commission Judge has impermissibly substituted his views of enforcement policy for those of the Secretary.[15] Rather, the Judge requested facts to support the proposed settlement of 32 reduced penalties, and the Secretary refused to provide any facts whatsoever. The Judge did not abuse his discretion by denying approval of the settlement without any supporting facts.

Nor did the Judge conclude that the Secretary's ability to structure settlements as uniform penalty reductions was impermissible under the Mine Act. Rather, the Judge stated that the percentage reduction was a red flag, and that "*information* is needed to justify any reductions." 36 FMSHRC at 1501 (emphasis in original). The Mine Act does not prohibit uniform penalty reductions, nor has the Commission rejected the structuring of settlements based on uniform penalty reductions, and nothing in our decision should be construed as implying that they are improper *per se*. The Judge did not err in requesting facts supporting the reduction.

In sum, the Secretary's repeated failure to provide any facts to support the proposed reduction of 32 penalties through a settlement agreement is inconsistent with the requirements of the Act, Congressional intent, and Commission procedure. Accordingly, we conclude that the Judge did not err in denying the proposed settlement.

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[14] The Secretary's counsel made this representation after stating, "Exercising her professional judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial." S. Mot. for Recon. at 4. We note the Committee's statement in the Senate Report that, "the need to save litigation and collection expenses should play no role in determining settlement amounts." S. Conf. Rep. No. 95-181, at 44-45 (1977), *reprinted in Legis. Hist.* at 632-33.

[15] The Secretary stated during oral argument that Judges "second-guess[] the kinds of enforcement and prosecutorial decisions that the Secretary present[s] for approval." Oral Arg. Tr. at 71. The Secretary may seek appellate review of any perceived abuses by the Commission's Judges. *See, e.g., Knox Cty. Stone Co.*, 3 FMSHRC 2478 (Nov. 1981).

III.

Conclusion

For the reasons discussed above, we conclude that the Judge did not err in denying the proposed settlement, affirm the denial, and remand this matter for further proceedings.

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Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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